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LET THE JURY FIT THE CRIME: INCREASING NATIVE AMERICAN JURY POOL REPRESENTATION IN FEDERAL JUDICIAL DISTRICTS WITH INDIAN COUNTRY CRIMINAL JURISDICTION

JORDAN GROSS*

The very idea of a jury is that it is a body composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.

Batson v. Kentucky, 476 U.S. 79, 86 (1986).¹

I. INTRODUCTION

Federal law allocates jurisdiction to prosecute and punish crimes committed in Indian country² based on the race of the perpetrator, the race of the victim, and the federal political status of the Indian tribe on whose land the crime was committed. At the founding, Indian tribes had plenary authority to address and punish all crimes committed in Indian country. Congress systematically stripped away most of this authority and allocated it either to the federal government or to individual states, leaving Indian tribes with severely restricted jurisdiction over individuals who commit crimes on their reservations. The primary federal statute for prosecuting crimes committed in Indian country is the Major Crimes Act. This statute gives the federal government authority to prosecute and punish enumerated crimes committed by Indians on reservations that are subject to federal criminal jurisdiction. These crimes typically also violate the criminal code of the tribe on whose reservation the crime is committed. This gives rise to concurrent

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1. (ellipsis and quotation marks omitted) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 304 (1879), *abrogated on other grounds* by *Taylor v. Louisiana*, 419 U.S. 522 (1975)).

2. This article uses the term “Indian country” as it is used in federal law—to refer to Indian lands subject to federal trust obligations and federal jurisdiction. 18 U.S.C. § 1151 (2012). The term “Indian” has multiple definitions in federal law. This article uses the term “Indian” to refer to a Native American subject to federal criminal jurisdiction under the Major Crimes Act. *See* U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL § 686 (1997) (“To be considered an Indian, one generally has to have both ‘a significant degree of blood and sufficient connection to his tribe to be regarded [by the tribe or the government] as one of its members for criminal jurisdiction purposes.’ A threshold test, however, is whether the tribe with which affiliation is asserted is a federally acknowledged tribe.”) (citing *United States v. Rogers*, 45 U.S. 567, 573 (1846); *United States v. Torres*, 733 F.2d 449, 455 (7th Cir. 1984); *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir. 1979); *United States v. Driver*, 755 F. Supp. 885 (D.S.D. 1991); *LaPier v. McCormick*, 986 F.2d 303 (9th Cir. 1993); *but see* *United States v. Zepeda*, 792 F.3d 1103 (9th Cir. 2015) (en banc) (element of Major Crimes Act offense is proof that defendant has “Indian blood,” whether or not that blood tie is to a federally recognized tribe)).

federal and tribal criminal jurisdiction over the same defendant for the same conduct.

Under federal constitutional law, jury pools must reflect a fair cross section of the community in which a crime is prosecuted and from which no distinct group in the community has been excluded. These jury selection standards apply to the states through the Fourteenth Amendment, and they are codified into federal law under the Jury Selection and Service Act of 1968.³ These standards reflect a notion engrained in American criminal justice that an accused should be judged by a jury of his peers in the community where the crime was committed. These legal principles, however, reflect more than a popular normative ideal of what an American jury should look like. They are also the product of a Supreme Court jurisprudence targeted at eradicating the practice of excluding potential jurors from service on the basis of race.

Whether a jury pool satisfies the fair cross section guarantees and the systematic exclusion prohibition is measured against “the community” from which a jury pool is drawn. Thus, how “community” is defined for jury selection purposes becomes critically important in evaluating whether a defendant’s jury pool reflects a fair cross section of that community from which no distinct group in that community has been systematically excluded. Federal, state and tribal courts use different jury pool boundaries for jury selection purposes. Federal district courts typically draw jury pools from large, multi-county areas; states from smaller judicial districts; and tribes from reservation communities. The three sovereigns, thus, will look to different “communities” from which to draw their jury pools, and that will often result in jury pools (and ultimately trial juries) with very different racial demographics.

When jury pool boundaries in federal districts with Indian country jurisdiction extend beyond a reservation on which a crime was committed and include non-reservation communities, the representation of Native Americans in that pool is naturally and inevitably diluted. In an Indian country prosecution with concurrent federal/tribal jurisdiction, this means the reference jury selection “community” for the same defendant (by definition, an Indian) will be radically different depending on whether he is tried in federal or tribal court. In federal court, this Indian defendant will face a jury drawn from a pool with a significantly smaller concentration of his ethnic and cultural peers than that found on the reservation on which the crime was committed. This same defendant in tribal court will face a jury drawn from the reservation community, the actual community in which the crime

3. Jury Selection and Service Act of 1968, Pub. L. No. 90-274, § 1861, 82 Stat. 53, 54.

was committed and in which Native Americans will typically represent a majority of the residents.

While all concurrent jurisdiction defendants (whether federal/tribal or federal/state) can be subject to different criminal procedures depending on which sovereign prosecutes them, federal/tribal concurrent jurisdiction Indian country prosecutions are unique. Indian country crimes subject to concurrent federal/tribal jurisdiction are crimes of personal violence, such as murder and assault, whose impacts are felt mostly, if not exclusively, at the local level by the victim, the victim's family, and the reservation community. In the American federal system, crimes of personal violence have traditionally been prosecuted at the local level by local governments. Crimes of personal violence with local impact historically were not prosecuted at the federal level, absent an identifiable federal interest impacted by the crime. In federal Indian country prosecutions, the defendant is in federal court based entirely on his status as an Indian, not because the federal government has a superior, or even identifiable, federal interest in prosecuting the crime. American jury pools are traditionally drawn from the community in which the crime was committed in order to subject the defendant to the judgment of his peers in that community, and to safeguard against the transportation of the defendant to a location distant from that community to stand trial. Federal Indian country prosecutions are typically tried off-reservation and, as a result of federal jury selection procedures, the Indian defendants in those cases are tried by juries drawn from communities that look nothing like the "community" from which that defendant's jury would otherwise be drawn if not for Congress' usurpation and limitation of tribal court jurisdiction over crimes committed on reservations.

This article argues that to the extent federal jury selection procedures result in a significant and quantifiable dilution of Native American representation in federal Indian country jury pools, they are incompatible with the anti-discrimination policies and fair cross section requirements of the federal Jury Selection and Service Act, federalism, and tribal sovereignty. The article forwards two proposals to lessen the dilution of Native American representation in federal jury pools in judicial districts with Indian country criminal jurisdiction. One, organize divisions in those districts around Indian reservations in such a way that increases the concentration of Native Americans in the jury pools in those divisions. Two, expand the sources from which those districts compile potential juror lists to include, at a minimum, tribal voter registration records.⁴ This article looks to the Dis-

4. For a proposal to limit the jury pool boundaries in Major Crimes Act prosecutions to reservation boundaries see Shannon Rogers, *Giving Meaning to Empty Words: Promoting Tribal Self-Governance by Narrowing the Scope of Jury Vicinage and Venue Selection in MCA Adjudications*, 13 Wyo. L. Rev. 711, 742–743 (2013) (proposing federal Major Crimes Act jury pools limited to the reservation

trict of Montana, a federal jurisdiction with a significant number of Indian country criminal prosecutions, to demonstrate the feasibility of these proposals.

II. BACKGROUND

A. Criminal jurisdiction in Indian country⁵

1. Early contours of tribal court criminal jurisdiction

At the founding, Indian nations were independent sovereigns of equal stature to the federal government and the governments of the individual states.⁶ This status carried with it plenary jurisdiction over all criminal conduct in Indian country.⁷ Congress has steadily chipped away at tribes' exclusive and complete jurisdiction over crime in Indian country, leaving behind a patchwork criminal justice system that allocates jurisdiction to prosecute and punish criminal conduct in Indian country among tribes, the States,

community to protect the vicinage interests of the reservation community). My article agrees with the goal of obtaining a higher percentage of potential Native American jurors in federal Indian country jury pools, but not the means or the rationale for doing so offered therein. As discussed *infra* I disagree that it is politically or administratively viable to create federal judicial divisions for each reservation in a Major Crimes Act jurisdiction. Further, my proposal is grounded in the federalism and tribal sovereignty concerns raised in concurrent jurisdiction prosecutions and the federal jury selection policies identified in the Jury Selection and Service Act, not reservation communities' vicinage interest in being adequately represented on Major Crimes Act juries.

5. Criminal jurisdiction in Indian country is a complex topic that has been extensively and ably covered by others. This section provides only a high-level overview of the topic to allow a reader unfamiliar with the general framework of this area of law to follow the issues discussed here. *See* David H. Getches, Charles F. Wilkinson, Robert A. Williams, Jr. & Mathew Fletcher, *Federal Indian Law* (6th ed. 2011); William C. Canby, Jr., *American Indian Law in a Nutshell* (4th ed. 2004); Troy Eid & Carrie Covington Doyle, *Separate But Unequal: The Federal Criminal Justice System in Indian Country*, 81 U. COLO. L. REV. 1067 (2010) (providing comprehensive treatment of this subject).

6. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (tribes are "separate sovereigns pre-existing the Constitution"). The Supreme Court has interpreted the relationship between the United States and the Indian nations as a trust relationship in which tribes are considered domestic dependent nations, with authority to autonomously manage their internal affairs. *Cherokee Nation v. Georgia*, 30 U.S. 1, 3 (1831) (Indian tribes are not "foreign state[s]" as understood in Article III of the Constitution); *see also* Eid & Doyle, *supra* note 5, at 1075 ("In the mid-nineteenth century, Indian tribes were widely acknowledged to be legally sovereign within their own ancestral homelands.") (citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559–561 (1832) and *Ex parte Kan-gi-Shun-ca* (Crow Dog), 109 U.S. 556, 571 (1883)).

7. *United States v. Bruce*, 394 F.3d 1215, 1218 (9th Cir. 2005) ("The historical background of federal criminal jurisdiction in Indian country can be traced to colonial times, when Indian territory was entirely the province of the tribes and the tribes were understood to possess jurisdiction over all persons and subjects present on Indian lands.") (citing Canby, Jr., *supra* note 5, at 133).

and the federal government based on the racial classification of the perpetrator and the victim, and the type and location of the crime involved.⁸

Early in United States history, Indian nations were divested of authority over non-Indians who commit crimes in Indian country.⁹ And, as discussed below, tribal authority over Indians who commit crimes in Indian country was also restricted by Congress through federal legislation that shifted jurisdiction over many Indian country crimes away from tribes to federal and state authorities. This left tribes with either limited or no authority to address and punish many crimes committed in Indian country, even those committed by their own members. Congress changed this status quo relatively recently with legislation permitting some tribes to exercise “enhanced”¹⁰ jurisdiction and sentencing authority over non-Indians in a limited category of crimes committed in Indian country. Criminal jurisdiction in Indian country is unique in many respects. Perhaps its most idiosyncratic (and dubious) distinction is that it allocates jurisdiction over criminal conduct based primarily on the defendant and victim’s legal status as an Indian or non-Indian.¹¹

8. *Id.* (“The exercise of criminal jurisdiction over Indians and Indian country is a ‘complex patchwork of federal, state, and tribal law,’ which is better explained by history than by logic.”) (quoting *Duro v. Reina*, 495 U.S. 676, 680 n. 1 (1990)).

9. *See id.* (Tribal authority over crime in Indian Country “continued until shortly after the ratification of the Constitution, when Congress extended federal jurisdiction to non-Indians committing crimes against Indians in Indian territory.”); *see also* Carrie E. Garrow & Sarah Deer, *Tribal Criminal Law And Procedure* 42 (2d ed. 2015).

10. *See infra* notes 57–68 and accompanying text. Some observers, including this writer, would describe recent federal laws providing for greater criminal jurisdiction and sentencing authority by tribal courts not as “enhanced,” but as “restored” authority given the fact that tribal courts were originally understood to have plenary authority to punish criminal activity occurring on tribal land.

11. *See* Eid & Doyle, *supra* note 5, at 1097 (“[A] Native American who is accused of committing serious crime on a reservation is subjected to a separate set of criminal laws and enforcement mechanisms based on his or her ethnicity. So too, then, are Native American crime victims. . . . In federal court, a defendant’s Indian status is considered both as it pertains to federal jurisdiction and as an element of the crime.”) (citing *United States v. Stymiest*, 581 F.3d 759, 763 (8th Cir. 2009)); *see also* Brian L. Lewis, *Do You Know What You Are? You Are What You Is; You Is What You Am: Indian Status for the Purpose of Federal Criminal Jurisdiction and the Current Split in the Courts of Appeals*, 26 *HARV. J. ON RACIAL & ETHNIC JUST.* 241, 242 (2010) (“With the enactment of the Major Crimes Act, Congress provided federal courts the jurisdiction they previously lacked—criminal jurisdiction over Indians in Indian Country. What was previously the criterion for exception from federal jurisdiction is now an element of the crime under federal law. Despite its flawed inception, the Major Crimes Act is the federal law applied today in Indian Country to prosecute Indians. The application of the Major Crimes Act depends on the determinative test for Indian status, which is the prerequisite for federal jurisdiction in Indian Country.”).

2. *Post-treaty boundaries of tribal court criminal jurisdiction*

Congress began legislating tribes' post-treaty criminal jurisdiction with the Trade and Intercourse Act of 1790.¹² The 1790 Act placed all interactions with Indians under federal law and provided for federal jurisdiction over crimes committed by non-Indians against Indians in Indian country.¹³ The Indian Country Crimes Act of 1817¹⁴ subsequently reaffirmed federal jurisdiction over all crimes committed by non-Indians in Indian country and explicitly acknowledged that tribes retained jurisdiction over crimes committed in Indian country by one Indian against the person or property of another Indian.¹⁵ The Indian Trade and Intercourse Act of 1834¹⁶ repealed the Indian Country Crimes Act of 1817, but incorporated the latter's criminal jurisdiction provision.¹⁷

Against this backdrop, in 1883 the Supreme Court first addressed the authority of Indian tribes to punish crimes committed in Indian country in *Ex parte Kan-gi-Shun-ca (Crow Dog)*.¹⁸ Kan-gi-Shun-ca (Crow Dog) was a Brulé Lakota.¹⁹ He killed a member of his tribe, Chief Spotted Tail, on an Indian reservation in the Dakota Territory.²⁰ The tribe resolved the matter

12. Trade and Intercourse Act of 1790, Pub. L. No. 1-33, 1 Stat. 137. As discussed, *infra*, the 1790 Act and amendments to it formed the foundation for the current version of the Indian Country Crimes Act (ICCA), 18 U.S.C. §1153 (2012).

13. § 5, 1 Stat. at 138 (“[I]f any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, shall go into any town, settlement or territory belonging to any nation or tribe of Indians, and shall there commit any crime upon, or trespass against, the person or property of any peaceable and friendly Indian or Indians, which, if committed within the jurisdiction of any state, or within the jurisdiction of either of the said districts, against a citizen or white inhabitant thereof, would be punishable by the laws of such state or district, such offender or offenders shall be subject to the same punishment, and shall be proceeded against in the same manner as if the offence had been committed within the jurisdiction of the state or district to which he or they may belong, against a citizen or white inhabitant thereof.”).

14. The relevant provisions of the 1817 Act are now codified in the General Crimes Act, 18 U.S.C. § 1152 (2012).

15. Indian Country Crimes Act of 1817, Pub. L. No. 14-92, § 2, 3 Stat. 383 (repealed 1834) (“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 offence committed by one Indian against another, within any Indian boundary.”).

16. Indian Trade and Intercourse Act of 1834, Pub. L. No. 23-161, § 25, 4 Stat. 729, 733.

17. § 29, 4 Stat. at 733. Section 29 of the Indian Trade and Intercourse Act (ITTA) repealed the Indian Country Crimes Act of 1817 (ICCA), but § 25 of the ITTA retained the ICCA's criminal jurisdiction provision as follows: “so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in Indian country: Provided, the same shall not extend to “crimes committed by one Indian against the person or property of another Indian.”

18. 109 U.S. 556 (1883).

19. *Id.* at 557.

20. *Id.*

according to tribal custom.²¹ Notwithstanding the tribal punishment, a federal grand jury indicted Crow Dog for murder, and he was convicted and sentenced to death in the Dakota Territorial Court.²² The issue before the Supreme Court on review was whether federal courts have jurisdiction over Indians who commit crimes against other Indians in Indian country. The Court held that under federal treaty and statutory law,²³ the tribe had inherent authority over Crow Dog, and that the Dakota Territorial Court didn't. Accordingly, it overturned his conviction.²⁴

3. Redrawing the boundaries of tribal criminal jurisdiction

a. Federal Enclaves Act, Assimilative Crimes Act, Major Crimes Act, Public Law 280 and Indian Civil Rights Act

In 1885, in direct response to *Crow Dog*,²⁵ Congress passed the Indian Major Crimes Act.²⁶ The Major Crimes Act grants the federal government jurisdiction over Indians who commit a listed offense²⁷ in Indian country, regardless of whether the victim is an Indian or non-Indian.²⁸ The Major Crimes Act initially covered seven crimes—murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny.²⁹ By successive

21. See Barbara L. Creel, *The Right to Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative*, 18 MICH. J. RACE & L. 317, 336 n.118 (2013) (“Under the Brule tradition, the tribal council met to resolve the murder, ordered an end to the disturbance, and arranged a peaceful reconciliation of the families involved through offered or accepted gifts. For the murder, Kan-gi-shun-ca’s family was ordered under tribal law to compensate Spotted Tail’s family for the loss by offering \$600 in cash, eight horses, and one blanket) (citing Sidney L. Harring, *Crow Dog’s Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century* 1, 104–105 (1994)).

22. *Ex parte Kan-Gi-Shun-Ca*, 109 U.S. at 557.

23. *Id.* at 562–565. The Court interpreted the Treaty of Fort Laramie, signed on April 29, 1868.

24. *Id.* at 572.

25. See *Keeble v. United States*, 412 U.S. 205, 209–212 (1973); *United States v. Kagama*, 118 U.S. 375, 382–383 (1886).

26. Indian Major Crimes Act, Pub. L. No. 48-341, § 9, 23 Stat. 385 (1885) (codified, as amended, as 18 U.S.C. §§ 1153, 3242 (2012)). 18 U.S.C. § 3242 provides: “All Indians committing any offense listed in the first paragraph of and punishable under section 1153 (relating to offenses committed within Indian country) of this title shall be tried in the same courts and in the same manner as are all other persons committing such offense within the exclusive jurisdiction of the United States.”

27. § 9, 23 Stat. at 385 (codified, as amended, as 18 U.S.C. §§ 1153, 3242). The current version of the Major Crimes Act enumerates fifteen offenses. See *infra* note 28 and accompanying text. These enumerated offenses are, for the most part, defined by distinct federal statutes. Offenses that are not defined by federal law are defined and punished in accordance with the law of the state where the crime was committed. See 18 U.S.C. § 1153(b).

28. The Major Crimes Act places specific crimes committed by an Indian in Indian country within federal jurisdiction. The crimes are offenses against the person, such as murder and assault that, if committed in a state jurisdiction, have traditionally and historically been left to state governments to prosecute and punish. 18 U.S.C. § 1153(a).

29. As originally enacted, the statute provided: “That immediately upon and after the date of the passage of this act all Indians, committing against the person or property of another Indian or other

amendments, Congress increased the number of enumerated crimes from seven to thirteen, adding carnal knowledge, assault with intent to commit rape, incest, assault with a dangerous weapon, assault resulting in serious bodily injury, and robbery.³⁰

The Major Crimes Act provides that Indians who commit an enumerated offense in 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.”³¹ Before Congress passed the Major Crimes Act, offenses committed by Indians in Indian country were tried exclusively in tribal courts.³² It is not clear whether Congress intended the language “within the exclusive jurisdiction of the United States” to extinguish tribal jurisdiction over enumerated crimes committed by Indians in Indian country in favor of exclusive federal jurisdiction or, rather, in favor of concurrent federal/state jurisdiction.³³ The Major Crimes Act, however, has been interpreted to completely divest state courts of jurisdiction over the crimes enumerated in the statute in Indian country that is subject to federal criminal jurisdiction.³⁴ According to the U.S. Department of Justice,

person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny within any Territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such Territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner and shall be subject to the same penalties as are all other persons charged with the commission of said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States.” § 9, 23 Stat. at 385.

30. The Major Crimes Act currently provides: “Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, 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.” 18 U.S.C. § 1153(a). Legislative history indicates Congress used the words “or other person” to make clear that Indians were to be prosecuted in federal court for all enumerated crimes committed in Indian country, regardless of the race of the victim. 16 CONG. REC. 934 (1885).

31. 18 U.S.C. § 1153(a).

32. The Supreme Court upheld the constitutionality of the Major Crimes Act in *United States v. Kagama*, where two Indians were prosecuted for killing another Indian on a reservation. The Court held that although the prosecution of major crimes did not fall within the federal government’s power to regulate commerce with the Indian tribes, it was authorized by the federal government trust responsibilities to Indian tribes. *Kagama*, 118 U.S. at 383–385.

33. See Eid & Doyle *supra* note 5, at 1077–1078 (“It is not clear from the limited legislative record that Congress intended for Indians to be brought under exclusive federal rather than concurrent federal and state jurisdiction.”).

34. *Id.* at 1082–1083.

whether *tribal* courts have concurrent jurisdiction with federal courts over offenses covered by the Major Crimes Act remains an “open question.”³⁵ In this writer’s view, there is no question that tribal courts have concurrent jurisdiction with the federal government over the offenses covered by the Major Crimes Act, albeit subject to Congressionally-mandated restrictions on the severity of the punishment they can impose.³⁶ Thus, tribes can, and do, independently criminalize, prosecute and punish the types of crimes enumerated in the Major Crime Act under tribal codes.³⁷

In 1948 Congress passed the Indian Country Crimes Act (“ICCA”).³⁸ The ICCA applies federal criminal statutes to federal “enclaves,” areas such as Indian reservations, military installations and national parks, and provides for federal criminal jurisdiction over interracial crimes in which either the defendant or the victim is an Indian. The statute explicitly allows for concurrent tribal court jurisdiction in criminal prosecutions of Indian defendants.³⁹ And it provides that Indian defendants cannot be charged federally under the ICCA if they have already been punished by a tribe.⁴⁰ Case

35. U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL tit. 9 (1997).

36. *Wetsit v. Stafne*, 44 F.3d 823 (9th Cir. 1995) (tribes retain concurrent jurisdiction over crimes enumerated in the Major Crimes Act); Timothy J. Droske, *Correcting Native American Sentencing Disparity Post-Booker*, 91 MARQ. L. REV. 723, 737 (2008) (“Tribes . . . share concurrent jurisdiction with the federal government over Indian defendants who have violated the Major Crimes Act although tribal courts are subject to the sentencing limitations imposed by the Indian Civil Rights Act.”).

37. The catch, of course, is that tribes cannot impose a punishment over three even for the most serious crimes committed in their jurisdictions. 25 U.S.C. § 1302(a)(7)(B) (2012).

38. Indian Country Crimes Act, Pub. L. No. 80-772, 62 Stat. 683, 757 (1948) [hereinafter ICCA] (codified as 18 U.S.C. § 1152). It is also known as the General Crimes Act, the Federal Enclaves Act, and the Interracial Crime Provision General Crimes Act. It provides: “Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country. This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.”).

39. The Supreme Court upheld the constitutionality of 18 U.S.C. §§ 1152 and 1153 in *United States v. Antelope* against an equal protection challenge. 430 U.S. 641 (1977). In *Antelope*, the Court rejected an argument that the Major Crimes Act relies on an impermissible racial classification, holding that the statutory scheme “is rooted in the unique status of Indians as ‘a separate people’ with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a ‘racial’ group consisting of Indians.” *Id.* at 646; *Morton v. Mancari*, 417 U.S. 535 (1974).

40. The General Crimes Act reauthorized and clarified existing federal laws pertaining to criminal jurisdiction in Indian country and made clear that the same federal criminal jurisdiction exercised in other “federal enclaves” also extends to Indian country. The General Crimes Act explicitly reserves tribal court jurisdiction over non-federal crimes committed in Indian country that only involve Indians. 18 U.S.C. § 1152 (“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 in the District of Columbia, shall extend to the Indian Country. This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian Country who has been punished by the local law of the

law further provides that federal laws of national applicability apply in Indian country in most circumstances.⁴¹

In addition to federal jurisdiction over some crimes committed in Indian country, federal law provides for state court jurisdiction over offenses committed on some tribal lands in two instances. One, if the perpetrator is a non-Indian who commits either a crime against a non-Indian or a “victimless” crime. Or, two, if the tribal land is subject to Public Law 280, a federal statute that transferred criminal jurisdiction over some crimes in some Indian country to states.⁴² Further, the Supreme Court has held that tribal courts do not have jurisdiction to try non-Indians who commit crimes in Indian country “absent affirmative delegation of such power by Congress.”⁴³ Thus, the extent of federal and tribal jurisdiction vis-à-vis individual states over crimes committed in Indian country depends on the status of the particular tribal land under Public Law 280.⁴⁴

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.”). Under the General Crimes Act, the federal government has jurisdiction over non-major crimes committed by Indian defendants if a tribal court has not imposed prior punishment or if tribal jurisdiction is not established by treaty or statute. Droske, *supra* note 36, at 737 (“tribes have jurisdiction over non-major crimes committed by an Indian against a non-Indian, as does the federal government under the General Crimes Act, so long as the Indian defendant has not been punished by the tribe.”).

41. *United States v. Mitchell*, 502 F.3d 931, 947 (9th Cir. 2007) (“the general rule is that a federal statute of nationwide applicability that is otherwise silent on the question of jurisdiction as to Indian tribes ‘will not apply to them if (1) the law touches ‘exclusive rights of self-governance in purely intramural matters’; (2) the application of the law to the tribe would ‘abrogate rights guaranteed by Indian treaties’; or (3) there is proof ‘by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations[.]’”) (citing *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985)); *United States v. Anderson*, 391 F.3d 1083, 1085–1086 (9th Cir. 2004); 1 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 4.5 (2d ed.) (West’s Crim. Practice Ser. 2003).

42. Public Law 280 is codified as 18 U.S.C. § 1162 (2012). It required some states to exercise concurrent criminal jurisdiction over Indian country. Until Congress enacted Public Law 280, state court jurisdiction in Indian country was generally limited to crimes committed by non-Indians that were either victimless or committed against another non-Indian. Robert T. Anderson, *Negotiating Jurisdiction: Retreating State Authority over Indian Country Granted by Public Law 280*, 87 Wash. L. Rev. 915, 928–29 (2012) (Absent federal legislation to the contrary “[s]tate jurisdiction over Indian country is precluded by the inherent sovereignty of Indian nations, and is also preempted by the MCA and the ICCA. Similarly, states lack jurisdiction over crimes by non-Indians when the victim is an Indian because of the same principles. On the other hand, by common law rule, states have jurisdiction over crimes committed by non-Indians against other non-Indians within Indian country. States also appear to have jurisdiction over victimless crimes committed by non-Indians when no federal or tribal interests are implicated.”) (citations and footnotes omitted).

43. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 204 (1978) (Indian tribes lack criminal jurisdiction over non-Indians). Until the Court decided *Oliphant*, tribal jurisdiction over non-Indians for tribal offenses was assumed. *Bruce*, 394 F.3d at 1218. As discussed *infra*, in 2013, Congress authorized tribes to exercise limited jurisdiction over non-Indians if they meet certain procedural requirements. See *infra* note 59 and accompanying text.

44. In 1990, the Supreme Court ruled that tribal courts did not have criminal jurisdiction over Indians who were not members of that tribe. *Duro*, 495 U.S. at 685. Congress disagreed and amended

Because Indians tribes are separate sovereigns and did not participate in the ratification of the Constitution, the Bill of Rights does not apply to defendants in tribal court proceedings.⁴⁵ In 1968, Congress passed the Indian Civil Rights Act (“ICRA”). This statute extends some, but not all, of the guarantees in the Bill of Rights to tribal court defendants. ICRA also limits the sentencing authority of tribal courts.⁴⁶ With some exceptions, even for serious offenses, ICRA generally limits the penalty a tribal court can impose for a single tribal offense to one year incarceration and a five thousand dollar fine.⁴⁷ A tribal court may impose a sentence over one year only if the defendant has been previously convicted of, or is being prosecuted for, the same or a comparable offense,⁴⁸ and only if the tribal court extends specific procedural protections to the defendant.⁴⁹ In those cases, a tribal court may impose a sentence of no more than three years for a single offense, and a fine of no more than \$15,000.⁵⁰ As discussed below, if a tribal court is exercising jurisdiction over a domestic violence offense under the Violence Against Women Reauthorization Act of 2013 (“VAWA 2013”), it is required to provide the procedural protections set out in ICRA to all defendants facing incarceration (not just those sentenced to more than one year) and to provide additional procedural protections.⁵¹ For multiple offenses, ICRA limits a tribal court sentence to imprisonment of no more than nine years.⁵²

the Indian Civil Rights Act, 25 U.S.C. § 1301 (2012), discussed *infra*, to make clear that tribal courts retained criminal jurisdiction over non-member Indians. See 25 U.S.C. § 1301(2), Act of Oct. 28, 1991, Pub. Law No. 102–137, 105 Stat. 646 (recognizing and affirming “the inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians”).

45. Samuel E. Ennis & Caroline P. Mayhew, *Federal Indian Law and Tribal Criminal Justice in the Self-Determination Era*, 38 AM. INDIAN L. REV. 421, 428 (2013–2014) (Since Indian tribes “did not participate in the Constitutional Convention and did not ‘sign on’ by joining the federal union,” they are not bound by the Constitution, absent affirmative congressional action to the contrary. Rather, federal and state courts have recognized that tribal courts generally retain inherent civil and criminal jurisdiction over Indian reservations by virtue of their sovereign status.”) (footnotes omitted).

46. 25 U.S.C. §§ 1301–1304 (2012).

47. *Id.* § 1302(a)(7)(B). As discussed *infra*, prior to enactment of the Tribal Law and Order Act of 2010, tribal court sentencing authority was limited to one year.

48. *Id.* § 1302(b).

49. 25 U.S.C. § 1302(c), for example, requires tribe courts to extend the right to counsel to defendants (at public expense if indigent) who receive a sentence of more than one year: “In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall—(1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and (2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys.”

50. 25 U.S.C. § 1302(b).

51. *Id.* § 1304(d).

52. *Id.* § 1302(a)(7)(D).

b. Tribal Law and Order Act of 2010 and Violence Against Women Reauthorization Act of 2013

As noted, early in United States' history, tribal courts were divested of jurisdiction over non-Indians who commit crimes in Indian country.⁵³ As further noted, Congress also severely restricted tribes' authority to punish violations of their own laws committed by Indians when it capped tribal court sentencing authority at one year imprisonment and/or a \$5,000 fine, even for the most serious offenses.⁵⁴ In two recent legislative enactments, Congress carved out some narrow exceptions to these long-standing federal policies. In 2010, under the Tribal Law and Order Act ("TLOA"), Congress authorized tribal courts to go beyond ICRA's one year, \$5,000 punishment cap in some circumstances.⁵⁵ In VAWA 2013, for the first time since tribes were divested of criminal jurisdiction over non-Indians,⁵⁶ Congress authorized some tribes to exercise criminal jurisdiction over some non-Indians for some domestic violence offenses committed on tribal land.⁵⁷

53. § 5, 1 Stat. at 137–138 (“[I]f any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, shall go into any town, settlement or territory belonging to any nation or tribe of Indians, and shall there commit any crime upon, or trespass against, the person or property of any peaceable and friendly Indian or Indians, which, if committed within the jurisdiction of any state, or within the jurisdiction of either of the said districts, against a citizen or white inhabitant thereof, would be punishable by the laws of such state or district, such offender or offenders shall be subject to the same punishment, and shall be proceeded against in the same manner as if the offence had been committed within the jurisdiction of the state or district to which he or they may belong, against a citizen or white inhabitant thereof.”).

54. 25 U.S.C. § 1302(a)(7)(B). As discussed *infra*, prior to enactment of the Tribal Law and Order Act of 2010, tribal court sentencing authority was limited to one year.

55. Tribal Law and Order Act of 2010, Pub. L. No. 111–211, § 234, 124 Stat. 2258 (codified at 25 U.S.C. § 1302).

56. See *supra* note 9 and accompanying text. See *infra* notes 57–68 and accompanying text. Some observers, including this writer, would describe recent federal laws providing for greater criminal jurisdiction and sentencing authority by tribal courts not as “enhanced,” but as “restored” authority given the fact that tribal courts were originally understood to have plenary authority to punish criminal activity occurring on tribal land.

57. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113–114, 127 Stat. 54. The driving force behind VAWA 2013 was the federal government's failure to adequately prosecute domestic violence crimes in Indian country. See Cynthia Castillo, *Tribal Courts, Non-Indians, and the Right to an Impartial Jury After the 2013 Reauthorization of VAWA*, 39 AM. INDIAN L. REV. 311, 314 (2015) (citing under-enforcement of crimes of sexual violence as the impetus for VAWA 2013 special domestic violence jurisdiction over some non-Indians). Frustration with lack of effective federal law enforcement and prosecution in Indian country is not limited to crimes of domestic violence. For example, in September 2015, the Tribal Council of the Blackfeet Tribe of Montana voted to begin banishing known drug dealers from its reservation because the lack of federal prosecution, combined with the tribal court's inability to impose felony penalties against drug dealers, means some drug cases fall through the cracks and endanger community safety. Justin Franz, *Blackfeet Tribal Council Votes to Banish Drug Dealers*, FLATHEAD BEACON, Sept. 4, 2015, <https://perma.cc/MR42-LPJ5>. Some tribes have recently invoked the historic practice of banishment to address the vacuum created by tribes' limited authority to impose felony penalties for crimes committed in their communities. See Patrice H. Kunesch, *Banishment As Cultural Justice in Contemporary Tribal Legal Systems*, 37 N.M. L. REV. 85, 88 (2007) (“Indian tribes

Congress codified the changes in tribal authority to punish (TLOA's "enhanced sentencing") and tribal authority to exercise jurisdiction over non-Indians for certain offenses (VAWA 2013's "special domestic violence criminal jurisdiction")⁵⁸ as amendments to ICRA. Under TLOA's enhanced sentencing provisions, tribal courts are now authorized to impose sentences of up to three years imprisonment and fines up to \$15,000.⁵⁹ And, for the first time, Congress addressed "stacking" offenses for sentencing purposes, providing that tribes may impose punishment for multiple offenses up to a maximum of nine years.⁶⁰ Under VAWA 2013, qualifying tribes can exercise criminal jurisdiction over some non-Indians who commit certain crimes in Indian country—domestic violence, dating violence, and violations of protection orders involving Indian victims.⁶¹ To fall within a tribe's VAWA 2013 criminal jurisdiction, a non-Indian must have some connection to the tribe—such as working or living in the community; or being married to, or in an intimate or dating relationship with, a member of the tribe or a non-member Indian living in the community.⁶²

Exercising TLOA's enhanced sentencing and VAWA 2013's expanded jurisdiction is optional for tribes. But not all tribes can participate—both statutes require Indian tribes seeking to exercise these sentencing and jurisdictional powers to extend specific procedural protections to criminal defendants that are coextensive with those guaranteed to state and federal criminal defendants under the federal constitution. Thus, this Congressional beneficence comes at a price—if tribal courts want to exercise "enhanced" sentencing and jurisdictional authority, they must agree to incorporate limitations on their power and authority styled after the federal constitutional guarantees in the Bill of Rights. In other words, tribal courts need to act

have historically used banishment as a means of social control and punishment. The custom has been recently revived to help tribes cope with a host of socially deviant and criminally dangerous activities within their respective communities. Hindered by their limited civil and criminal jurisdiction, frustrated with their inability to impose meaningful sanctions, and fearful of further disruption, harm, and violence to their communities, tribal governments recognize that the old customs of banishment and exclusion are powerful and effective means of reestablishing order and safety in their communities.") (footnotes omitted).

58. VAWA 2013 added a section to ICRA titled "Tribal Jurisdiction Over Crimes of Domestic Violence," authorizing "participating" tribes "to exercise special domestic violence criminal jurisdiction over all persons" (i.e. over Indians and non-Indians) who commit specific offenses in Indian country. 25 U.S.C. § 1304.

59. 25 U.S.C. § 1302(a)(7)(C)–(b).

60. *Id.* § 1302(a)(7)(D).

61. *Id.* § 1304(b)(4)(A). VAWA 2103 jurisdiction is limited to cases involving an Indian victim; thus, tribes cannot exercise jurisdiction over domestic violence offenses committed in Indian country if both the victim and defendant are both non-Indians.

62. *Id.* § 1304(b)(4).

more like federal courts procedurally if they want to be treated more like federal and state courts jurisdictionally⁶³ and penologically.⁶⁴

ICRA tracks some, but not all, of the criminal procedural protections set out in the Bill of Rights. And it provides for “tiered” protections based on the extent of the authority a tribal court seeks to exercise. Like the Bill of Rights, ICRA provides for the right to be free from unreasonable searches and seizures; requires probable cause and particularity for warrants;⁶⁵ prohibits double jeopardy⁶⁶ and compelled self-incrimination;⁶⁷ provides rights to a speedy and public trial, notice of charges, confrontation of witness, compulsory process, and counsel;⁶⁸ prohibits excessive bail, fines and cruel and unusual punishment;⁶⁹ requires equal protection and due process;⁷⁰ prohibits bills of attainder and ex post facto laws;⁷¹ and provides for a six-person jury for offenses punishable by imprisonment.⁷² For defendants sentenced to imprisonment of more than one year, in addition to these protections, ICRA requires tribal courts to ensure the right to effective assistance of counsel, at public expense if the defendant is indigent.⁷³

63. VAWA 2013 took effect on March 7, 2015, but it authorized a voluntary “Pilot Project” to allow tribes selected by the U.S. Department of Justice to begin exercising special domestic violence criminal jurisdiction sooner. DOJ selected five tribes for the Pilot Project—Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana; Confederated Tribes of the Umatilla Indian Reservation, Oregon; Pascua Yaqui Tribe, Arizona; Sisseton Wahpeton Oyate of the Lake Traverse Reservation, South Dakota/North Dakota; and Tulalip Tribe, Washington. Nat’l Cong. of Am. Indians, *Tribal Implementation of VAWA*, NCAI.ORG, <https://perma.cc/XG4V-T29F> (last visited Nov. 30, 2015). As of Fall 2015, eight tribes had implemented VAWA 2013 special domestic violence jurisdiction legislation, making them “participating tribes” able to exercise jurisdiction over non-Indians: Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana; Confederated Tribes of the Umatilla Indian Reservation, Oregon; Eastern Band of Cherokee, North Carolina; Little Traverse Bay Bands of Odawa Indians, Michigan; Pascua Yaqui Tribe, Arizona; Seminole Nation of Oklahoma, Oklahoma; Sisseton Wahpeton Oyate of the Lake Traverse Reservation, South Dakota/North Dakota; Tulalip Tribes, Washington. U.S. Dep’t of Justice, *Violence Against Women Act Reauthorization 2013*, JUSTICE.GOV, <https://perma.cc/WS9E-ZE2K> (last visited Nov. 30, 2015).

64. As of Fall 2015, eight tribes were exercising ICRA enhanced sentencing and eleven more were close to implementing ICRA enhanced sentencing. Nat’l Cong. of Am. Indians, *Tribal Law & Order Resource Center*, TLOA.NCAI.ORG, <https://perma.cc/DZ8J-PAXD> (last visited Nov. 30, 2015).

65. 25 U.S.C. § 1302(a)(2).

66. *Id.* § 1302(a)(3).

67. *Id.* § 1302(a)(4).

68. *Id.* § 1302(a)(6).

69. *Id.* § 1302(a)(7)(A).

70. *Id.* § 1302(a)(8).

71. 25 U.S.C. § 1302(a)(9).

72. *Id.* § 1302(a)(10). The U.S. Constitution does not specify the number of jurors that are constitutionally required. The Supreme Court has held that the Sixth Amendment jury right (applicable to the state through the Fourteenth Amendment) is satisfied by a jury of six in criminal cases. *Williams v. Florida*, 399 U.S. 78 (1970). Federal criminal defendants are entitled to a jury of twelve for felony offenses. FED. R. CRIM. P. 23(b).

73. 25 U.S.C. § 1302(c)(1)–(2).

Indian tribes exercising “special domestic violence criminal jurisdiction” under VAWA 2013 must provide defendants all the protections above. In addition, they must provide defendants subject to *any* term of imprisonment with effective assistance of counsel, at public expense if indigent. Under VAWA 2013, tribal courts must also provide defendants an “impartial jury,” which Congress specifically defined using the language the Supreme Court developed to define an impartial jury under the Constitution; that is, a jury drawn from a fair cross section of the community using a procedure that does not systematically exclude any distinctive group in the community.⁷⁴ Finally, tribal courts must provide VAWA 2013 defendants “all other rights whose protection is necessary under the Constitution . . . in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction[.]”⁷⁵

B. Criminal jury composition and selection procedure in Indian country prosecutions

1. Federal court

Trial location and jury selection procedure in federal court are governed primarily by five authorities: Article III to the U.S. Constitution, the Sixth Amendment’s impartial jury requirement, the Fifth Amendment’s Equal Protection guarantee,⁷⁶ the Jury Selection and Service Act of 1968 (JSSA),⁷⁷ and Federal Rule of Criminal Procedure 18. Article III, Section 2, Clause 3 provides “[t]he trial of all Crimes . . . shall be held in the State where the said crimes shall have been committed[.]” The Sixth Amendment provides, in pertinent part: “in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed[.]” The JSSA, discussed in detail below, sets forth the policy and procedure for jury selection in federal courts. Rule 18 provides that

74. *Id.* § 1304(d). The TLOA amendments to ICRA that have been incorporated into the VAWA 2013 provisions of ICRA in section 1304(d) further provide that a judge presiding over TLOA and VAWA 2013 proceedings authorized by ICRA must have legal training and be licensed to practice law; that tribes make their criminal laws, rules of evidence and criminal procedure publically available; and, that courts maintain a record of proceedings. *Id.* § 1302(c)(3)–(5).

75. *Id.* § 1304(d).

76. As discussed *infra*, the phrase “equal protection” appears in the Fourteenth, but not the Fifth, Amendment. The Fourteenth Amendment, however, only applies to the states, not the federal government. Although the phrase is not in the text of the Fifth Amendment, the Supreme Court has interpreted the Fifth Amendment to incorporate an equal protection guarantee applicable to the federal government that is co-extensive with the Fourteenth Amendment equal protection guarantee. *See* note 94 and accompanying text.

77. 28 U.S.C. §§ 1861–1878.

unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice.⁷⁸

a. Constitutional jury selection requirements

Article III and the Sixth Amendment impose both venue and vicinage requirements. Article III requires that the venue—the location—of criminal trials be the state in which a crime is committed. The Sixth Amendment requires the vicinage⁷⁹—the locality from which a criminal jury is drawn—to be the state and district where the crime is committed.⁸⁰ The distinction between venue and vicinage, although not of much relevance today,⁸¹ reflected two separate concerns of the Founders. One was the practice permitted under British rule of transporting colonists to England for trial of crimes committed in the colonies.⁸² The other was ensuring that those accused of crimes would be judged by a local jury—a jury drawn from the vicinity in

78. FED. R. CRIM. P. 18. An exception to Rule 18's place of prosecution requirement exists for continuing offenses that are begun in one district and completed in another. *United States v. Slutsky*, 487 F.2d 832, 838–839 (2d Cir. 1973). For continuing offenses, 18 U.S.C. §3237(a) provides that “any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.” When a defendant is charged with more than one offense, venue must lie for each offense. *United States v. Bowens*, 224 F.3d 302, 308 (4th Cir. 2000).

79. “Vicinage” is defined as “a neighboring or surrounding district.” Its synonyms are “backyard, neighborhood, purlieu, environs, vicinity.” MERRIAM-WEBSTER DICTIONARY, *available at* <https://perma.cc/Q7Q6-MWDC>; 4 WILLIAM BLACKSTONE, COMMENTARIES *350–351 (“Vicinage” means neighborhood, and “vicinage of the jury” means jury of the neighborhood or, in medieval England, jury of the County).

80. *United States v. Passodelis*, 615 F.2d 975, 977 n.3 (3d Cir. 1980). (“Literally, the provision in Article III is a venue provision since it specifies the place of trial, whereas the provision in the Sixth Amendment is a vicinage provision since it specifies the place from which the jurors are to be selected.”).

81. *Id.* at 977 n.3 (The distinction between vicinage and venue “has never been given any weight, perhaps because it is unlikely that jurors from one district would be asked to serve at a trial in another district, or perhaps, more importantly, because the requirement that the jury be chosen from the state and district where the crime was committed presupposes that the jury will sit where it is chosen.”); *United States v. Royer*, 549 F.3d 886, 893 n.8 (2d Cir. 2008) (Technically, Article III specifies ‘venue’ and the Sixth Amendment specifies ‘vicinage,’ but that refined distinction is no longer of practical importance.).

82. One of the complaints levied against George III in the Declaration of Independence was “transporting us beyond Seas to be tried for pretended offenses.” THE DECLARATION OF INDEPENDENCE para. 15 (U.S. 1776); *United States v. Flaxman*, 304 F. Supp. 1301, 1304 (S.D.N.Y. 1969) (“The Sixth Amendment was written against the history of an arbitrary British government trying American subjects in England for crimes committed in the colonies . . . [t]he standards which the Amendment established are stringent ones, and they were purposely made stringent.”); *Glasser v. United States*, 315 U.S. 60, 85 (1942) (“Lest the right of trial by jury be nullified by the improper constitution of juries, the notion of what a proper jury is has become inextricably intertwined with the idea of jury trial. When the original Constitution provided only that ‘The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury;’ the people and their representatives, leaving nothing to chance, were quick to implement that

which the crime was committed, where the defendant likely resided (or at least spent time) and was known to by the community, and where the witnesses were likely to be located.⁸³

Until 1925, the Bill of Rights (the first ten amendments to the U.S. Constitution) was understood to constrain only the federal Congress' ability to pass laws abridging certain freedoms, and to grant "persons" or "the people" the right to be free from specific conduct or actions by the federal government.⁸⁴ In 1925, the Supreme Court began a process of "selective incorporation" of certain Bill of Rights guarantees into the Fourteenth Amendment's due process clause, which prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law[.]"⁸⁵ As part of the incorporation process, the Court systematically addressed whether specific constitutional guarantees afforded an accused in a federal criminal trial under the Bill of Rights were also part of the "process due" an accused in state criminal investigations and prosecutions by virtue of the Fourteenth Amendment.⁸⁶ The result was the application of most,⁸⁷ but not

guarantee by the adoption of the Sixth Amendment which provides that the jury must be impartial.") (footnote omitted).

83. *Travis v. United States*, 364 U.S. 631, 640 (1961) (The "basic policy" of the Sixth Amendment is best served by holding trial where "[t]he witnesses and relevant circumstances surrounding the contested issues" are located); *Multi-Venue and the Obscenity Statutes*, 115 U. PA. L. REV. 339, 413 (1967) ("Early provisions which required trial where the crime was committed would also, in an age of restricted travel and mobility, in effect decree trial at the defendant's home, or, if not at his home, at least where the defendant was physically present at the time the crime was committed.").

84. Before ratification of the Fourteenth Amendment in 1868 and the development of the incorporation doctrine, the Supreme Court specifically held that the Bill of Rights applied only to the federal government. See *Barron v. Baltimore*, 32 U.S. 243 (1833). The Supreme Court also initially rejected incorporation after ratification of the Fourteenth Amendment. See *United States v. Cruikshank*, 92 U.S. 542 (1875).

85. U.S. CONST. amend. XIV; Barry Latzer, *Toward the Decentralization of Criminal Procedure: State Constitutional Law and Selective Disincorporation*, 87 J. CRIM. L. & CRIMINOLOGY 63, 70 (1996) ("Under the incorporation doctrine, certain rights in the Bill of Rights, originally restrictions on only the federal government, become, when "incorporated" into the Fourteenth Amendment Due Process Clause, restrictions upon the state governments as well) (footnotes omitted) (citing *Barron*, 32 U.S. at 243 (Fifth Amendment Taking Clause, and by implication the entire Bill of Rights, restricted only the federal government) and *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968)).

86. The rights and guarantees applicable to federal criminal investigations and prosecutions are contained in the Fourth, Fifth, Sixth and Eighth Amendment to the U.S. Constitution. They include the rights to be secure from unreasonable searches and seizures, U.S. CONST. amend. IV; the right to indictment by a grand jury for infamous crimes, to be free from double jeopardy, not to be compelled to be a witness against oneself, or be deprived of life, liberty, or property without due process of law, U.S. CONST. amend. V; the right to a speedy and public trial, an impartial jury, to be informed of charges, to confront witnesses, to have compulsory process, to have the assistance of counsel, U.S. CONST. amend. VI; and prohibitions against excessive bail and infliction of cruel and unusual punishment, U.S. CONST. amend. VIII.

87. See e.g. *Wolf v. Colorado*, 338 U.S. 25 (1949) (prohibition against unreasonable search and seizure); *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusionary rule; overruling *Wolf v. Colorado*, to extent it held exclusionary rule not incorporated); *Aguilar v. Texas*, 378 U.S. 108 (1964) (warrant requirement); *Ker v. California*, 374 U.S. 23 (1963) (standard for warrantless search or seizure); *Benton v.*

all,⁸⁸ of the specific criminal procedure guarantees contained in the Fourth, Fifth, and Sixth Amendments to the states. With respect to jury rights, the Court has incorporated the Sixth Amendment guarantees to a speedy trial,⁸⁹ a public trial,⁹⁰ and the right to trial by impartial jury for non-petty offenses.⁹¹ The Court has not incorporated the right to have a jury selected from residents of the state and district where the crime occurred.⁹² As explained above, these constitutional guarantees have never applied in tribal court, although ICRA has required some procedural jury trial rights be extended to tribal court defendants since it was enacted 1968.

A “jury of one’s peers” is a familiar phrase associated with the American legal system. The concept, derived from the Magna Carta,⁹³ however, appears nowhere in the Constitution. Rather, the peer jury concept is found in Supreme Court case law interpreting the equal protection guarantees in the Fifth and Fourteenth Amendments and the Sixth Amendment impartial jury right.⁹⁴ The Supreme Court interprets the constitutional equal protection guarantee to prohibit jury selection procedures that intentionally ex-

Maryland, 395 U.S. 784 (1969) (double jeopardy); *Malloy v. Hogan*, 378 U.S. 1 (1964) (self-incrimination); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (speedy trial); *In re Oliver*, 333 U.S. 257 (1948) (public trial); *Duncan*, 391 U.S. 145 (right to trial by impartial jury for non-petty offenses); *In re Oliver*, 333 U.S. 257 (1948) (right to be informed of accusations); *Rabe v. Washington*, 405 U.S. 313 (1972) (same); *Pointer v. Texas*, 380 U.S. 400 (1965) (right to confront witnesses); *Washington v. Texas*, 388 U.S. 14 (1967) (compulsory process); *Powell v. Alabama* 287 U.S. 85 (1932) (assistance of counsel in capital cases); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to assistance of counsel in felony cases); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (right to assistance of counsel for imprisonable misdemeanors); *Schilb v. Kuebel*, 404 U.S. 357 (1971) (dicta) (excessive bail), *Robinson v. California*, 370 U.S. 660 (1962) (cruel and unusual punishments); *Baze v. Rees*, 553 U.S. 35, 47 (2008) (dicta) (excessive bail).

88. Of these rights and guarantees, only the right to presentment or indictment by a Grand Jury, the right to have a jury selected from residents of the state and district where the crime occurred, and the prohibition against excessive fines have not been incorporated and applied to the states. *Hurtado v. California*, 110 U.S. 516 (1884) (grand jury right not incorporated); *Caudill v. Scott*, 857 F.2d 344 (6th Cir. 1988) (right to have a jury selected from residents of the state and district where the crime occurred not incorporated); *Cook v. Morrill*, 783 F.2d 593 (5th Cir. 1986) (same); *Zicarelli v. Dietz*, 633 F.2d 312 (3d Cir. 1980) (same), *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (prohibition against excessive fines).

89. *Klopfer*, 386 U.S. at 222 (speedy trial).

90. *In Re Oliver*, 333 U.S. at 278 (public trial).

91. *Duncan*, 391 U.S. 145 (right to trial by impartial jury for non-petty offenses).

92. *Caudill*, 857 F.2d at 345–346 (right to have a jury selected from residents of the state and district where the crime occurred not incorporated); *Cook*, 783 F.2d at 594 (same); *Zicarelli*, 633 F.2d at 313 (same).

93. The Magna Carta of 1215, chap. 39, provides: “No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.” MAGNA CARTA (1215 ed. & British Library trans.), available at <https://perma.cc/VV9U-JYJW>.

94. The Fifth Amendment, which only applies to the federal government, does not contain an equal protection clause; the Fourteenth Amendment, which contains an equal protection clause, only applies to the states. U.S. CONST. amend. V, VI, XIV. In *Bolling v. Sharpe*, the Supreme Court held that the

clude or single out any “recognizable, distinct class” for different treatment “under the laws, as written or as applied.”⁹⁵ And it interprets the Sixth Amendment impartial jury right, applicable to the states through the Fourteenth Amendment, to require that criminal jury pools be composed of a “fair cross section” of the community in which a crime is tried.⁹⁶

A Sixth Amendment fair cross section challenge requires a showing that the jury pool selection used in a defendant’s case (1) excluded a “distinctive” group in the community; (2) whose representation in the venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) whose underrepresentation is due to systematic exclusion of the group.⁹⁷ In this context, “systematic” means “inherent in the particular jury-selection process utilized,” not the result of intentional exclusion.⁹⁸ A “distinct” group is one that (1) is defined and limited by some factor (i.e., that the group has a definite com-

Fourteenth Amendment’s equal protection guarantees apply to the federal government through the Fifth Amendment’s due process clause. 347 U.S. 497 (1954).

95. Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, 4 *Crim. Proc.* § 15.4(d) (3d ed.) (“The Sixth Amendment right to jury trial requires that a petit jury be drawn from a ‘fair cross-section of the community.’ This requirement overlaps to a substantial extent with equal protection restrictions upon jury selection, but the two guarantees are distinct. Equal protection prohibits discrimination against a ‘cognizable group,’ while the fair cross-section requirement prohibits the exclusion of a ‘distinct’ group that leaves the venire less than reasonably representative. The character of a distinct group for cross-section purposes may be somewhat different than that of a cognizable group for equal protection purposes. Also, equal protection prohibits only intentional discrimination, while a fair cross-section objection can reach the systemic underrepresentation of a distinct group even where there was no intent to underrepresent that group.”); Nina W. Chernoff, *Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing It with Equal Protection*, 64 *HASTINGS L.J.* 141, 157–158 (2012) (citing *Castaneda v. Partida*, 430 U.S. 482, 494 (1977)); *Holland v. Illinois*, 493 U.S. 474, 478 (1990) (“[R]acial groups cannot be excluded from the venire from which a jury is selected. That constitutional principle was first set forth not under the Sixth Amendment but under the Equal Protection Clause.”); *Peters v. Kiff*, 407 U.S. 493, 500 n.9 (1972) (“The principle of the representative jury was first articulated by this Court as a requirement of equal protection[.]”).

96. *Taylor*, 419 U.S. at 528 (“the selection of a petit jury from a representative cross-section of the community is an essential component of the Sixth Amendment right to a jury trial” applicable to the states through the Fourteenth Amendment). The fair cross section of the community requirement applied to federal courts under statutory and common law, and it was explicitly codified in the JSSA of 1948. *See Ballard v. United States*, 329 U.S. 187, 191 (1946) (anti-discrimination provisions of the Judicial Code “reflect a design to make the jury ‘a cross-section of the community’ and truly representative of it.”) (citing *Glasser*, 315 U.S. at 60.). The fair cross section guarantee is concerned with the composition of the venire, not the petit (trial) jury that will hear the defendant’s case. Thus, there is no requirement that a defendant’s petit jury be representative of the community, only that the pool of names from which a court draws a petit jury (or, if applicable, a grand jury), and the process it uses produce a pool (or venire) that represents a fair cross-section of the community. *See United States v. Van Allen*, 208 F. Supp. 331, 334 (S.D.N.Y. 1962).

97. *Duren v. Missouri*, 439 U.S. 357, 363 (1979). For a discussion of the important differences between the equal protection and sixth amendment guarantees *see* Chernoff, *supra* note 95, at 157–158 (citing *Castaneda v. Partida*, 430 U.S. 482, 494 (1977)).

98. *See* Chernoff, *supra* note 95, at 144–158 (citing *Duren*, 439 U.S. at 366, 371 (Rehnquist, J., dissenting) (“[U]nder Sixth Amendment analysis intent is irrelevant[.]”).

position); (2) has a common thread or basic similarity in attitude or ideas or experience; and (3) has a community of interest that cannot be adequately represented if the group is excluded from the jury selection process.⁹⁹

b. Federal Judicial Code of 1948 and Jury Selection and Service Act of 1968

Congress codified the judicially-created non-discriminatory federal jury procedure requirements discussed above in the Federal Judicial Code of 1948.¹⁰⁰ Twenty years later, it codified the fair cross-section requirement discussed above in the Federal Jury Selection and Service Act (JSSA) of 1968.¹⁰¹ The Judicial Code of 1948 was a predecessor statute to the JSSA. It prohibited disqualification of citizens from jury service “on account of race or color,” required that jurors be chosen “without reference to party affiliations,” and required that jurors be “returned from such parts of the district as the court may direct . . . so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district.”¹⁰² The JSSA provides: “It is the policy of the United States that all litigants in Federal Courts entitled to trial by

99. *United States v. Test*, 550 F.2d, 577, 591 (10th Cir. 1976).

100. *See* Federal Judicial Code of 1948, Pub. L. No. 80–773, §101, 62 Stat. 869, 952.

101. Jury Selection and Service Act of 1968, Pub. L. No. 90–274, § 1862, 82 Stat. 53, 54. Even before Congress codified fair cross section requirements for federal court, the Supreme Court had held that fair cross section requirements in federal court could be addressed through reviewing courts’ supervisory powers over lower courts. *Ballard*, 329 U.S. at 193. (“We conclude that the purposeful and systematic exclusion of women from the panel in this case was a departure from the scheme of jury selection which Congress adopted and that . . . we should exercise our power of supervision over the administration of justice in the federal courts . . . to correct an error which permeated this proceeding.”) (citing *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946) and *McNabb v. United States*, 318 U.S. 332 (1943)). There appears to be some confusion among federal courts as to whether the federal statutory fair cross section requirement is co-extensive with the constitutional fair cross section guarantee. *Compare Test*, 550 F.2d at 584. (“Although the Supreme Court has not directly considered the issue, the majority of lower federal courts have responded to this congressional mandate by construing the statutory ‘fair cross section’ standard as the functional equivalent of the constitutional ‘reasonably representative’ standard previously developed.”) (citing *United States v. Whiting*, 538 F.2d 220, 222 (8th Cir. 1976); *Anderson v. Casscles*, 531 F.2d 682, 685 n.1 (2nd Cir. 1976) (dictum); *United States v. Tijerina*, 446 F.2d 675, 679–681 (10th Cir. 1971)); *United States v. Rodriguez*, 924 F. Supp. 2d 1108, 1117 (C.D. Cal. 2013) (Sixth Amendment and the requirements codified in the JSSA are coextensive) (citing *United States v. Torres-Hernandez*, 447 F.3d 699, 703 (9th Cir. 2006)); *United States v. Shine*, 571 F. Supp. 2d 589, 594 (D. Vt. 2008) (three-prong test for violation of Sixth Amendment’s fair cross-section requirement applies to proof of JSSA violation); *United States v. Orange*, 364 F. Supp. 2d 1288, 1293 (W.D. Okla. 2005) (JSSA codifies defendant’s Fifth and Sixth Amendment rights and statutory claim is evaluated under constitutional standards) *with* *United States v. Guzman* 337 F. Supp. 140, 142–143 (S.D.N.Y. 1972) (“Although the defendant challenges the Southern District Plan under both the Act and the Constitution, the standards embodied in the Act embrace and go beyond the constitutional requirements.”) (citing *Fay v. New York*, 332 U.S. 261, 287 (1947); *United States v. Leonetti*, 291 F. Supp. 461, 473 (S.D.N.Y. 1968)).

102. Federal Judicial Code of 1948, Pub. L. No. 80–773, §101, 62 Stat. 869, 952.

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.”¹⁰³ The JSSA requires each federal court district to create a written jury random selection plan implementing these policies.¹⁰⁴

The JSSA also sets out eligibility requirements for federal grand and petite juries.¹⁰⁵ It requires jurors to be U.S. citizens at least eighteen years old who have resided in the judicial district for at least a year.¹⁰⁶ A potential juror must be able to “read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form” and be able to “speak the English language.”¹⁰⁷ A potential juror may be excluded based on a mental or physical condition that makes him or her incapable of rendering “satisfactory jury service,”¹⁰⁸ based on a pending felony charge, or based on a felony conviction if the potential juror’s civil rights have not been restored.¹⁰⁹

2. Tribal court

Outside of VAWA 2103 “special domestic violence prosecutions,”¹¹⁰ the only jury composition requirements ICRA imposes on tribes is a six person jury.¹¹¹ ICRA does not, for example, require an impartial jury in non-VAWA 2013 proceedings, or otherwise impose any jury selection requirements outside the VAWA 2013 context. In contrast, ICRA entitles VAWA 2013 defendants to an “impartial jury” and specifies that the jury must be drawn from “sources that . . . reflect a fair cross section of the community” using procedures that “do not systematically exclude any distinctive group in the community, including non-Indians[.]”¹¹² In this way, ICRA sanctions a tiered system of tribal court jury procedure — under ICRA and VAWA 2013, only tribal court VAWA 2013 defendants are entitled to jury selection procedures that mirror the federal impartial jury and fair cross section guarantees and the systematic exclusion prohibition.

103. 28 U.S.C. § 1861 (2012).

104. *Id.* § 1863.

105. *Id.* § 1865.

106. *Id.* § 1865(1).

107. *Id.* § 1865(2), (3).

108. *Id.* § 1865(4).

109. 28 U.S.C. § 1865(5).

110. In this writer’s view, prosecutions under the Major Crimes Act should also be considered “special jurisdiction” cases, although they are not referred to as such—Major Crimes Act cases are in federal court only because federal law grants the federal courts “special” (i.e. not consistent with default rules of jurisdiction) jurisdiction over Indian defendants who commit certain crimes in Indian country.

111. 25 U.S.C. § 1302(a)(10).

112. *Id.* § 1304(d)(2)–(3).

Tribes follow different jury selection procedures in non-VAWA 2013 cases. Some tribes limit jury service to tribal members.¹¹³ Others include non-member member Indians and/or non-Indians with ties to the reservation community, such as employment or residence, in their jury pools.¹¹⁴ Some VAWA 2013 tribes extend the VAWA 2013 jury procedures to all tribal court defendants, not just VAWA 2013 defendants.¹¹⁵ Other VAWA 2013 tribes distinguish between VAWA 2013 and non-VAWA 2013 defendants (limited to Indians) in their jury selection procedures.¹¹⁶

III. JURY SELECTION PROCEDURE ANOMALIES IN INDIAN COUNTRY PROSECUTIONS

A. *Same crime, same place; different procedures for Indian defendants*

As with other areas of criminal law in Indian country, jury selection procedure for defendants charged with crimes committed in Indian country is characterized by a patchwork of different rules for different defendants based on their ethnicity, the crime(s) charged, and the political status of the tribe under Public Law 280. As illustrated by the table at Appendix A, once ICRA is overlaid with VAWA 2013 and compared to federal and state court procedure, Indian defendants tried for crimes committed in Indian country will be subject to very different jury selection procedures depending on whether they are prosecuted in state, tribal, or federal court. As illustrated, an Indian tried in tribal court for a crime committed in Indian country will

113. *See e.g.* 6 FORT PECK TRIBES COMPREHENSIVE CODE OF JUSTICE § 507(a)–(b) (2015) (person accused of crime punishable by imprisonment shall be granted jury trial upon request; jury shall consist of at least six tribal members with no felony convictions, who are not members of tribal council, or employees of tribal judiciary, law enforcement or jail).

114. *See e.g.* CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION CRIM. CODE § 3.19(A) (as amended by Resolution No. 14-018, March 24, 2014) (“any resident within the boundaries of the Umatilla Indian Reservation of the age of 18 or over is eligible to be a juror regardless of race or tribal citizenship.”); LAW AND ORDER CODE OF THE TULALIP TRIBE §1.11.2 (Jurors “shall be chosen from the following classes of persons: 1) tribal members living on or near the Tulalip Indian Reservation; 2) residents of the Tulalip Indian Reservation; and 3) employees of the Tulalip Tribes or any of its enterprises, agencies, subdivisions, or instrumentalities who have been employed by the Tribes for at least one continuous year prior to being called as a juror.”).

115. CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION CRIM. CODE §§ 3.19(A), 3.28(F) (as amended by Resolution No. 14-018, March 24, 2014) (“In any criminal proceeding, a defendant has a right to an impartial jury drawn from sources that reflect a fair cross section of the community and do not systematically exclude any distinctive group in the community, including non-Indians.”).

116. *See* 6 FORT PECK TRIBES COMPREHENSIVE CODE OF JUSTICE § 507(b)(1) (eligible juror in VAWA 2013 prosecution is any resident within the boundaries of the Fort Peck Reservation age of 18 or over, regardless of race or tribal citizenship not otherwise disqualified under Court standards; eligible juror in non-VAWA 2013 prosecution is a tribal member who is at least 18 years old, “is of sound mind an discretion, has never been convicted of a felony, is not a member of the Tribal Council, or a judge, officer or employee of the court or an employee of the Reservation police or Reservation jail, and is not otherwise disqualified according to standards established by the Court.”).

have a jury drawn from a pool of potential jurors with some connection to the reservation. An Indian defendant who commits the same crime on a reservation subject to Public Law 280 who is tried in state court will have a jury drawn from a state county or judicial district, a larger geographic area than the reservation. Finally, an Indian defendant tried in federal court for the same crime committed in Indian country will have a jury drawn from a pool that can be as large as the entire federal district.

A comparison among the crimes and procedures applicable in Indian country within the state of Montana provides a good illustration. There are seven Indian reservations within the geographic borders of Montana;¹¹⁷ six are subject to Major Crimes Act jurisdiction (Blackfeet, Crow, Fort Belknap, Fort Peck, Rocky Boy's, Northern Cheyenne), and one (Flathead) is a Public Law 280 jurisdiction.¹¹⁸ Using Fort Peck, a non-Public Law 280 tribe, as an example, an Indian who commits an aggravated assault on the Fort Peck reservation is subject to both tribal court¹¹⁹ and federal court jurisdiction.¹²⁰ If the assault is prosecuted in tribal court and it does not qualify for special domestic violence criminal jurisdiction under VAWA 2013 (i.e. the assault is not a VAWA 2013 offense), the defendant's jury pool will consist only of tribal members (i.e. it will exclude non-Indians and non-member Indians).¹²¹ If the charge is brought under VAWA 2013, the defendant's tribal court jury pool will consist of a fair cross section of the reservation community from which no distinctive group in the community, including non-Indians, has been systematically excluded (i.e. the pool will not be limited to tribal members).¹²² If the same defendant is prosecuted in federal court for the same conduct under the Major Crimes Act, that defendant will be tried in the Great Falls Division of the U.S. District Court for

117. The Little Shell Tribe of Chippewa Indians is also located within the geographic borders of Montana. It is recognized by the state, but not the federal, government and it does not have a reservation.

118. See MONT. CODE ANN. § 2-1-301 (2015) ("The state of Montana hereby obligates and binds itself to assume, as herein provided, criminal jurisdiction over Indians and Indian territory of the Flathead Indian reservation and country within the state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd congress, 1st session)").

119. See 7 FORT PECK COMPREHENSIVE CODE OF JUSTICE § 230 (defining aggravated assault).

120. See Major Crimes Act, 18 U.S.C. §§ 1153, 113(a)(6) (identifying "assault resulting in serious bodily injury" as one form of felony assault subject to federal jurisdiction).

121. See 6 FORT PECK TRIBES COMPREHENSIVE CODE OF JUSTICE § 507(a)-(b)(1).

122. *Id.*

the District of Montana,¹²³ which draws its jury pool from a sixteen-county region.¹²⁴

*B. The shifting definition of “community” in concurrent jurisdiction
Indian country prosecutions*

The Supreme Court interprets the Sixth Amendment impartial jury guarantee to require that a defendant’s jury be drawn from a “fair” cross section of the “community” in which the crime is tried.¹²⁵ The Supreme Court says that “fair,” in this context, means “truly representative” of the community.¹²⁶ But it hasn’t mandated how to define the reference community against which the representativeness of the jury pool will be measured.

123. The District of Montana encompasses the entire state. 28 U.S.C. § 106 (Montana, exclusive of Yellowstone National Park, constitutes one judicial district). It is divided into five Divisions by county: Billings (Big Horn, Carbon, Carter, Custer, Dawson, Fallon, Garfield, Golden Valley, McCone, Musselshell, Park, Petroleum, Powder River, Prairie, Richland, Rosebud, Stillwater, Sweetgrass, Treasure, Wheatland, Wibaux, Yellowstone Counties); Butte (Beaverhead, Deer Lodge, Gallatin, Madison, Silver Bow Counties); Great Falls (Blaine, Cascade, Chouteau, Daniels, Fergus, Glacier, Hill, Judith Basin, Liberty, Phillips, Pondera, Roosevelt, Sheridan, Teton, Toole, Valley Counties), Helena (Broadwater, Jefferson, Lewis & Clark, Meagher, Powell Counties); Missoula (Flathead, Granite, Lake, Lincoln, Mineral, Missoula, Ravalli, Sanders Counties). U.S. Dist. Ct. Dist. of Mont., *Counties Served by District*, MTD.USCOURTS.GOV, <https://perma.cc/S34J-WMNF> (last visited Feb. 25, 2016); UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, JURY PLAN FOR THE U.S. DISTRICT COURT DISTRICT OF MONTANA, (Feb. 2013) [hereinafter DISTRICT PLAN].

124. Two of the Divisions in the District of Montana—Billings and Great Falls—encompass all the non-Public Law 280 Indian country in Montana (i.e. all of the Indian country subject to the Major Crimes Act). The Billings Division encompasses twenty-three counties; two of those counties, Rosebud and Big Horn, encompass Indian reservations (Crow and Northern Cheyenne Reservations). The Great Falls Division encompasses sixteen counties; ten of the counties in that sixteen county region encompass four of the seven Indian reservations located within Montana’s geographic boundaries, and each of those reservations straddles more than one county. The Blackfeet Reservation, home to the Blackfeet tribe, straddles Glacier and Pondera Counties; Fort Belknap Indian Reservation, home to the Gros Ventre and the Assiniboine tribes, straddles Blaine and Phillips Counties; Fort Peck Indian Reservation, home to Sioux and Assiniboine tribes, straddles Daniels, Roosevelt, Sheridan, and Valley Counties; and Rocky Boy’s Reservation, home to the Chippewa/Cree straddles Chouteau and Hill Counties. 28 U.S.C. § 106; DISTRICT PLAN, *supra* note 123; U.S. DIST. CT. DIST. OF MONT., *Counties Served by District*, MTD.USCOURTS.GOV, <https://perma.cc/S34J-WMNF> (last visited Feb. 25, 2016).

125. *Taylor*, 419 U.S. at 528 (“the selection of a petit jury from a representative cross-section of the community is an essential component of the Sixth Amendment right to a jury trial” applicable to the states through the Fourteenth Amendment). The fair cross section of the community requirement applied to federal courts under statutory and common law, and it was explicitly codified in the JSSA of 1948. *See Ballard*, 329 U.S. at 191 (anti-discrimination provisions of the Judicial Code “reflect a design to make the jury ‘a cross-section of the community’ and truly representative of it.”) (citing *Glasser*, 315 U.S. at 60). The fair cross section guarantee is concerned with the composition of the venire, not the petit (trial) jury that will hear the defendant’s case. Thus, there is no requirement that a defendant’s petit jury be representative of the community, only that the pool of names from which a court draws a petit jury (or, if applicable, a grand jury), and the process it uses produce a pool (or venire) that represents a fair cross-section of the community. *See Van Allen*, 208 F. Supp. at 334.

126. *See Ballard*, 329 U.S. at 191 (anti-discrimination provisions of the Judicial Code “reflect a design to make the jury ‘a cross-section of the community’ and truly representative of it.”) (citing *Glasser*, 315 U.S. at 60).

Rather, it has left the task of delineating the size and contours of the judicial units from which courts draw jury pools (and which, consequently, becomes the reference “community” for fair cross section purposes) to individual court jurisdictions. In this way, state, tribal, and federal jurisdictions drive the evaluation of what will be deemed a “fair” (i.e. truly representative) cross section of the “community.” The result in concurrent jurisdiction cases is a definition of “community” for jury selection purposes that will change depending on which sovereign prosecutes a defendant, even where the victim and the community harmed by the crime are the same.

In concurrent jurisdiction cases in Indian country, this means that the same crime committed by an Indian on reservation will be subject to a jurisdictionally-sensitive sliding scale of jury selection procedures depending whether that defendant is tried in tribal, state, or federal court because each of those courts uses a different “community” for jury selection purposes. For example, an Indian who commits an aggravated assault (an offense enumerated in Major Crimes Act) on a reservation subject to federal Major Crimes Act jurisdiction that is also a violation of tribal code can be tried in tribal court or federal court, but not state court; an Indian who commits the same offense on a reservation subject to Public Law 280 may be tried in state, and possibly in tribal court, but not federal court, for identical conduct. As set out in Appendix A, the jury pool for an Indian defendant tried in tribal court will be made up of potential jurors with some connection to the reservation on which the crime was committed. The jury pool in state court will be drawn from an area that includes the reservation and nearby state counties. And the jury pool in federal court for the same conduct will be drawn from an even larger geographic region that includes, but extends well beyond, the reservation on which the crime was committed. In all three instances, the conduct is the same, the harm to the victim is the same, and the community most directly impacted by the crime is the same. But the “community” from which the jury pool will be drawn (and against which cross section requirements and systematic exclusion prohibitions will be measured), will vary greatly both in size and in demographics.

This shifting definition of “community” for jury pool purposes will impact the demographics of an Indian defendant’s jury pool (and ultimately, the petite jury as well) because Indian reservations in the United States typically have a significantly higher concentration of Native American residents than that found in nearby counties that do not encompass Indian country.¹²⁷ Thus, an Indian defendant tried in tribal court is most likely to

127. The demographics of the non-Public Law 280 reservations and associated off-reservation trust land in Montana illustrate this: According to the 2010 Census, Native Americans constitute a significant majority of the residents on all the non-Public Law 280 reservations and associated off-reservation trust lands in Montana: Blackfoot Reservation/Trust Land had 10,405 residents, 8,944, of whom self-identi-

secure a jury that ethnically and culturally reflects the community in which the crime was committed and in which it is being prosecuted because, quite simply, the jury pool will be drawn from the reservation community in which the crime was committed and in which it is being prosecuted. In a state court prosecution, the jury pool will include potential jurors from nearby counties, which will have a lower concentration of Native American residents than the reservation community in which the crime was committed. This, of course, will have the natural effect of diluting the percentage of prospective Native American jurors in the state court jury pool. But not nearly to the same extent as the representation of prospective Native American jurors will be diluted in federal courts, which draw their jury pool from a district (which may encompass an entire state) or a division (which may encompass several counties and which are typically larger than state judicial units).¹²⁸

Using the example of the Indian who commits an aggravated assault on the Fort Peck Reservation illustrates this point. According to the 2010 census, 10,008 people live on the Fort Peck Indian reservation, 6,714 (roughly 67%) of whom identify as American Indian/Native Alaskan.¹²⁹ If

fied as American Indian/Alaskan Native; Rocky Boy's Reservation/Trust Land had 3,323 residents, 3,221 of whom self-identified as American Indian/Alaskan Native; Fort Belknap Reservation/Trust Land had 2,851 residents, 2,704 of whom self-identified as American Indian/Alaskan Native; Fort Peck Reservation/Trust Land had 10,008 residents, 6,714 of whom self-identified as American Indian/Alaskan; Crow Reservation/Trust Land had 6,863 residents, 5,322 of whom self-identified as American Indian/Alaskan; and Northern Cheyenne Reservation/Trust Land had 4,789 residents, 4,406 of whom self-identified as American Indian/Alaskan. U.S. Census Bureau, *U.S. Census 2010: Interactive Population Map*, CENSUS.GOV, <https://perma.cc/HLV9-2RD2> (click "Race" button, click "American Indian" button, enter name of reservation in "Enter a location" field, and click on shaded area of map) (last visited Feb. 18, 2016). In contrast, as set out in Appendix D, the highest concentration of Native American residents in a Montana county in the federal judicial divisions in the District of Montana that contain Indian country (Great Falls and Billings) that does *not* contain Indian country is 4.5% of the population (Toole County in the Great Falls Division).

128. Challenges to federal jury selection procedures brought by federal Indian defendants have been largely unsuccessful. *See* Castillo, *supra* note 57, at 312 ("Many of the fears about subjecting non-Indians to an unfamiliar judicial system with different norms and potential cultural and language barriers [under VAWA 2013] are equally applicable when Indians are tried in federal courts; yet Indians who have argued that they were deprived of a fair cross section of the community when faced with severely diluted jury pools in federal courts have not prevailed under the Duren test."); *but see* United States v Tranakos, 690 F. Supp. 971, 976–977 (D. Wyo. 1998) (Wyoming jury plan resulted in a failure to draw the grand jury from a "fair cross-section of the community," contrary to the requirements of 28 U.S.C. 1861 and Sixth Amendment because it resulted in exclusion of Shoshone and Arapaho, a "manifestly a cognizable group, with unique ideas, values, customs and culture.").

129. *See* U.S. CENSUS BUREAU, *supra* note 127. The demographics of the non-Public Law 280 reservations and associated off-reservation trust land in Montana illustrate this: According to the 2010 Census, Native Americans constitute a significant majority of the residents on all the non-Public Law 280 reservations and associated off-reservation trust lands in Montana: Blackfeet Reservation/Trust Land had 10,405 residents, 8,944, of whom self-identified as American Indian/Alaskan Native; Rocky Boy's Reservation/Trust Land had 3,323 residents, 3,221 of whom self-identified as American Indian/Alaskan Native; Fort Belknap Reservation/Trust Land had 2,851 residents, 2,704 of whom self-identified as

an Indian commits a non-VAWA 2013 assault on the Fort Peck reservation, his tribal court jury pool will be limited to tribal members; if he commits a VAWA 2013 assault, his jury pool may include non-tribal member Indians and non-Indians.¹³⁰ In either case, the majority of the defendant's jury pool will be American Indian/Alaskan Native and all the potential jurors (whether Indian, members of the tribe, or non-Indian) will have some connection to the reservation community, either due to tribal affiliation or residence on the reservation. This same Indian defendant's federal jury pool will include state registered voters (but not tribal registered voters) and state licensed drivers from the sprawling sixteen county region that makes up the Great Falls Division.¹³¹ Six of the sixteen counties in the Great Falls Division, including the most populated (Cascade County), do not encompass or border Indian country; and those six counties have Native American populations ranging from .2 to 4.5%¹³²—significantly lower than the concentration of American Indians/Alaska Natives on the Fort Peck Reservation.¹³³ This example demonstrates the significant dilution of Native American jury pool representation that can occur in concurrent jurisdiction Indian country prosecutions for the same crime as a function of the different jury selection “communities” tribal and federal courts use in jury selection.

If an Indian commits the same type of assault on the Flathead Reservation, a Public Law 280 jurisdiction, that defendant will be subject to prosecution in tribal court¹³⁴ or a state district court.¹³⁵ If the defendant is tried in

American Indian/Alaskan Native; Fort Peck Reservation/Trust Land had 10,008 residents, 6,714 of whom self-identified as American Indian/Alaskan; Crow Reservation/Trust Land had 6,863 residents, 5,322 of whom self-identified as American Indian/Alaskan; and Northern Cheyenne Reservation/Trust Land had 4,789 residents, 4,406 of whom self-identified as American Indian/Alaskan.

130. See 6 FORT PECK TRIBES COMPREHENSIVE CODE OF JUSTICE § 507(b)(1).

131. DISTRICT PLAN, *supra* note 123.

132. The six counties in the Great Falls Division that do not encompass or border Indian Country and the respective percentage of Indians residing in those counties are: Toole (4.5%), Cascade (4.3%); Teton (1.4%), Fergus (1.2%), Judith Basin (.8), and Liberty (.2%). See appendix C.

133. U.S. CENSUS BUREAU, *supra* note 127 (Fort Peck Reservation/Trust Land had 10,008 residents, 6,714 of whom self-identified as American Indian/Alaskan). Census figures, of course, represent the percentage of Native Americans in the overall population, not the percentage of eligible jurors. But the figures give a good indication of the very different demographics on and off reservation. It should be noted that courts do not agree whether the fair cross section requirement is measured by the demographics of the total population of the relevant jurisdiction, or only by reference to the jury-eligible population. See *Smith v. State*, 275 Ga. 715 (Ga. 2002) (whether Hispanics sufficiently represented for fair cross section purposes determined by reference Hispanic names on juror source list (2.6 percent), rather than Hispanic population of county (17.1 percent)); *United States v. Esquivel*, 88 F.3d 722 (9th Cir. 1996) (jury-eligible population is reference community for fair cross section analysis). *But see State v. Paz*, 798 P.2d 1 (Idaho 1990) (actual proportion of Hispanics in the community used for fair cross section analysis) (*overruled on other grounds*, *State v. Card*, 825 P.2d 1081 (Idaho 1991)).

134. See LAWS OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES § 2–1–504(1)(a) (2013) (defining aggravated assault as “knowingly or purposely causing serious bodily harm to another”).

135. Montana state felony criminal law and jurisdiction extend to the Flathead reservation and it is concurrent with tribal court jurisdiction over Indians committing crimes on the Flathead reservation. See

the Confederated Salish and Kootenai tribal court, his or her jury will be drawn from residents of the Flathead Reservation who are enrolled members of Tribes qualified to vote in tribal council elections.¹³⁶ If this defendant is prosecuted by the state, the trial will be held in the state district court in the county with jurisdiction over the part of the Flathead Reservation on which the crime was committed. In this particular example, four Montana counties are contiguous to the Flathead Reservation¹³⁷ and those counties lie in three different state judicial districts.¹³⁸ In each case, the defendant's jury will be drawn from the judicial district (which, in Montana, may encompass a single county or several counties).¹³⁹ This will, of course, result in a different and larger jury pool than the one that would be used in tribal court for the same offense.

This same dynamic, of course, is present in every concurrent jurisdiction prosecution. Any defendant whose conduct violates tribal, state and/or federal law is similarly subject to the different criminal procedural rules, including jury selection procedures that can have an identifiable impact on the composition of his or her jury. The problem unique to federal/tribal concurrent jurisdiction in Indian country prosecutions is that federal jurisdiction over the defendant is based on the fact that the defendant is an Indian, not on geography. Traditionally, particularly with respect to crimes of personal violence like those covered by the Major Crimes Act, criminal jurisdiction is tied to, and often limited by, the physical location of the crime—and thus, a defendant who commits an assault within a state will be subject to state criminal jurisdiction. Absent an identifiable federal interest (such as an assault against a federal officer), the state's jurisdiction is exclusive and federal jurisdiction is constitutionally impermissible. In contrast, an Indian defendant prosecuted in federal court under the Major Crimes Act

LAWS OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES § 2-1-105(4) (“Concurrent jurisdiction remains with the Tribal Court and in the Tribal Government (where applicable with Federal Courts) of all matters referred to in Subsection (3) [which includes felony criminal offenses]; and any matter initiated in either a State or Tribal Court shall be completed and disposed of in that Court, and shall not be subject to re-examination in the Courts of the other jurisdiction. (b) No person, once convicted of a crime falling within the jurisdiction of the State or the Tribes pursuant to this Ordinance, shall be punished for the identical act in the Courts of the other jurisdiction, but shall be accorded the benefit of the doctrine of former jeopardy as if the separate jurisdictions were one.”).

136. LAWS OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES § 1-2-601, 602.

137. Flathead, Sanders, Lake and Missoula Counties all border the Flathead Reservation.

138. Flathead County is the sole county in the Eleventh Judicial District, Sanders and Lake Counties are in the Twentieth Judicial District, and Missoula County is one of two counties in the Fourth Judicial District.

139. MONT. CODE ANN. § 3-15-404(6) (clerk of court shall prepare a list of persons to serve as trial jurors for the ensuing year for the district court or each division of the district court).

for a crime committed in Indian country is there only because he or she is an Indian.¹⁴⁰

In a federal system, different procedures, on their face, are to be expected and are not necessarily of concern where a sovereign is prosecuting a crime in which it has a superior or equal interest as another sovereign. And procedural disparity may not be of concern if the other sovereign's procedure is the functional equivalent of, or more protective than, the procedure that would apply in the concurrent jurisdiction sovereign's court.¹⁴¹ However, procedural disparity matters greatly if it can impact substantive outcomes.¹⁴² And it should be alarming where it is directly tied to race or political status of the defendant. In the United States, when it comes to criminal law, race matters. And when it comes to offenses prosecuted against Native Americans, race matters a lot. Native Americans represent 1.2% of the general population of the United States; they account for 2.0% of all federal offenders and 3.2% of all U.S. citizen offenders nationally.¹⁴³ As set out below, in the five federal judicial districts with the highest Indian country criminal caseloads, the percentage of Indian defendants is dispro-

140. *But see Antelope*, 430 U.S. at 646 (rejecting equal protection challenge to the Major Crimes Act notwithstanding disparity in treatment of federal Indian defendants because statute, like all federal regulation of Indian affairs, is not based upon an impermissible racial classification, but, rather, "is rooted in the unique status of Indians as 'a separate people' with their own political institutions"); *see also* *Morton v. Mancari*, 417 U.S. 535, 554 n.24 (1974) (federal hiring preference not racial discrimination because Indian statute is "political rather than racial in nature."); *Lee v. Walters*, 433 F.3d 672, 677 (9th Cir. 2005); *Zepeda*, 792 F.3d at 1110 (element of Major Crimes Act offense is proof that defendant has "Indian blood," whether or not that blood tie is to a federally recognized tribe). *Zepeda* filed a Petition for Certiorari on November 19, 2015, presenting the following question: "Whether, as construed by the Ninth Circuit, Section 1153 impermissibly discriminates on the basis of race." Petition for a Writ of Certiorari at i, *Zepeda v. United States*, <https://perma.cc/K2PG-VK6Q> (U.S. Nov. 19, 2015) (No. 15–675).

141. *But see Antelope*, 430 U.S. at 646–670 (Indian defendant in Major Crimes Act prosecution did not have viable equal protection argument even though trial in federal, rather than state, court subjected him to federal felony-murder doctrine, which would not have been available to prosecutors in state court).

142. As argued in an earlier article, when the federal government is prosecuting a crime over which another sovereign has concurrent jurisdiction, procedural disparity that has substantive impact is incompatible with a federalist system that ostensibly recognizes the superior interests of state and local governments in the prosecution and punishment of crimes with primarily local impacts and in the procedural protection available to criminal defendants who commit crimes in their jurisdictions. Procedural disparity, further, is indefensible where there is no legitimate constitutional or policy basis an individual defendant's procedural rights should fluctuate depending on which sovereign in a concurrent jurisdiction prosecution happens to prosecute the defendant. *See* Jordan Gross, *The Upside Down Mississippi Problem: Addressing Procedural Disparity Between Federal And State Criminal Defendants In Concurrent Jurisdiction Prosecutions*, 38 *HAMLIN L. REV.* 1 (2015).

143. 2014 estimate based on 2010 Census data. U.S. Census Bureau, *QuickFacts: United States*, [CENUS.GOV, https://perma.cc/M8KR-DM2Z](https://perma.cc/M8KR-DM2Z) (last visited Feb. 19, 2016); In 2013, 80,035 cases were reported to the United States Sentencing Commission, of which 1,419 involved Indian defendants. U.S. Sentencing Comm'n, *Quick Facts: Native Americans in the Federal Offender Population*, [ussc.gov, https://perma.cc/D7KU-FK5Y](https://perma.cc/D7KU-FK5Y) (last visited Feb. 19, 2016).

portionately high relative to the percentage of Indians in the general population of the state.

Judicial District	Native American offenders as percentage of criminal caseload ¹⁴⁴	Native Americans as percentage of state population ¹⁴⁵
South Dakota	57.5	8.9
Montana	33.4	6.6
North Dakota	25.0	5.4
Minnesota	14.4	1.3
E. Dist. Oklahoma	13.4	9.0

If race matters generally in the American criminal justice system, it matters acutely in the selection of criminal juries.¹⁴⁶ Our experience, both distant and near, has shown that the racial composition of criminal juries can impact both the outcome and the perceptions of criminal proceedings; who sits on a jury can affect verdicts and whether they are perceived as just.¹⁴⁷ Indeed, the United States' history of racial injustice in criminal proceedings was the driving force in the development of the law and jurisprudence of jury selection. The Constitution guarantees criminal defendants an "impartial jury" of the "State and district wherein the crime shall have been committed." But that's all. The Sixth Amendment says nothing about what impartiality means or how it is to be measured, nor do the constitutional fair cross section requirement and systematic exclusion prohibition appear anywhere in the Constitution. These are judicially-created doctrines aimed at ensuring a constitutionally "impartial jury" in a criminal system permeated

144. U.S. SENTENCING COMM'N, *supra* note 143.

145. These figures represent the Census Bureau's 2014 population estimates based on the 2010 Census. See U.S. Census Bureau, *QuickFacts: South Dakota*, CENSUS.GOV, <https://perma.cc/5EZ9-738G> (enter state name into location field, click on desired state, and scroll down to row titled "American Indian and Alaska Native alone, percent, July 1 2014") (last visited Feb. 19, 2016).

146. See David Margolick, *Idea of Jury of Peers Is Questioned: Must a Jury Reflect the Population?* N.Y. TIMES, (February 17, 1992), <https://perma.cc/39UD-B3SE>; Deborah Ramirez, *Affirmative Jury Selection: A Proposal to Advance Both the Deliberative Ideal and Jury Diversity*, 1998 U. CHI. LEGAL F. 161, 165–166 ("empirical evidence shows in some close cases, where small differences in perspective matter, the racial composition of the jury affects substantive outcomes and verdicts[.]").

147. Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 747 (2006) ("A community denied its proper role in the criminal justice system may feel aggrieved and may seek justice by other means. Consider, for example, the trial against white police officers accused of beating African American Rodney King, which was moved out of Los Angeles to Simi Valley, a predominantly white suburb. When the Simi Valley jury returned not guilty verdicts on the most serious charges, members of the black community in Los Angeles perceived a miscarriage of justice. The ensuing riot was the most destructive in the United States in the twentieth century, culminating in fifty-two deaths, thousands of injuries, and nearly a billion dollars of property damage.") (footnotes omitted).

by racial prejudice and disgraced by a long history of race-driven jury selection procedures.

Congress recognized that race matters, both to outcome and perception, when it incorporated federal constitutional impartial jury standards into VAWA 2103. As noted, under VAWA 2013, tribal courts may not exclude non-Indians in the reservation community from tribal juries in those cases. Although VAWA 2013's fair cross section guarantee and systematic exclusion prohibition, by their terms, could apply to both Indian and non-Indian defendants, they were clearly aimed at ensuring that non-Indians would bring their federal constitutional rights with them to tribal court in VAWA 2013 prosecutions. This provision was animated by concerns that non-Indians would not be treated fairly by tribal court juries, and an apparent (and highly questionable) assumption that tribal court outcomes are only reliable if their procedures mimic those required in federal court.¹⁴⁸ By requiring tribal courts to incorporate federal jury selection rights and policies into their jury selection procedures in order to exercise jurisdiction over non-Indians, Congress granted non-Indian tribal court defendants portable and enforceable jury procedure selection rights to have their non-Indian peers represented in their tribal court jury pools. There is no reason why federal courts cannot make similar efforts in concurrent jurisdiction Indian country prosecutions to provide Indian defendants with jury pools in which their reservation peers are adequately represented.

Concurrent jurisdiction Indian country prosecutions are unique—they involve crimes of primarily local interest to reservation communities that are in federal court not because the federal government has an equal or superior interest in the case, but because in 1885 Congress passed a statute relegating tribal justice systems to the sidelines in addressing serious crimes of personal violence committed by Indians on reservations. Presumably, Congress did this because it did not perceive tribal court systems as either effective or competent to address these types of crimes in their communities. One significant consequence of this policy is that federal Indian defendants today face juries in federal court that look nothing like the tribal juries that would otherwise judge these crimes. The argument presented here is based on that unique dynamic, and it is grounded in the status of tribal governments as separate and equal sovereigns in our federal system. In concurrent jurisdiction Indian country prosecutions, the federal government has stepped into the shoes of tribal government and (unilaterally) as-

148. See Castillo, *supra* note 57, at 319 (“Most criticism of the VAWA’s jurisdictional provision, and tribal court jurisdiction over non-Indians in general, has centered over whether tribal court juries can be impartial. In reaction to the VAWA’s tribal court provision, Senator Chuck Grassley stated, ‘[y]ou’ve got to have a jury that is reflective of society as a whole, and on an Indian reservation, it’s going to be made up of Indians, right? So the non-Indian doesn’t get a fair trial.’”) (footnotes omitted).

sumed the role of prosecuting tribal citizens who would, if not for the federal government's usurpation of tribal jurisdiction, be subject to the exclusive jurisdiction of tribal courts. Short of repealing the Major Crimes Act and similar statutes, procedures in federal court that occasion an identifiable disadvantage to the citizens of a tribal nation who would otherwise be subject to the exclusive jurisdiction of that sovereign should be revised to put those tribal citizens on par with their tribal court counterparts to the extent possible.

IV. TAILORING JURY PLANS IN FEDERAL DISTRICTS WITH INDIAN COUNTRY CRIMINAL JURISDICTION TO THE POLICIES AND HISTORY OF THE JSSA

This article forwards two proposals aimed at lessening the dilution of Native American representation on federal jury pools in districts with Indian country jurisdiction. One, create federal court divisions organized around Indian reservations that are small enough to produce jury pools with a concentration of Native Americans closer to that found on reservations within a given federal district, yet large enough to yield predictably viable and administratively-coherent federal jury pools. Two, expand the sources of potential jury names those districts use to include tribal voting records. These proposed changes are currently authorized by the JSSA and can, therefore, be effected on the local federal judicial level through revisions to individual district court jury plans. This proposal is illustrated below using Montana as an example to demonstrate the feasibility of creating federal judicial divisions at the local district court level to achieve more robust Native American representation in federal Indian country jury pools.¹⁴⁹

149. Although this article proposing a voluntary, local approach on the District Court level, a viable argument exists that failing to address fair cross section disparity in Major Crimes Act prosecutions is required either by the JSSA or the Constitution. In *United States v. Ortiz*, for example, the defendant brought an equal protection/fair cross section challenge based on the under-representation of Native Americans on his petit jury. 125 F.3d 863 (table), 1997 WL 608733 (10th Cir. 1997). His jury was drawn from a federal district with a significantly lower representation of Native Americans (0.71%) than the county in which he resided and in which the crime was committed (18.48%). *Id.* at *2. The Tenth Circuit rejected his challenge, but clearly left the door open for future arguments on this ground, noting: "With these statistics, Ortiz raises some troubling questions about the implementation of the Jury Selection and Service Act in Wyoming, which would merit careful consideration if properly raised. However, as discussed hereinafter, Ortiz's failure to properly and timely raise the issue prevents our consideration of the issue on direct review." *Id.* at *n.4. To the extent local jury selection procedures in federal districts with Indian country criminal jurisdiction dilute Native American Indian representation in Major Crimes Act jury pools, Congress should amend the JSSA to require a uniform approach to jury selection plans in federal districts with Indian country criminal jurisdiction to address this issue. This is especially true since Congress has specifically granted non-Indians a statutory right to racial peer representation in tribal court VAWA 2013 jury pools.

A. *Condensing judicial divisions*

Federal district courts can be divided into divisions by statute or under a court's jury plan. In districts that are not divided by statute, divisions are based on state political units, such as counties or parishes, within the district.¹⁵⁰ Under the JSSA, each state political subdivision within a district must be included in a division.¹⁵¹ The JSSA, enacted many years after the Major Crimes Act, makes no mention of Indian reservations as distinct political units. The JSSA does not limit the numbers, size or configurations of divisions the district court can create.¹⁵² This leaves district courts with a great deal of latitude in deciding how to configure divisions, as long as they advance the federal jury selection policies identified in the JSSA that federal juries be selected at random from a fair cross section of the community in the district or division where the court convenes, and that all eligible citizens have the opportunity to be considered for federal jury service.¹⁵³ Other than the requirements that each state political subdivision be included in a division and that district court jury plans promote the policies set out in the JSSA, federal district courts have tremendous flexibility to create judicial divisions to forward federal constitutional, statutory, and/or administrative interests.¹⁵⁴

An obvious and compelling solution for addressing the dilution of Native American representation in federal Indian country jury pools would be to create federal divisions for individual reservations.¹⁵⁵ This is most consistent with the federal government's delineation of tribal geographic jurisdiction and sovereignty. The boundaries are already drawn, and the crime is one over which a tribal court would have exclusive jurisdiction if not for federal law.¹⁵⁶ This approach also acknowledges the superior, if not exclu-

150. 28 U.S.C. § 1869(e) ("division" shall mean: (1) one or more statutory divisions of a judicial district; or (2) in statutory divisions that contain more than one place of holding court, or in judicial districts where there are no statutory divisions, such counties, parishes, or similar political subdivisions surrounding the places where court is held as the district court plan shall determine: Provided, That each county, parish, or similar political subdivision shall be included in some such division.").

151. *Id.*

152. *See* United States v. Gluzman, 154 F.3d 49, 50–51 (2d Cir. 1998) (rejecting argument that § 1869(e), which requires federal jury pools be drawn from "counties . . . surrounding the places where court is held as the district court plan shall determine" must be read literally to require that jurors be drawn only from counties geographically adjacent to the place where the court is held).

153. 28 U.S.C. § 1861.

154. United States v. Gottfried, 165 F.2d 360, 364 (2d Cir. 1948) ("[T]he district and circuit courts have had power since the first Judiciary Act of 1789 to divide a district territorially in the interest of an impartial trial, of economy, and of lessening the burden of attendance.").

155. Rogers, *supra* note 4.

156. *Id.* ("Legislation, and in some cases legislative ratification, establishes the reservation and designates federally recognized tribes. Therefore, it is legislation that creates the boundaries of tribal sovereignty, geographically as well as racial-politically. Likewise, Congress drafted the MCA to establish federal jurisdiction dependent on Indian Country and membership in a federally recognized tribe.

sive, interest a tribal community has in prosecuting crimes committed on its reservation because it would limit jury service to potential jurors with a connection to the reservation.

This approach, however, may not be viable in some federal judicial districts because it may not yield a jury pool sufficiently large to seat a federal jury. Tribal courts are only required to provide a defendant with a trial jury of six. But federal defendants are entitled to a jury of twelve. If a crime is committed on a reservation with a small population, it may be difficult to assemble a jury pool large enough to reliably and consistently seat a twelve-person jury, following application of federal jury eligibility requirements (such as age, citizenship, and English proficiency) and exclusions (such as felony convictions), and allowing for dismissal based on cause, hardship, and preemptory challenges. In Montana, for example, the total number of registered voters in precincts associated with the Rocky Boy's Reservation is approximately 1013. Not all of those voters will be eligible for jury service and this number might prove too small to maintain a viable federal jury pool.¹⁵⁷ Furthermore, in a jurisdiction like Montana, with six reservations subject to federal criminal jurisdiction, creating judicial divisions for each reservation (in addition to the existing divisions in the district) might prove administratively cumbersome.

A more practical (and, therefore, perhaps more palatable), option for securing federal jury pools large enough, yet sufficiently connected to Indian country, to promote the goals of the JSSA is to use existing state political units, like judicial districts or counties, as the boundaries for federal judicial divisions in districts with Indian country jurisdiction. This is the approach the District of Wyoming took in 2009 when it amended its Jury Plan to create a judicial division encompassing the sole Indian reservation in the District of Wyoming.¹⁵⁸ The new division—the Fremont Division—is based on the political boundaries of the state county of the same name. That state county completely encompasses the Wind River Indian Reservation—the sole Indian reservation within Wyoming.¹⁵⁹

Constraining the criminal adjudication processes of jury selection and trial venue to the boundaries set by the MCA is consistent with the federal government's custom of setting tribal boundaries, and would be preferable because of the unique geographic and racial-political elements of the MCA.”).

157. See appendix B, listing Reservation voting precincts in Montana. Although some Montana voting precincts are identified as reservation precincts, not all of these precincts are located entirely in on-reservation. Nor are the voters in reservation precincts all Indian. Thus, the Reservation voter registration figures in Appendix B are only a rough approximation (and may overstate) the number of registered voters on each reservation within Montana's borders.

158. See AMENDED DISTRICT PLAN FOR RANDOM SELECTION OF GRAND AND PETIT JURORS, 1–2 (D. Wyo. July 30, 2009) [hereinafter WYO. DIST. PLAN], available at <https://perma.cc/8T7E-SFSQ>.

159. Wyoming's Jury Plan does not distinguish between Major Crimes Act prosecutions and other prosecutions, or between civil and criminal cases – it simply creates a new division defined by the

A one-county approach like that adopted by the District of Wyoming is not workable in districts like Montana, with Indian reservations subject to federal jurisdiction that straddle more than one county.¹⁶⁰ However, there is a simple way to tailor Wyoming's innovation to federal districts like Montana to create jury pools with higher concentrations of potential Native American jurors. This can be accomplished by defining new, smaller, federal divisions based on existing state judicial district boundaries and combining multiple state judicial districts into federal divisions organized around individual reservations. An approach based on existing state judicial districts is workable—state judicial districts are already proven to be large enough to seat twelve-person criminal juries in the types of cases prosecuted under the Major Crimes Act. Further, it is efficient and economical—state courts already compile jury pool information by judicial district, and that information can be easily shared with the federal courts. This proposal is illustrated below using Montana as an example.

Federal judicial divisions and state judicial districts in Montana are both defined by county boundaries. In Montana, the federal divisions that contain Indian country subject to federal criminal jurisdiction (Great Falls and Billings) currently track state judicial district boundaries, with the exception of two counties noted below. It would be fairly simple to divide these two existing divisions into smaller units organized around the Indian reservations located therein using existing state judicial district and/or county boundaries. The maps at Appendix C illustrate this proposal by

political boundaries of Fremont County and encompassing the Wind River Indian Reservation for all jury selection purposes. *Id.*

160. See *supra* notes 123–124. The District of Montana encompasses the entire state. 28 U.S.C. § 106. Montana (Montana, exclusive of Yellowstone National Park, constitutes one judicial district). It is divided into five Divisions by county: Billings (Big Horn, Carbon, Carter, Custer, Dawson, Fallon, Garfield, Golden Valley, McCone, Musselshell, Park, Petroleum, Powder River, Prairie, Richland, Rosebud, Stillwater, Sweetgrass, Treasure, Wheatland, Wibaux, Yellowstone Counties); Butte (Beaverhead, Deer Lodge, Gallatin, Madison, Silver Bow Counties); Great Falls (Blaine, Cascade, Chouteau, Daniels, Fergus, Glacier, Hill, Judith Basin, Liberty, Phillips, Pondera, Roosevelt, Sheridan, Teton, Toole, Valley Counties); Helena (Broadwater, Jefferson, Lewis & Clark, Meagher, Powell Counties); Missoula (Flathead, Granite, Lake, Lincoln, Mineral, Missoula, Ravalli, Sanders Counties). See *Jury Plan for the U.S. District Court District of Montana*, MTD.USCOURTS.GOV (Feb. 2013), <https://perma.cc/FJP6-WTFE> (last visited Feb. 18, 2016). Two of the Divisions in the District of Montana – Billings and Great Falls – encompass all the non-Public Law 280 Indian country in Montana (i.e. all of the Indian country subject to the Major Crimes Act). The Billings Division encompasses twenty-three counties; two of those counties, Rosebud and Big Horn, encompass Indian reservations (Crow and Northern Cheyenne Reservations). The Great Falls Division encompasses sixteen counties; ten of the counties in that sixteen county region encompass four of the seven Indian reservations located within Montana's geographic boundaries, and each of those reservations straddles more than one county. The Blackfeet Reservation, home to the Blackfeet tribe, straddles Glacier and Pondera Counties; Fort Belknap Indian Reservation, home to the Gros Ventre and the Assiniboine tribes, straddles Blaine and Phillips Counties; Fort Peck Indian Reservation, home to Sioux and Assiniboine tribes, straddles Daniels, Roosevelt, Sheridan, and Valley Counties; and Rocky Boy's Reservation, home to the Chippewa/Cree straddles Chouteau and Hill Counties.

showing (1) the existing overlap among federal judicial divisions and state judicial districts in Montana, and (2) the proposed new smaller divisions organized around the Indian reservations in the current Great Falls and Billings Divisions.

As shown, this proposal would compress the current Great Falls and Billings Divisions and add three new divisions to the District of Montana, which is currently divided into five. These three new proposed divisions are organized around the reservations within the Great Falls and Billings Divisions. A table listing the counties in the proposed new divisions and the total number of registered voters in each is at Appendix D. As shown, the resulting divisions contain a significantly higher concentration of Native Americans relative to the general population than is presently the case in the Great Falls and Billings Divisions. These re-drawn units, however, still contain a large enough population from which to reliably draw federal criminal juries.¹⁶¹

B. Expanding sources of potential juror names

The JSSA permits, but does not require, federal judicial districts to rely solely on either actual voter lists or registered voter lists to compile jury pools. It defines “voter registration lists” as

the official records maintained by State or local election officials of persons registered to vote in either the most recent State or the most recent Federal general election, or, in the case of a State or political subdivision thereof that does not require registration as a prerequisite to voting, other official lists of persons qualified to vote in such election.¹⁶²

In the case of Guam and the Virgin Islands, jurisdictions whose citizens are not able to vote in Federal elections, the JSSA defines the term as “the official records maintained by territorial election officials of persons registered to vote in the most recent territorial general election.”¹⁶³

The JSSA requires districts to use other sources of names in lieu of, or in addition to, voter lists to forward the policies of, and protect the rights granted by, the JSSA—i.e. the right of litigants to have “grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes” and to prohibit discrimination and exclusion from jury service “on account of race, color, religion,

161. The smallest of the proposed new divisions (consisting of the sparsely-populated state judicial districts 15 & 17) contains 19,263 registered voters. The table at Appendix D only shows the number of registered voters in each county. As noted, the District of Montana also uses state motor vehicle lists to compile its jury pools. The actual number of eligible jurors in each proposed division, therefore, would be larger than the number of registered voters in Montana federal court.

162. 28 U.S.C. § 1869(c).

163. *Id.*

sex, national origin, or economic status.”¹⁶⁴ The JSSA contains a non-exclusive list of jurisdictions for which Congress has determined that reliance on voter lists is inadequate to forward the goals and protect the rights set out in the JSSA. The JSSA provides, for example, that the jury selection plan for the District of Columbia may require prospective juror names to be selected from the city directory, rather than from voter lists.¹⁶⁵ It further provides that the plans for the districts of Puerto Rico and the former Canal Zone of Panama “may prescribe some other source or sources of names of prospective jurors in lieu of voter lists[.]”¹⁶⁶ Thus, the JSSA not only anticipates the use of sources other than voter lists for jury selection, it requires the use of other sources when necessary to forward the goals of the Act. The JSSA’s definition of “voter registration lists” does not mention or refer to Indian country elections and/or tribal voting lists. But, by its terms, it does not exclude those as sources for jury pool names.¹⁶⁷

In addition to re-defining federal divisions to increase the representation of Native Americans in federal Indian country jury pools, federal judicial districts with Indian country jurisdiction can expand the sources from which they draw the names of potential jurors. As other commentators have

164. *Id.* § 1863(b) (“Among other things [District jury plans] shall: specify whether the names of prospective jurors shall be selected from the voter registration lists or the lists of actual voters of the political subdivisions within the district or division. The plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this title.”); *see also Id.* § 1861 (“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. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.”); *Id.* § 1862 (“No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States or in the Court of International Trade on account of race, color, religion, sex, national origin, or economic status.”).

165. *Id.* § 1863(b)(2) (“The plan for the District of Columbia may require the names of prospective jurors to be selected from the city directory rather than from voter lists. The plans for the districts of Puerto Rico and the Canal Zone may prescribe some other source or sources of names of prospective jurors in lieu of voter lists, the use of which shall be consistent with the policies declared and rights secured by sections 1861 and 1862 of this title. The plan for the district of Massachusetts may require the names of prospective jurors to be selected from the resident list provided for in chapter 234A, Massachusetts General Laws, or comparable authority, rather than from voter lists.”).

166. *Id.* § 1863(b)(2).

167. Under Ninth Circuit law, Districts are not required to supplement state voter registration lists unless a defendant can show a “substantial underrepresentation of a cognizable group in the community.” *See United States v. Luong*, 255 F. Supp. 2d 1123, 1130 (E.D. Cal. 2003) (“While the JSSA does require the supplementation of voter lists when ‘necessary’ to further the goals of the JSSA, the Ninth Circuit has found that ‘[the Act] and its legislative history clearly contemplate that the use of sources other than voter lists will be the exception rather than the rule.’”) (citing *United States v. Ross*, 468 F.2d 1213, 1216 (9th Cir. 1972); *see also United States v. Brady*, 579 F.2d 1121, 1131 (9th Cir. 1978) (“The legislative history indicates that use of supplemental sources should be used only when the voter lists deviate substantially from the makeup of the local community.”)).

observed, limiting the sources for potential juror names to state sources such as voter and driver registration lists likely decreases representation of Native Americans because these otherwise eligible jurors may participate in tribal, but not state or federal, elections.¹⁶⁸ As a matter of federalism and in recognition of tribal sovereignty, federal district courts with Indian country jurisdiction should place tribal government records on equal footing with those of the state. If a federal district court relies on state voter registration records to compile jury pool lists, it should also include tribal voter registration records.¹⁶⁹

V. CONCLUSION

Federal district courts with Indian country criminal jurisdiction have authority to implement jury plans to address the dilution of Native American representation in federal Indian country jury pools consistent with the policies of the JSSA. The JSSA is animated and informed by a long history of jury selection jurisprudence aimed at eradicating jury selection procedures that exclude potential jurors of the defendant's race from his jury. A federal Indian country prosecution, by definition, involves an Indian defendant charged with a crime committed on an Indian reservation, a community with high concentration of Native Americans. Consistent with the policies of the JSSA, district courts with Indian country criminal jurisdiction can, and should, develop jury selection procedures that increase the representation of Native American in their jury pools to so that Indian country criminal juries look a little more like those a tribal court would assemble if it were to try that same defendant.

168. Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 748 ("Even aside from poverty, Indians may well have lower representation in the potential pool than their small absolute numbers might forecast. Indians are, for example, likely to be far more invested in their tribal governments than state governments. Since juries are routinely selected from voter registration lists of state political subdivisions, even relatively politically active and aware tribal members may nevertheless not be represented if they focus their activism solely within the tribal government."). The Ninth Circuit has dismissed the importance of this factor in evaluating whether the JSSA or constitutional fair cross section requirements have been violated. *Brady*, 579 F.2d at 1134 ("It is of no importance that Indians may have a tendency not to register to vote in non-Indian elections. The legislative history of the Act specifies that, '(n)o economic or social characteristics prevent one who wants to be considered for jury service from having his name placed in the pool from which jurors are selected.'") (citing 968 U.S. Code Cong. & Admin. News, p. 1795)).

169. Other sources of potential juror names that would increase representation of Indians in federal jury pools include tribal membership lists and federal Indian county records. Rogers, *supra* note 4, at 737 ("Instead of basing jury selection only on voter registration, the process should employ alternative means of compiling names. The lists may be based on federal income tax filings, tribal member registration, public record of title holders in Indian Country, a BIA list of those members of a federally recognized tribe receiving federal assistance or by including tribal voter registration rolls. Any of those methods could be used in combination with one another to ensure a vicinage that better includes tribal members and non-Indians living in Indian Country.").

APPENDIX A
 JURISDICTION AND JURY PROCEDURE IN INDIAN COUNTRY

Court	Tribal	Tribal	Federal	Federal	Federal	State (non-PL 280 jurisdiction)	State (PL 280 jurisdiction)
Offense	Non-VAWA 2013	VAWA 2013	Major Crimes Act	General Crimes Act	Federal law of national applicability	State	State
Jurisdiction	Indian Perpetrator + Indian Victim or Non-Indian Victim	Indian Perpetrator or Non-Indian Perpetrator with ties to community + Indian Victim	Indian + Indian Victim or Non-Indian Victim	Indian Perpetrator + Non-Indian Victim Non-Indian Perpetrator + Indian Victim	Exclusive jurisdiction	Non-Indian Perpetrator + Non-Indian victim Non-Indian Perpetrator + "Victimless" offense	Exclusive or concurrent jurisdiction with tribal & federal government depending on PL 280 status
Jury pool	No impartial jury, fair cross section requirements or systematic exclusion prohibitions unless provided under tribal law	Reflect fair cross section of community No systematic exclusion of "any distinctive group in community including non-Indian"	Reflect fair cross section of district or division where court convenes No systematic exclusion of recognizable, distinct class	Same as column to left	Same as column to left	Reflect fair cross section of community No systematic exclusion of recognizable, distinct class Constitutional and/or statutory requirements under state law	Same as column to left
Reference community for jury pool	Varies by jurisdiction – reservation boundaries, tribal membership, or connection to tribe	Same as column to left	Federal District or Division	Same as column to left	Same as column to left	Varies by jurisdiction – states county or judicial district	Same as column to left

APPENDIX B

MONTANA INDIAN COUNTRY VOTING PRECINCTS¹⁷⁰

County	Reservation	Reservation Precincts (Note: not all precincts wholly on reservation; not all reservation precincts wholly populated by Native American Indians)	Registration 11/13/2015
Big Horn	Crow	1*	238
		2*	210
		5	356
		7	1463
		8	234
		9	381
		14	257
		15	493
		21	619
		25	189
	N. Cheyenne	26	683
Blaine	Ft Belknap	3	533
		9	230
		15	717
Chouteau	Rocky Boy	5	311
Daniels	Ft Peck	2*	147
		3*	338
Flathead	Flathead	24*+	863
Glacier	Blackfeet	5*	614
		7	46
		8	543
		9	1630
		10	399
		11	162
		12	309
		13	310
		15	290
		19	241
		21C	358
Hill	Rocky Boy	8	703
		28*	864
Lake	Flathead	ARL 1	946
		DAY 1*	627
		POL 1	1025

170. Figures provided to the author on November 17, 2015 by the Office of Montana Secretary of State. The original spreadsheet with data provided by county election administrators is on file with the author and available by request from the Office of Montana Secretary of State.

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County	Reservation	Reservation Precincts (Note: not all precincts wholly on reservation; not all reservation precincts wholly populated by Native American Indians)	Registration 11/13/2015
		POL 2	1136
		POL 3	589
		POL 4	1446
		POL 5	1828
		POL 6	307
		POL 7	615
		POL 8	32
		RON 1	2383
		RON 2	1936
		ST I 1	829
		ST I 2	880
Phillips	Ft Belknap	2-S*	73
		5*	86
Pondera	Blackfeet	20	394
		35*	497
Roosevelt	Ft Peck	10*	223
		15	303
		16	358
		17	139
		18	1059
		22	229
		24	624
		26	686
		27	562
		28	145
Rosebud	N Cheyenne	15	880
		17*	378
Sanders	Flathead	8*	849
		9*	224
Sheridan	Ft Peck	2*	440
		5*	255
Valley	Ft Peck	2	268
		5*	1208
		6*	242
		8*	218
		7**	106
Yellowstone	Crow	42.2*	284

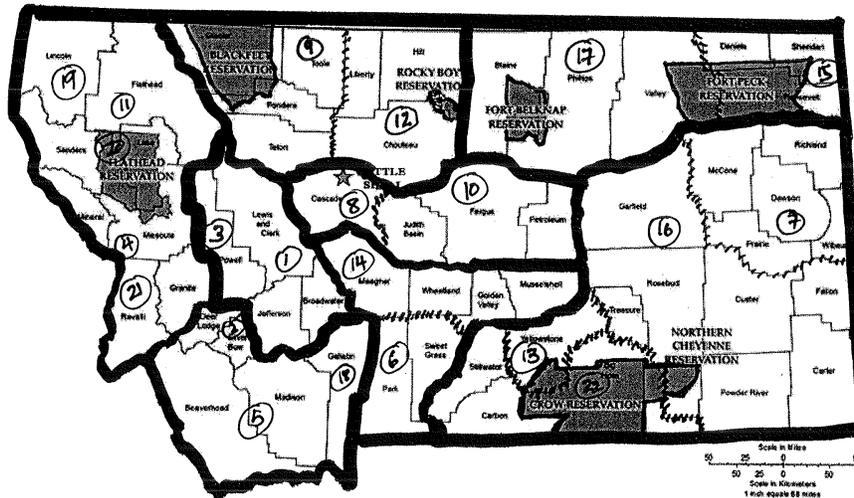
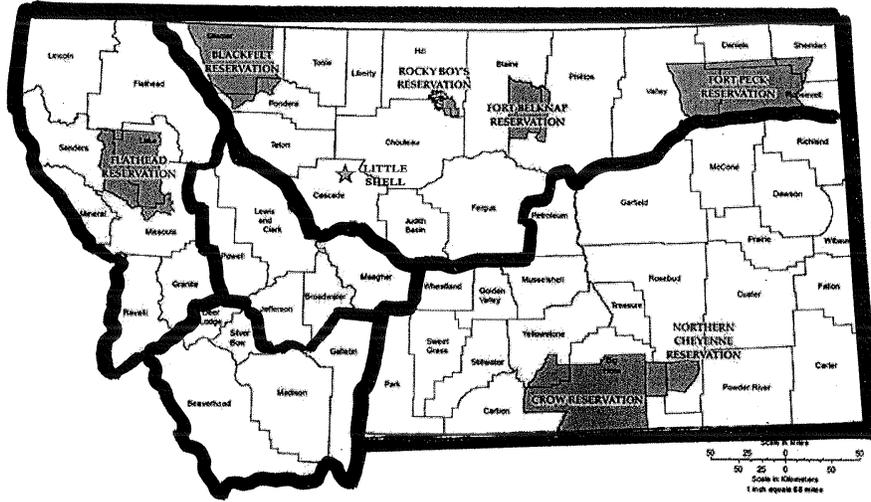
*+Flathead Co: 6 registered voters in the reservation portion of Precinct 24.

*includes reservation and non-reservation

**located on the reservation, but not populated by Native American Indians (Lustre)

APPENDIX C

DISTRICT OF MONTANA – EXISTING & PROPOSED DIVISIONS



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APPENDIX D

MONTANA – PROPOSED INDIAN COUNTRY DIVISIONS

MONTANA PROPOSED FEDERAL DIVISIONS BASED STATE JUDICIAL DISTRICT <i>Counties that do not encompass Indian Country in italics</i>	REGISTERED VOTERS ¹⁷¹	AMERICAN INDIAN/NATIVE ALASKAN PER- CENTAGE OF GENERAL POP- ULATION ¹⁷²
Proposed Re-Drawn Great Falls Division State Judicial Districts 8 & 10		
District 8		
• <i>Cascade</i>	49,043	4.3
District 10		
• <i>Fergus</i>	7,264	1.2
• <i>Judith Basin</i>	13,687	.8
• <i>Petroleum</i> ¹⁷³	395	0
TOTAL Registered voters	70,389	
Proposed Blackfoot/Rocky Boy's Division State Judicial Districts 9 & 12		
District 9		
• <i>Glacier</i>	6,553	65.6
• <i>Pondera</i>	3,328	14.5
• <i>Teton</i>	3,809	1.4
• <i>Toole</i>	2,453	4.5
District 12		
• <i>Chouteau</i>	3,263	21.8
• <i>Hill</i>	8,848	21.7
• <i>Liberty</i>	1,124	.2
TOTAL Registered voters	29,378	
Proposed Fort Belknap/Fort Peck Division State Judicial Districts 15 & 17		
District 15		
• <i>Daniels</i>	1,124	2.1
• <i>Roosevelt</i>	5,258	60.4
• <i>Sheridan</i>	2,225	1.7

171. See MONT. SEC'Y OF STATE, *Montana Registered Voters by County*, http://sos.mt.gov/elections/Voter_Turnout/index.asp (click "Voter Registration by County" button on left side of screen to download spreadsheet) (last visited Dec. 11, 2015).

172. U.S. Census Bureau, *QuickFacts: United States*, CENSUS.GOV, <https://perma.cc/NRV4-JWDZ> (type name of county into location field and click desired county in drop down menu, look for "American Indian and Alaska Native alone, percent, April 1, 2010") (last visited Feb. 20, 2016).

173. Petroleum County is currently included in the Billings Division. Under the proposal to re-draw the Billings and Great Falls Divisions to track state judicial districts, Petroleum County is included in a new district with the other counties in District 10 that are currently in the Great Falls Division.

<i>District 17</i>		
• <i>Blaine</i>	3,627	49.4
• <i>Phillips</i>	2,562	8.3
• <i>Valley</i>	4,467	9.8
TOTAL Registered voters	19,263	
Proposed Re-Drawn Billings Division State Judicial Districts 6 & 14		
District 6		
• <i>Park</i>	11,299	.8
• <i>Sweetgrass</i>	2,398	.4
District 14		
• <i>Golden Valley</i>	564	1
• <i>Meagher</i> ¹⁷⁴	1,188	.3
• <i>Musselshell</i>	2,698	1.3
• <i>Wheatland</i>	1,245	.5
TOTAL Registered voters	33,653	
Proposed Crow/Northern Cheyenne Division ¹⁷⁵ State Judicial Districts 7, 13, 16 & 22		
District 7		
• <i>Dawson</i>	5,353	1.7
• <i>McCone</i>	1,155	.4
• <i>Prairie</i>	833	.2
• <i>Richland</i>	6,094	1.7
• <i>Wibaux</i>	702	.4
District 13		
• <i>Yellowstone</i>	87,187	4
District 16		
• <i>Carter</i>	911	.9
• <i>Custer</i>	6,649	1.7
• <i>Fallon</i>	1,837	.4
• <i>Garfield</i>	861	.4
• <i>Powder River</i>	1,192	1.5
• <i>Rosebud</i>	4,504	34.7
• <i>Treasure</i>	542	.8
District 22		
• <i>Carbon</i>	6,990	.8
• <i>Stillwater</i>	5,524	.8
• <i>Big Horn</i>	7,548	64.3
TOTAL Registered voters	137,883	

174. Meagher County is currently encompassed in the federal division for Helena, even though it is part of state judicial District 14. Under the proposal here, the Billings Division boundary would be adjusted to track state judicial District 14 and encompass all the counties contained in the later, including Meagher County.

175. This proposal bundles the Crow and Northern Cheyenne Reservations in a single proposed division because parts of both reservations fall within the boundaries of Big Horn County, and that

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County's voting records, therefore, include precincts located on both reservations. Furthermore, the boundaries of each Reservation vis-à-vis Big Horn County makes separate divisions for each of these reservations difficult to define. The proposed combination should not suggest that the two Reservations constitute a single "community" for jury selection purposes, or that they are culturally interchangeable or even similar.

