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Giving Meaning to Empty Words: Promoting Tribal Self-Governance by Narrowing the Scope of Jury Vicinage and Venue Selection in MCA Adjudications

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COMMENT

**Giving Meaning to Empty Words: Promoting Tribal Self-Governance
by Narrowing the Scope of Jury Vicinage and Venue Selection in
MCA Adjudications**

*Shannon Rogers**

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And I say that life is indeed darkness save when there is urge,
And all urge is blind save when there is knowledge,
And all knowledge is vain save when there is work,
And all work is empty save when there is love;
And when you work with love you bind yourself to yourself, and to one another,
and to God.

—Kahlil Gibran, *The Prophet*

I have truly enjoyed my love affair with Wyoming and will always have fond memories of my time in this untrammelled, wild and scenic place. While sad to be leaving, I am proud and excited to be joining the North Dakota firm of Camrud, Maddock, Olson & Larson. Forever—Go Pokes!

I. INTRODUCTION

I'm no idealist to believe firmly in the integrity of our courts and in the jury system—that is no ideal to me, it is a living, working reality. Gentlemen, a court is no better than each man of you sitting before me on this jury. A court is only as sound as its jury, and a jury is only as sound as the men who make it up.

—Harper Lee, *To Kill a Mockingbird*

The headline of the February 2, 2012 edition of the New York Times reads “Brutal Crimes Grip an Indian Reservation.”¹ Another from February 20, 2012 reads “High Crime, Fewer Charges on Indian Land.”² The January 11, 2013 edition of the High Country News reads “Native Women fail to find Justice.”³ These articles highlight the skepticism regarding effective pursuit of criminal prosecution of Indian Country crimes.⁴ For a number of years the United States Department of Justice has been accused of ineffective enforcement, failing to share information with tribal law enforcement, and prosecutorial declination of a disproportionate number of cases under the Indian Major Crimes Act (MCA).⁵

¹ Timothy Williams, *An Indian Reservation in Crime's Deadly Grip*, N.Y. TIMES, Feb. 3, 2012, at A1, available at <http://www.nytimes.com/2012/02/03/us/wind-river-indian-reservation-where-brutality-is-banal.html>.

² Timothy Williams, *Higher Crime, but Fewer Charges on Indian Land*, N.Y. TIMES, Feb. 21, 2012, at A14, available at <http://www.nytimes.com/2012/02/21/us/on-indian-reservations-higher-crime-and-fewer-prosecutions.html?pagewanted=all&r=0>.

³ Sarah Keller, *Native women fail to find justice*, HIGH COUNTRY TIMES (Jan. 11, 2013), <http://www.hcn.org/blogs/goat/native-women-fail-to-find-justice>.

⁴ “Indian Country” refers to any land within the limits of an established reservation, dependent Indian communities in the United States, and Indian allotments. 18 U.S.C. § 1151 (2011) (containing definition of “Indian country”); see *infra* notes 36–39 (discussing the definition of Indian Country in more detail).

⁵ See 18 U.S.C. § 1153 (2011); Act of Mar. 3, 1885, ch. 341, 23 Stat. 362 (codified as amended at 18 U.S.C. § 1153); CAROLE GOLDBERG-AMBROSE WITH TIMOTHY CARR SEWARD, *PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW* 280, at 162 (1997) (“In practical application, federal law enforcement agents, particularly the Federal Bureau of Investigation and the U.S. Attorney’s Office, have demonstrated a history of declining to investigate or prosecute violations of the Major Crimes Act.”); B.J. Jones, *Welcoming Tribal Courts into the Judicial Fraternity: Emerging Issues in Tribal-State and Tribal-Federal Court Relations*, 24 W.M. MITCHELL L. REV. 457, 513 (1998) (“Federal prosecutors, busy with prosecuting a variety of more serious crimes, perhaps have been remiss in devoting the necessary attention to the problems that arise when non-Indians commit offenses in Indian country”); Peter Nicolas, *American-Style Justice in No Man’s Land*, 36 GA. L. REV. 895, 963 (2002) (“U.S. Attorneys, unlike state prosecutors, typically decline to prosecute in a far greater percentage of cases . . . [resulting] in the underenforcement of criminal laws in Indian country.”); Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 733 (2006) (“United States Attorneys have been widely criticized for decades for failing to give proper attention to Indian country cases. The substance of such complaints almost always involves the failure to prosecute aggressively enough and almost never involves complaints of ‘over-prosecution.’ Because of the non-reviewability of decisions to decline prosecution or to under-prosecute, the weak

The number of crimes committed in Indian Country is shocking, but the reason may not be as easy to determine.⁶ The most telling reasons come from tribal members themselves: “There has always been the white-Indian tension. It’s always been something;” “One of the basic problems is that . . . we are not getting the reason or notification for the declination;” “The federal system takes a long time to make a decision, and . . . the community gets the message that nothing is being done;” and “These crimes are very serious for the reservation, but the prosecutors really don’t see it from a reservation perspective.”⁷ While these statements should be taken in context, the message is clear: Although the Justice Department has recently made improvements in the federal-tribal lines of communication and has provided more strength to tribal adjudicatory systems through the Tribal Law and Order Act of 2010, recent efforts may not be enough to meet the tribal community needs.⁸ Changing certain aspects of the federal adjudicatory process to comport with the MCA may provide a solution to some of these frustrations by creating a greater sense of community involvement within the Indian community.⁹

or nonexistent political accountability of federal prosecutors to tribal communities, and the lack of media interest in Indian country prosecutions, federal prosecutors feel little external pressure to treat Indian country cases seriously. Under such a scheme, well-intentioned federal prosecutors will work hard in Indian country, and many do. But even high levels of commitment and interest by federal prosecutors are no substitute for actual accountability.” (citations omitted); Larry Cunningham, Note, *Deputization of Indian Prosecutors: Protecting Indian Interests in Federal Court*, 88 GEO. L. J. 2187, 2188 (2000) (“[M]any United States Attorneys have abdicated their responsibility to prosecute crimes in Indian country committed by non-Indians.”); Amy Radon, Note, *Tribal Jurisdiction and Domestic Violence: The Need for Non-Indian Accountability on the Reservation*, 37 U. MICH. J.L. REFORM 1275, 1278 (2004) (“Because federal prosecutors decline to prosecute [domestic violence], the law provides no deterrent effect”); see also S. REP. NO. 101-167 (1st Sess. 1989), reprinted in 1990 U.S.C.C.A.N. 712, 1989 WL 225003, *4–*6 (“The purpose of H.R. 498 is to clarify and strengthen the authority of the law enforcement personnel and functions within the Bureau of Indian Affairs (BIA) of the Department of Interior for law enforcement activities.”).

⁶ See generally Carole Goldenberg & Kevin Washburn, *Lies, Damn Lies, and Crime Statistics*, INDIAN COUNTRY TODAY MEDIA NETWORK.COM (July 25, 2008), <http://indiancountrytodaymedianetwork.com/ictarchives/2008/07/25/goldberg-and-washburn-lies-damn-lies-and-crime-statistics-93310> (discussing Bureau of Justice Statistics data that show elevated rates of crime committed in Indian Country compared to outside and challenging some of the results).

⁷ Williams *supra* note 2; see also Williams, *supra* note 1.

⁸ Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2261 [hereinafter TLOA] (codified as amended at 25 U.S.C. §§ 2801–2815 (2011)). TLOA was signed into law by President Obama on July 29, 2010 to strengthen law enforcement efforts on reservations. See Lynn Rosenthal, *The Tribal Law and Order Act of 2010: A Step Forward for Native Women*, THE WHITE HOUSE (July 29, 2010), <http://www.whitehouse.gov/blog/2010/07/29/tribal-law-and-order-act-2010-a-step-forward-native-women> (“The Act will strengthen tribal law enforcement and the ability to prosecute and fight crime more effectively.”). TLOA provides enhanced training for tribal enforcement officers and deputized a number of special assistant United States Attorneys to handle the prosecution of reservation crimes. 25 U.S.C. § 2810 (2011). The White House stated “[t]hese provisions help to increase communication between tribal law enforcement, Federal authorities and the court system.” Rosenthal, *supra* note 8.

⁹ Washburn, *supra* note 5, at 734 (“Yet the federal prosecutor is unaccountable to the relevant community and has no particular motivation to address community concerns. . . . The ramifications

A practical step to solving the federal-tribal disconnect and involving the Indian community is to narrow the MCA adjudication procedures. As discussed below, the MCA, unlike any other criminal statute, explicitly draws geographic and racial-political boundaries.¹⁰ The adjudication process, through venue and jury venire selection reform, needs to be limited in consideration of the MCA's constraints. This comment discusses two proposals for modifying MCA adjudications to better involve the Indian community: (1) moving the venue for MCA adjudications closer to the Indian community, and (2) shrinking the jury venire used.¹¹ To exemplify these proposals, the discussion herein focuses on Wyoming because the state geography, proximity of the federal courts to the reservation, and tribal population provide a perfect case study for general issues faced in MCA prosecutions. The ultimate intent of this comment is to highlight the practical implications of ignoring venue problems and the over-inclusion of non-Indians in MCA adjudications. In doing so, the proposals presented in this comment will help further the federal government's policy of self-governance for tribes.¹²

This comment proceeds in three sections. First, the background presents the historical federal-tribal relationship within Indian Country,¹³ the geography of Wyoming and its reservations,¹⁴ and the general law of venue and jury selection.¹⁵ Second, the analysis critiques the practical problems and inconsistencies created by the MCA and existing adjudication system.¹⁶ Then, the analysis offers solutions to the problems to better involve the Indian community.¹⁷ Third and finally, the conclusion stresses the benefits of improving the MCA adjudication procedure through localized venue and limiting the jury selection pool.¹⁸

of this structural problem are enormous and undermine the legitimacy of the federal prosecutor's power in Indian country cases.”).

¹⁰ 18 U.S.C. § 1153 (2011). Federal criminal jurisdiction is triggered when a crime is committed in Indian Country and allegedly committed by an Indian. *Id.*

¹¹ Typically under the Sixth Amendment the focus is on under-inclusion of a specific racial class within the vicinage, however, the argument here is that including the entire federal district causes the problem of over-inclusion. *See infra* ANALYSIS.

¹² Over-inclusion is used rather than under-inclusion because the broad scope of the usual federal jury venire in Wyoming includes the entire state. Under-inclusion is not an effective argument because the actual percentage of Indians in the entire district of Wyoming is insubstantial compared to the percentage if the vicinage was constrained to Fremont County, where the Wind River Indian reservation is located. It is this broad statewide venire that causes over-inclusion of individuals not a part of the Indian Country community; rather than an issue of under-inclusion of Indian community members.

¹³ *See infra* BACKGROUND: *Indian Major Crimes Act.*

¹⁴ *See infra* BACKGROUND: *History and Geography of the Federal District of Wyoming.*

¹⁵ *See infra* BACKGROUND: *Controlling Federal Law.*

¹⁶ *See infra* ANALYSIS: *Practical Logistical Problems.*

¹⁷ *See infra* ANALYSIS: *Solving the Inconsistencies and Involving the Community.*

¹⁸ *See infra* CONCLUSION.

II. BACKGROUND

A. *Indian Major Crimes Act: Federal Jurisdiction*

Historically, tribes in the United States were recognized as sovereign nations whose authority could only be diminished by Congress.¹⁹ *Ex parte Crow Dog*,²⁰ decided in 1883, is one of the strongest cases from the United States Supreme Court affirming the concept of tribal sovereignty following the *Marshall Trilogy*.²¹ In *Ex parte Crow Dog*, an Indian killed another Indian of the same tribe in Indian Country.²² The defendant, Crow Dog, had been punished by the tribe and required to pay \$600, eight horses, and one blanket to recompense the victim's family.²³ The Court held federal criminal laws do not extend into the reservations.²⁴ The crux of the *Ex parte Crow Dog* opinion is the Court's language, albeit racially charged, comparing Indian and non-Indian criminal adjudicatory processes:

It is a case where . . . [federal law] is sought to be extended over aliens and strangers; over the members of a community, separated by race, by tradition, by the instincts of a free though savage life, from the authority and power which seeks to impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they could have no previous warning; which judges them by a standard made by others and not for them, which takes no account of the conditions which should except them from its exactions and makes no allowance

¹⁹ While the tribes themselves are considered wards of the federal government, this is not solely based on having a particular interest in the Indian community's well-being. See *Ex parte Crow Dog*, 109 U.S. 556, 568–69 (1883). Rather, the definition of “dependent nation” is based in the medieval doctrine of discovery. *United States v. Lara*, 541 U.S. 193, 204 (2004); *Cherokee Nation v. Georgia*, 30 U.S. 1, 2 (1831). This concept meant the conqueror held ultimate title to “discovered lands” against outside powers. See *Oneida Cnty., N.Y. v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 234 n.3 (1985). There are numerous historical references tracking this same self-interested intention. See, e.g., Dawes Act of 1887 (General Allotment Act), ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. § 349 (2011)); DAVID GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW: CH. 4 CENTURIES OF SHIFTING LAW AND POLICY 140 (Sixth Ed., West 2011).

²⁰ See generally 109 U.S. 556.

²¹ The “Marshall Trilogy” provides the basic framework for modern federal Indian Law. See *Worcester v. Georgia*, 31 U.S. (5 Pet.) 515 (1838); *Cherokee Nation v. Georgia*, 30 U.S. (6 Pet.) 1 (1831); *Johnson v. McIntosh*, 21 U.S. 543 (1823); Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 627 n.2 (2006) (“[The “Marshall Trilogy” cases] are intertwined in the literature and do form the basis for federal Indian law.”). Professor Charles Wilkinson first described the cases as a trilogy. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 24 (1987).

²² *Crow Dog*, 109 U.S. at 557.

²³ GETCHES ET AL., *supra* note 19, at 157.

²⁴ *Crow Dog*, 109 U.S. at 572.

for their inability to understand it. It tries them, not by their peers, nor by the customs of their people nor the law of their land but by superiors of a different race according to the law of a social state of which they have an imperfect conception and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man's revenge by the maxims of the white man's morality.²⁵

The Court reasoned that in order to apply United States federal criminal law to an Indian crime, the Court would have to abrogate the 1868 Indian treaty rights.²⁶ The Court refused to do this without a clear expression of congressional intent to apply federal criminal laws of the United States to crimes solely involving Indians in Indian communities.²⁷ The holding sparked a decade-long campaign by the Bureau of Indian Affairs (BIA) to extend United States federal criminal jurisdiction over Indian Country.²⁸

²⁵ *Id.* at 571.

²⁶ *Id.* at 572.

²⁷ *Id.*

²⁸ The Supreme Court, in *Keeble v. United States*, quoted portions of the MCA congressional record that provides insight into the true motivations behind the campaign to expand federal jurisdiction into reservations and Indian Country.

The prompt congressional response—conferring jurisdiction on the federal courts to punish certain offenses—reflected a view that tribal remedies were either nonexistent or incompatible with principles that Congress thought should be controlling. Representative Cutcheon, sponsor of the Act, described the events that followed the reversal by this Court of Crow Dog's conviction:

. . . .

“It is an infamy upon our civilization, a disgrace to this nation, that there should be anywhere within its boundaries a body of people who can, with absolute impunity, commit the crime of murder, there being no tribunal before which they can be brought for punishment. *Under our present law there is no penalty that can be inflicted except according to the custom of the tribe*”

“If . . . an Indian commits a crime against an Indian on an Indian reservation, *there is now no law to punish the offense except, as I have said, the law of the tribe, which is just no law at all.*”

The Secretary of the Interior who supported the Act, struck a similar note:

“If offenses of this character (the killing of Spotted Tail) *can not be tried in the courts of the United States, there is no tribunal in which the crime of murder can be punished.*”

. . . .

In short, Congress extended federal jurisdiction to crimes committed by Indians on Indian land out of a conviction that many Indians would “be civilized a great deal sooner by being put under (federal criminal) laws and taught to regard life and the personal property of others.”

Ultimately, Congress responded with the passage of the MCA in 1885.²⁹ The MCA marked the federal government's shifting policy regarding Indian affairs towards one of forced assimilation.³⁰ The purpose of the MCA is to remove certain crimes, which would otherwise fall under the tribal court's jurisdiction, to federal court.³¹ Under the MCA, to assert federal jurisdiction, the prosecution must establish three conditions: (1) the crime was committed by an Indian; (2) in Indian Country; and (3) is one of the enumerated crimes in the MCA.³²

The first requirement is established by showing the defendant satisfies the "blood quantum requirement"³³ and is connected to a federally recognized tribe.³⁴

412 U.S. 205, 210–12 (1973) (emphasis added) (internal citations omitted). The court makes a point in footnote 10 that these motivations had not dissipated from the original adoption of the MCA:

The same congressional purpose is evident in the most recent amendment to the Act, the 1968 addition to the list of enumerated crimes of the offense of assault resulting in serious bodily injury.

"Without this amendment an Indian can commit a serious crime and receive only a maximum sentence of 6 months. Since Indian courts cannot impose more than a 6-month sentence, the crime of aggravated assault should be prosecuted in a Federal court, where the punishment will be in proportion to the gravity of the offense."

Id. at 217 n.10 (internal citations omitted). Many scholars and academics summarize Congress's actions as completely motivated by racism. *See, e.g.*, Jared B. Cawley, *Just When You Thought It Was Safe to Go Back on the Rez: Is It Safe?*, 52 CLEV. ST. L. REV. 413, 417 (2004) (arguing that the result of the Supreme Courts decision in *Crow Dog* "sent fear throughout the United States Congress that Indians would literally, and actually, be getting away with murder if things were to remain as they were."); M. Brent Leonhard, *Returning Washington P.L. 280 Jurisdiction to Its Original Consent-Based Grounds*, 47 GONZ. L. REV. 663, 672 (2011) ("Congress's adoption of the Major Crimes Act was fundamentally driven by racist views. . . . This implicit racism and explicit discounting of the customary laws of tribal nations is reflected throughout much of the Act's legislative history.").

²⁹ Act of Mar. 3, 1885, ch. 341, 23 Stat. 362 (codified as amended at 18 U.S.C. § 1153 (2011)).

³⁰ Sidney L. Harring, *Crow Dog's Case: A Chapter in the Legal History of Tribal Sovereignty*, 14 AM. INDIAN L. REV. 191, 223, 230 (1989).

³¹ *See* 18 U.S.C. § 1153 (2011); *see also* Washburn, *supra* note 5, at 730 ("The crimes enumerated and prosecuted under the federal Indian country regime are crimes that Roscoe Pound would have characterized as crimes against 'local order.'") (citing ROSCOE POUND, CRIMINAL JUSTICE IN AMERICA 151 (1930)).

³² *See* § 1153. The MCA lists fourteen crimes that if committed in Indian country, the defendant "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." *Id.*

³³ These Indian classification requirements stem from §1153, as interpreted by courts to require "(1) the presence of *some* Indian blood indicating tribal ancestry; and 2) tribal or government recognition as an Indian." *See, e.g.*, *United States v. Maggi*, 598 F.3d 1073, 1075 (9th Cir. 2010) (emphasis added) (citing *United States v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005)). "Blood quantum requirement" has been defined as, "an individual's percentage of Indian blood, calculated according to ancestral connections to a tribe or tribes." *Id.* at 1076.

³⁴ *See, e.g.*, *United States v. Rogers*, 45 U.S. 567, 573 (1846); *LaPier v. McCormick*, 986 F.2d 303, 305 (9th Cir. 1993); *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir. 1979), *cert. denied*, 444 U.S. 859 (1979).

The second requirement, Indian Country, defines the geographic area in which tribal and federal law generally applies and state law only applies in limited circumstances.³⁵ Indian Country means:

(a) all land within the limits of any Indian reservation *under* the jurisdiction of the United States government *notwithstanding* the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights of way running through the same.³⁶

Indian Country focuses on the geographic isolation of tribal communities, in the form of a “reservation.” The term “reservation” originates from treaties and supports the concept of segregation.³⁷ A treaty “reserved” to the tribe the ability to retain their community, but still subjected them to aspects of the United States criminal justice system.³⁸ The MCA shifts criminal jurisdiction away from the tribes to the federal government.³⁹

As for the third requirement, currently, the MCA provides for limited federal jurisdiction in Indian Country of fourteen enumerated crimes.⁴⁰ A crime falls

³⁵ See 18 U.S.C. §§ 1151–1152 (2011).

³⁶ § 1151. A detailed analysis of the proof required to establish these threshold conditions is beyond the scope of this comment. For purposes of this comment the Wind River Reservation in Fremont County, Wyoming, will be used as an example of Indian Country. The Shoshone and Northern Arapahoe tribes, both federally recognized, reside on this reservation and the lands surrounding it. Federally Recognized tribes are listed at Indian Entities Recognized and Eligible To Receive Services from the Bureau of Indian Affairs, 77 Fed. Reg. 47868-01 (Aug. 10, 2012).

³⁷ See, e.g., *United States v. Shoshone Tribe of Indians of Wind River Reservation in Wyo.*, 304 U.S. 111, 113 (1938).

³⁸ *Id.* This right to reserved land was conditioned primarily on the tribe surrendering the right to form a community in all other United States territories. *Id.* at 114. Under the Treaty at Fort Bridger, the tribe “agreed that they would make the reservation their permanent home.” *Id.* at 113. The federal government’s interest in segregating the Indian community can also be seen from the federal government’s, often schizophrenic, treatment of the tribes throughout history. See GETCHES ET AL., *supra* note 19, at 140.

³⁹ See 18 U.S.C. § 1153 (2011). *United States v. Kagama*, 118 U.S. 375 (1886) (holding the MCA is a valid and constitutional law because being within the United States they are subject to acts of Congress).

⁴⁰ Under the MCA, the current list of crimes under federal jurisdiction are: “murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), 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” § 1153.

under MCA federal jurisdiction when an Indian allegedly commits one of the enumerated crimes in Indian Country.⁴¹

B. History and Geography of the Federal District of Wyoming

In Wyoming, federal trials are held in Cheyenne, Casper, and occasionally Jackson.⁴² The Wind River Reservation is located nearly 300 miles from Cheyenne and 150 miles from Casper.⁴³ Cases are assigned randomly among the federal district judges sitting in Wyoming.⁴⁴ Roughly two-thirds of the cases are held in Cheyenne with the other one-third held in in Casper. Given the distance from the Wind River Reservation, neither location can be considered “local” to the reservation or the surrounding communities.

⁴¹ *Id.*; see *supra* note 40 (listing enumerated crimes). Notably, most litigation surrounding the MCA has involved the determination of the scope of “Indian Country” and what it means to be Indian. See generally §1153; *United v. Antelope*, 430 U.S. 641, 645–46 (1977); *Seymour v. Superintendent*, 368 U.S. 351, 359 (1962) (holding a State conviction void for want of state jurisdiction where the charge was burglary by an enrolled member of a federally recognized tribe on Indian Country); *Kagama*, 118 U.S. at 377–81. The Commerce Clause, specifically the *Indian Commerce Clause*, has often been referenced as Congress’s source of plenary power to abrogate treaty rights and regulate transactions with tribes. *United States v. Lara*, 541 U.S. 193, 200 (2004); *Morton v. Mancari*, 417 U.S. 535, 551–52 (1974); see also, e.g., *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N. M.*, 458 U.S. 832, 837 (1982) (discussing the “broad power” under the Indian Commerce Clause); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142–43 (1980).

⁴² Cheyenne, in the far southeast corner of the state, is the state capital and is the home of the primary federal courthouse for the District of Wyoming. Laramie County, where Cheyenne is located, accounts for 16.3% of the population of Wyoming. *Wyoming, State and County QuickFacts*, U.S. DEP’T OF COMMERCE: U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/56000.html> (last revised Mar. 14, 2013). Currently, there are two active Federal Judges and one senior status judge sitting in Cheyenne. *About Wyoming and This District*, U.S. DIST. CT. OF WYO., <http://www.wyd.uscourts.gov/htmlpages/about.html> (last visited May 10, 2013). Casper is located in Natrona County, and is home to roughly 10% of the Wyoming population. *Wyoming, State and County QuickFacts*, *supra* note 42. Casper is home to Wyoming’s third federal judge. U.S. DIST. CT. OF WYO., *supra* note 42. Jackson is located in Teton County and represents under two percent of Wyoming’s population. *Wyoming, State and County QuickFacts*, *supra* note 42. The federal courthouse in Jackson is currently at risk of closing due to federal budget constraints. Kelsey Dayton, *Jackson Federal Court Among 60 on Chopping Block*, CASPER STAR TRIBUNE, Mar. 22, 2012, available at http://trib.com/news/state-and-regional/jackson-federal-court-among-on-chopping-block/article_aff34ca7-3bf5-5064-ae7d-9ddb4b5a75ab.html.

⁴³ See *Trip Calculator*, WYO. DEP’T OF TRANSP., <http://www.dot.state.wy.us/distances/> (calculating the distances between Lander and Cheyenne and Lander and Casper at 272 and 145 respectively) (last visited May 10, 2013).

⁴⁴ D. WYO. CRIM. R. 57.1(a) (“It is the policy of this Court, insofar as practicable and efficient, to provide for the assignment of cases among the Judges of this District by random selection.”).

Historically, there were six federal courthouses throughout Wyoming—Cheyenne, Casper, Evanston, Jackson, Sheridan, and Lander.⁴⁵ Federal district judges in Wyoming once “rode circuit” to hold court all across Wyoming.⁴⁶ This allowed federal judges to hold court in or near the community in which the alleged offenses occurred.⁴⁷ Over the years, the practice of riding the federal circuit faded into history and the federal courthouses in Evanston, Sheridan, and Lander were abandoned and sold.⁴⁸ The closure of the Lander courthouse severely impacted the venue choices for Indian defendants.⁴⁹

⁴⁵ Title 28 of the United States Code, Section 131 says “Wyoming and those portions of Yellowstone, National Park situated in Montana and Idaho constitute one judicial district. Court shall be held at Casper, Cheyenne, Evanston, Lander, Jackson and Sheridan.” 28 U.S.C. § 131 (2011).

⁴⁶ See *First Federal Court to Meet in Lander*, THE WEEKLY BOOMERANG, Sept. 26, 1912, at 3, available at <http://wyonewspapers.org> (announcing the first federal court session to be held in Lander, Wyoming; Judge Riner, Wyoming’s first federal judge, was set to preside over the hearings); *Diseased Cattle are Shipped From State, Sheridan Man Fined*, THE SHERIDAN DAILY ENTER., Jan. 21, 1919, at 4, available at <http://wyonewspapers.org> (discussing federal Judge Riner presiding in Cheyenne over a case in which a rancher shipped cattle knowing they were carrying a communicable disease); *Quash Indictment Against Herald Bros. Charging Intimidation, Judge Riner at Sheridan Holds that Indictments Drawn by Burke are Defective, and Not Binding*, PARK CNTY. ENTER., Apr. 20, 1912, at 1, available at <http://wyonewspapers.org> (discussing the first ever federal court hearing in Sheridan with Judge Riner presiding); *Weir Trial to Evanston*, THE WYO. PRESS, June 14, 1913, at 1, available at <http://wyonewspapers.org> (discussing a hearing in Evanston at which Judge Riner would preside over charges of burglary that occurred on government grounds). “Circuit Riding” was originally a system of sending Supreme Court Justices around the country to serve as judges of the various federal circuit courts. Joshua Glick, Comment, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1754–56 (2003).

⁴⁷ See Glick, *supra* note 46, at 1757–60, (identifying five primary benefits of “circuit riding” three of which are particularly relevant to the current discussion, (1) “circuit riding saved money for both the federal government and for the litigants”; (2) “allowed cases to receive immediate attention from the nation’s highest judges”; (3) “[kept] the Federal Judiciary in touch with the local communities.”); see also WYO. STAT. ANN. § 5-9-103 (2012). Although this practice at the state-level may also become extinct: “In Wyoming, budget cuts have curtailed judicial circuits to satellite courts, meaning prisoners will now be brought to their day in court, and not the other way around.” John M. Glionna, *She still rides the court circuit*, L.A. TIMES, Jan. 01, 2013, at A4, available at <http://articles.latimes.com/2013/jan/01/nation/la-na-circuit-judge-20130101>.

⁴⁸ The Sheridan courthouse was built in 1910, and became a federal courthouse for the District of Wyoming in 1924. *Historic Federal Court Houses*, FED. JUDICIAL CTR., <http://www.fjc.gov/history/courthouses.nsf/search?openagent&state=Wyoming> (last visited May 10, 2013). The Federal Judicial Center does not list when it was shut down. *Id.* The federal courthouse in Lander was built in 1912 and was used as a federal courthouse until the early 1990s. *Id.* It is now privately owned and used as a United States Post Office. *Id.* The Evanston federal courthouse was built in 1908 and was used as a federal courthouse until 1980 and is still in use as a United States Post Office. *Id.*

⁴⁹ The closure of the Lander courthouse limited the venues close to the reservation. See *supra* notes 42–48 and accompanying text.

Lander was originally within the Wind River Reservation.⁵⁰ Eventually the United States bought back the southern portion of the reservation—removing Lander from the reservation boundaries.⁵¹ Today, Lander sits less than fifteen miles from the towns of Fort Washakie and Ethete, the centers of the Shoshone and Arapaho governments.⁵² Lander is home to a branch of the United States Attorney's Office, the primary purpose of which is to better serve the Wind River Reservation.⁵³ Additionally, the Federal Bureau of Investigation, the BIA, the Bureau of Alcohol Tobacco and Firearms, the United States Fish and Wildlife Service, the United States Marshals, and United States Probation Office all have agents and employees stationed in Lander.⁵⁴ There is, also, a part-time United States Magistrate who oversees the preliminary proceedings of federal court cases.⁵⁵

C. *Controlling Federal Law*

Once federal jurisdiction is established under the MCA, two procedural aspects must be addressed: the jury vicinage and the venue selection.⁵⁶ In the

⁵⁰ See Treaty with the Eastern Band Shoshoni and Bannock 1868, July 3, 1868, 15 Stat. 673, 674. The Treaty was breached in 1891 when the United States government placed a band of Arapahoe on the reservation. *Shoshone Tribe of Indians of Wind River Reservation in Wyo. v. United States*, 299 U.S. 476, 494 (1937) (“The treaty of 1868 charged the government with a duty to see to it that strangers should never be permitted without the consent of the Shoshones to settle upon or reside in the Wind River Reservation. That duty was not fulfilled.”).

⁵¹ After gold was discovered there was a negotiation of a reduction, often called the “Brunot Cession Agreement of 1872.” Act of Dec. 15, 1874, ch. 3, 18 Stat. 291, 292. This provided for the cession of the southern portion, including South Pass where the gold was, for the payment of \$25,000 to be paid in increments of \$5,000 worth of cattle. *Id.*

⁵² *Trip Calculator*, *supra* note 43 (calculating the distances between Lander, Ethete, and Fort Washakie at approximately fifteen miles).

⁵³ *About the District*, U.S. ATTORNEY'S OFFICE: DIST. OF WYO., <http://www.justice.gov/usao/wy/about/district.html> (last visited May 10, 2013).

⁵⁴ The address of the listed federal offices can be accessed online. *Wind River Agency*, BUREAU OF INDIAN AFFAIRS, <http://www.bia.gov/WhoWeAre/RegionalOffices/RockyMountain/WeAre/WindRiver/index.htm> (last visited on May 5, 2013); *Wyoming Field Offices*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, <http://www.atf.gov/field/denver/fo-wyoming.html> (last visited on May 10, 2013); *State of Wyoming Offices*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/offices/directory/ListOffices.cfm?statecode=56> (last visited on May 10, 2013).

⁵⁵ *About Wyoming and This District*, U.S. DIST. CT. OF WYO., <http://www.wyd.uscourts.gov/htmlpages/about.html> (last visited May 10, 2013).

⁵⁶ See BLACK'S LAW DICTIONARY 1702–03 (9th ed. 2009) (“[V]icinage . . . [Law French “neighborhood”] 1. Vicinity; proximity. 2. The place where a crime is committed or a trial is held; the place from which jurors are to be drawn for trial; esp., the locale from which the accused is entitled to have jurors selected.”).

Whereas venue refers to the locality in which charges will be brought and adjudicated, vicinage refers to the locality from which jurors will be drawn. . . . The vicinage

United States legal system, the jury is fundamental to the democratic system of justice because it ideally represents the community impacted by the crime.⁵⁷ Accordingly, a state's vicinage is generally limited to those living in the impacted community.⁵⁸ In conjunction, venue supports community involvement by requiring a proceeding be located with convenience in mind for the community impacted, "the defendant, any victim, and the witnesses, and the prompt administration of justice."⁵⁹ Together, these two components infuse the criminal adjudication process with the concept of community.

D. Location, Location, Venue

Historically, the importance of community in the criminal adjudication process dates back to the founding of the United States.⁶⁰ One of the contentious debates at the Constitutional Convention was over the perceived weakness in Article III's vicinage clause.⁶¹ The "anti-federalists" primarily attacked the failure

concept requires that the jurors be selected from a geographical district that includes the locality of the commission of the crime, and it traditionally also mandates that such district not extend too far beyond the general vicinity of that locality.

WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 16.1, at 738–39 (2d ed. 1992). See also *infra* note 61 (discussing the term "vicinage").

⁵⁷ See Jeff D. May, *Alvarado Revisited: A Missing Element in Alaska's Quest to Provide Impartial Juries for Rural Alaskans*, 28 ALASKA L. REV. 245, 250 (2011). In the article he establishes that "the rationale for drawing jurors from the place where the crime occurred was to ensure the jurors were persons who could accurately express the opinions of the community most impacted by the offense." *Id.* See *infra* notes 77–89 for discussion of the importance of community representation in the jury and criminal adjudication.

⁵⁸ See, e.g., WYO. STAT. ANN. § 1-11-101 (2012) (requiring a Juror be a resident of the state and county for ninety (90) days before qualifying for selection); Uniform Jury Selection and Service Act, N.D. CENT. CODE §§ 27-09.1-01 through -22 (2012) (establishing that "it is the policy of this state that all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court"); Who competent—duty to serve and Inhabitants of local government jurisdiction competent, MONT. CODE ANN. §§ 3-15-301, -302 (establishing the requirement of a competent juror be "a resident for at least 30 days of the state and of the city, town, or county in which the person is called for jury duty").

⁵⁹ FED. R. CRIM. P. 18; see also May *supra* note 57, at 251–60. Assistant Professor May provides the community's role in the venue requirement: "The venue requirement also benefits the community by emphasizing the 'local' nature of crime. The community is given a voice in the resolution of a matter which impacts it. This voice acts as the community's conscience and establishes communal standards." *Id.*

⁶⁰ See *infra* notes 61–67.

⁶¹ See U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. VI ("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* . . .") (emphasis added). Vicinage refers to the geographic location from which the jury is to be empaneled. May, *supra* note 57, at 277. The vicinage requirement was in response to the British practice of transporting colonists back to England for trial. See Drew L. Kershen, *Vicinage*, 29 OKLA. L. REV. 801, 806, 814–15 (1976).

to define geographical limitations in the vicinage clause.⁶² Their argument was based on the concern people would be prosecuted great distances away from the community in which the crime was committed.⁶³ The criticism of this practice came from the anti-federalists' contempt of English rule, which would try Americans accused of treason in England for the benefit of the prejudicial environment.⁶⁴

Venue is encapsulated in Article III of the Constitution and supported by Rule 18 of the Federal Rules of Criminal Procedure.⁶⁵ Rule 18 requires the court to "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."⁶⁶ A defendant may motion the court to change the venue when he or she fears that, without transfer, there is an inability to preserve the constitutional interest in a prompt and fair trial.⁶⁷

⁶² See *Williams v. Florida*, 399 U.S. 78, 108 n.35 (1970). The Court articulated the framers' intentions:

In the Virginia Convention, Madison conceded that the omission was deliberate and defended it as follows:

It was objected yesterday, that there was no provision for a jury from the vicinage. If it could have been done with safety, it would not have been opposed. It might so happen that a trial would be impracticable in the county. Suppose a rebellion in a whole district, would it not be impossible to get a jury? The trial by jury is held as sacred in England as in America. There are deviations of it in England: yet greater deviations have happened here since we established our independence, than have taken place there for a long time, though it be left to the legislative discretion. It is a misfortune in any case that this trial should be departed from, yet in some cases it is necessary. It must be therefore left to the discretion of the legislature to modify it according to circumstances. This is a complete and satisfactory answer.

Id. (citing M. FARRAND, 3 RECORDS OF THE FEDERAL CONVENTION 332 (1911)); see also Laurie L. Levenson, *Change of Venue and the Role of the Criminal Jury*, 66 S. CAL. L. REV. 1533, 1549 (1993) ("While there was disagreement over whether the Constitution should specifically recognize the jury's power to ignore a judge's instructions and apply its own fundamental principles of justice, there was an understanding that trial by jury played an important role in the democratic process.").

⁶³ See John S. Baker, Jr., *State Police Powers and the Federalization of Local Crime*, 72 TEMP. L. REV. 673, 710–11 (1999).

⁶⁴ See *Hernandez v. Mun. Ct.*, 781 P.2d 547, 551 (Cal. 1989), *overruled by* *Price v. Super. Ct.*, 25 P.3d 618 (Cal. 2001) (citing Drew L. Kershen, *Vicinage*, 29 OKLA. L. REV. 801, 814 (1976)).

⁶⁵ U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."); FED. R. CRIM. P. 18; see also U.S.CONST. amend. VI.

⁶⁶ FED. R. CRIM. P. 18. See also *United States v. Gruberg*, 493 F. Supp. 234, 242–43 (S.D.N.Y. 1979) (government's convenience is given little weight when other considerations suggest transfer under FED. R. CRIM. P. 21(b)).

⁶⁷ Transfer of Trial, FED. R. CRIM. P. 21; see also *Parr v. United States*, 351 U.S. 513, 523 (1956) (Warren, C.J., dissenting) ("Rule 21 of the Federal Rules of Criminal Procedure allows defendants to obtain changes of venue in order to get fair and impartial trial. No rule or statute

The Article III jury provision ensures the community's participation in the criminal justice system.⁶⁸ The importance of venue has long been recognized as more than merely a procedural matter; rather it is inherently based in social policy.⁶⁹

The trial is to be in the district where the offence was committed, in order that the party may have, if not the reality, at least the possibility or fiction of a right to a jury of the vicinage. A constitutional provision, without a reason for it, would be a monster. The right is one that continues to the trial; it is, indeed, a right of the trial. The right is, that the identical place, and fixed solid ground, or unstable water, where the offence was committed, shall then be within the district in which the party is to be tried.⁷⁰

In addition to providing access to the adjudicatory process, venue exposes the prosecutor to community scrutiny and the community to the prosecutor. When prosecuting MCA crimes, the Assistant United States Attorney (AUSA) stands in a very different position from the usual federal prosecutorial role where the federal government is the primary victim.⁷¹ In MCA cases, the reservation and

grants such a privilege to the United States.”); *United States v. Abbott Labs.*, 505 F.2d 565, 572 (4th Cir. 1974) (“Change of venue is a recognized device to overcome pretrial prejudicial publicity because it is not unreasonable to assume that . . . even if it receives the same degree of dissemination elsewhere, that its prejudicial effect is less than in the jurisdiction where it has special local interest. . . . Because of a defendant’s sixth amendment right to be tried in the district where the crime was allegedly committed, Rule 21, F.R.Cr.P., conditions a change of venue, inter alia, upon the defendant’s request therefor.”), *cert. denied*, 420 U.S. 990 (1975). *But see* *United States v. Fernandez*, 480 F.2d 726, 730 (2d Cir. 1973) (Under Rule 18 the United States may transfer case to a location anywhere within the federal district, “It follows *a fortiori* that when a district is not separated into division, . . . trial at any place within the district is allowable under the Sixth Amendment . . .”). Also consider the Rodney King case, where the victim was brutally beaten by Los Angeles police officers, where the defense motioned to have venue transferred out of the community directly impacted and the uprising of that community because they had no involvement in the criminal adjudication process. *See* Marvin Zalman & Maurisa Gates, *Rethinking Venue in Light of the “Rodney King” Case: An Interest Analysis*, 41 CLEV. ST. L. REV. 215, 216 (2003) (“Soon after the verdict some legal observers suggested that an earlier decision to order a change of venue from urban Los Angeles to the suburban community of Simi Valley was the critical feature in the acquittal.”) (footnote omitted).

⁶⁸ Sanjay K. Chablani, *Re-Framing the “Fair Cross-Section” Requirement*, 13 U. PA. J. CONST. L. 931, 966 (2011).

⁶⁹ *See supra* notes 61–66 and accompanying text.

⁷⁰ *United States v. Dawson*, 56 U.S. 467, 476 (1853).

⁷¹ *Compare* *Berger v. United States*, 295 U.S. 78, 88 (1935) (“The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”), *with* Mary Lou Leary, Acting Assistant Attorney General, Remarks of Mary Lou Leary, at the Native

the surrounding community is the victim and the AUSA represents a specific community, the Indian community.⁷² MCA responsibility is very different from the AUSA's role in any other case.⁷³ The prosecutorial intent needs to be based on what is best for the Indian community, including the reservation and surrounding community.⁷⁴ While this nuance in roles may not seem distinct, an AUSA may struggle to connect with what is best for the Indian community when normally AUSAs represent a much larger and multifaceted community.⁷⁵ Although the crime is technically a violation of the federal criminal code, the challenge is also to consider the Indian community's more isolated set of communal values, needs, and concerns.⁷⁶

American Issues Subcommittee Meeting; Collaborating with AUSA Tribal Liaisons: Opportunities to enhance Resources to the District 2 (Sept. 5, 2012), http://www.ojp.usdoj.gov/newsroom/speeches/2012/12_0905mleary.pdf (last visited May 10, 2013) ("Although there are some obvious differences between Washington [D.C.] and tribal communities, there's at least one big similarity: In D.C., the U.S. Attorney's Office serves as the local prosecutor – and your offices play a similar role in Indian country, at least with regard to crimes under the Major Crimes Act.").

⁷² Leary, *supra* note 71, at 2.

⁷³ See *supra* notes 71–72 and accompanying text.

⁷⁴ *United States v. Lovasco*, 431 U.S. 783, 795 n.15 (1977). The Court articulated the prosecutorial declination factors:

The decision to file criminal charges, with the awesome consequences it entails, requires consideration of a wide range of factors in addition to the strength of the Government's case, in order to determine whether prosecution would be in the public interest.

. . . .

See, e. g., *The Prosecution Function*, [ABA Project on Standards for Criminal Justice, *The Prosecution Function* s 3.9 (App. Draft 1971)] at s 3.9(b): "The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his discretion are:

- "(i) the prosecutor's reasonable doubt that the accused is in fact guilty;
- "(ii) the extent of the harm caused by the offense;
- "(iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;
- "(iv) possible improper motives of a complainant;
- "(v) reluctance of the victim to testify;
- "(vi) cooperation of the accused in the apprehension or conviction of others;
- "(vii) availability and likelihood of prosecution by another jurisdiction."

Id. at 795 n.15.

⁷⁵ *Compare*, *Ferrow v. State*, 14-02-00558-CR, 2003 WL 751007 (Tex. App. Mar. 6, 2003), *with Washburn*, *supra* note 5, at 730 (articulating the more specific focus of a local prosecutor adjudicating state crimes as compared to the community disconnect an AUSA must overcome when adjudicating federal violations of law).

⁷⁶ One article quoting an AUSA states: "If I had the rates of crime in my community that they do, I'd be mad too." Timothy Williams, *Higher Crime, but Fewer Charges on Indian Land*, N.Y. TIMES, Feb. 21, 2012, at A14, *available at* <http://www.nytimes.com/2012/02/21/us/on-indian->

E. *The Jury Selection Process*

The affected community plays a pivotal role in the adjudicatory process.⁷⁷ In the federal system the community first helps determine the charges against alleged criminals, then the community decides guilt or innocence, and in cases of extreme deprivation of freedom, the community passes judgment in sentencing. The initial role a community plays in the federal system, and in many state courts, is a grand jury.⁷⁸ The grand jury screens and evaluates evidence presented by the prosecutor to ensure it is sufficient to meet the legal standard of probable cause.⁷⁹ The grand jury also determines the “wisdom of the prosecution, community priorities, the relative culpability of the accused, and a host of other discretionary factors”⁸⁰ Later in the criminal adjudicatory process, the community, as the petit jury, plays a larger role by determining guilt or innocence. Finally, the community plays a role in the sentencing of capital crimes for which the defendant faces extreme deprivation of freedom.⁸¹ At each step of the adjudicatory process, the community plays an important role in the evaluation of the accused’s culpability and ultimate disposition.

reservations-higher-crime-and-fewer-prosecutions.html?pagewanted=all&_r=0. This perspective is of an AUSA prosecuting MCA crimes as if he were a community member chosen to represent that specific community. *Id.*

⁷⁷ See Levenson, *supra* note 62, at 1551–52, 1557 (discussing the historical role of the jury and the current role as the “conscience of the community” and the significance in receiving a jury verdict to both the defendant and the prosecutor); Kenneth W. Simons, *The Relevance of Community Values to Just Deserts: Criminal Law, Punishment Rationales, and Democracy*, 28 HOFSTRA L. REV. 635, 663 (2000) (discussing how the criminal jury practice reflects community retributive norms on a local scale but is limited in terms of representing broad retributive norms); Andrew R. Strauss, Note, *Losing Sight of the Utilitarian Forest for the Retributivist Trees: An Analysis of the Role of Public Opinion in A Utilitarian Model of Punishment*, 23 CARDOZO L. REV. 1549, 1567–69 (2002) (analyzing the judge and the jury as the trial stage implementers of punishment and impact the legislators utilitarian approach to developing the entire system of punishment).

⁷⁸ U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury”); see also *Stirone v. United States*, 361 U.S. 212, 218 (1960) (“The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge.”).

⁷⁹ Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 GEO. L.J. 1265, 1268–69 (2006); see *Moore v. Hartman*, 571 F.3d 62, 67 (D.C. Cir. 2009) (adopting the position of “several of our sister circuits . . . that a grand jury indictment is prima facie evidence of probable cause which may be rebutted”).

⁸⁰ Kuckes, *supra* note 79, at 1269.

⁸¹ The jury plays a more prominent role in capital punishment cases where the sentencing is referred to as “jury recommendation.” Wyoming, for example, requires jury involvement in sentencing of capital crimes cases. WYO. STAT. ANN. § 6-2-102 (2012) (entitled “Presentence Hearing for Murder in the First Degree; Mitigating and Aggravating Circumstances; Effect of Error in Hearing”).

Despite community involvement at every level, the petit jury embodies the classic and generally most influential aspect of community involvement in the criminal system. The Jury Selection and Service Act of 1968 (JSSA) governs jury selection.⁸² Under the JSSA, the standard for selecting petit juries⁸³ is “at random from a fair cross section of the community in the district or division wherein the court convenes.”⁸⁴ While the defendant generally asserts an unfair cross-section challenge to a jury selection process, the importance of a fair representation of the community is equally important.⁸⁵ The United States Supreme Court found the principal purpose of a jury “is to prevent government oppression by providing a ‘safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.’”⁸⁶ For this reason, “the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen.”⁸⁷ In other cases, the United States Supreme Court found juries to be “instruments of public justice,” “a body truly representative of the community,” and fundamental to the “basic concepts of a democratic society and a representative government.”⁸⁸ The United States

⁸² Jury Selection and Service Act of 1968, Pub. L. No. 90-274, 82 Stat. 54 [hereinafter JSSA] (codified as amended at 28 U.S.C. §§ 1861–1878 (2011)); *see also* D. WYO. CRIM. R. 61.8; D. WYO. CT. R., JURY PLAN.

⁸³ A jury (usually consisting of six or twelve persons) summoned and empaneled in the trial of a specific case. BLACK’S LAW DICTIONARY 934 (9th ed. 2009).

⁸⁴ 28 U.S.C. § 1861 (2011).

⁸⁵ *See* Levenson, *supra* note 62, at 1558 (1993). She argues that:

To the extent, therefore, that the aggrieved community has an interest in the outcome of the case, the community should have some type of representation in the body that decides the case. Choosing jurors with some relation to the community most affected by the crime ensures that this representation will be present and makes it more likely that the verdict will be accepted by the community that must live with its consequences.

Id. In footnote 143 she cites Timothy P. O’Neill’s article in the *Los Angeles Daily Journal*, for further support of the proposition that “[v]icinage is about more than just a defendant’s rights. It provides for a jury that will function as the conscience of the community. ‘A community cannot escape responsibility for the rendered verdict’ . . . if a verdict is unjust, ‘the community - the vicinage - cannot avoid the knowledge that it has only itself to blame.’” *Id.* at 1558 n.143 (citing Timothy P. O’Neill, *Venue for King Trial Violated Principle That a Jury Is Community’s Conscience*, L.A. DAILY J., May 13, 1992, at 6 (quoting Drew L. Kershen, Univ. of Okla. Professor of Law)).

⁸⁶ *Apodaca v. Oregon*, 406 U.S. 404, 410 (1972) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)).

⁸⁷ *Williams v. Florida*, 399 U.S. 78, 100 (1970).

⁸⁸ *Glasser v. United States*, 315 U.S. 60, 70 (1942), *superseded by* FED. R. EVID. 104(a), *as recognized in* *Bourjay v. United States*, 483 U.S. 171, 183 (1987); *Smith v. Texas*, 311 U.S. 128, 130 (1940).

Supreme Court's reverence of the jury institution elevates the jury above a mere procedural right, to the medium through which the community accesses and participates in the criminal adjudication process.⁸⁹

In *Duren v. Missouri*, the United States Supreme Court established a three-prong test to challenge the composition of a jury pool:

- (1) that the group alleged to be excluded is a "distinctive" group in the community;
- (2) that the group's 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) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.⁹⁰

Indian defendants being tried under the MCA have challenged unfair jury selection in the Eighth, Ninth, and Tenth Circuits.⁹¹ All three circuits applied the same three-prong test of *Duren*, or similar tests.⁹² The Eighth Circuit, in *United States v. Clifford*, recognized that Indians are a "distinctive group" that should be represented by a fair cross-section of the community.⁹³ However, each Indian defendant failed to show substantial unfairness to overcome the second prong's reasonableness standard.⁹⁴ The Ninth Circuit found the defendant failed to show a systematic exclusion of the group because Indians were "not treated differently; they are excluded to the same extent as all other racial and ethnic groups."⁹⁵

In the Tenth Circuit, the Indian appellant argued he had the right to have Indians on his jury.⁹⁶ As evidence of the underrepresentation, the defense offered census data showing that although the percentage of Indians in the District of

⁸⁹ See, e.g., *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) ("The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge."); *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) ("Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law *in this insistence upon community participation in the determination of guilt or innocence.*") (emphasis added). See also *supra* notes 60–88 and accompanying text.

⁹⁰ *Duren v. Missouri*, 439 U.S. 357, 363 (1979).

⁹¹ *United States v. Mitchell*, 502 F.3d 931, 950 (9th Cir. 2007); *United States v. Footracer*, 189 F.3d 1058, 1061–62 (1999), *withdrawn*, 252 F.3d 1059 (9th Cir. 2001); *United States v. Ortiz*, 1997 WL 608733, at *2 (10th Cir. Oct. 3, 1997); *United States v. Clifford*, 640 F.2d 150, 154–56 (8th Cir. 1981).

⁹² See *Duren*, 439 U.S. at 363; *supra* note 91.

⁹³ *Clifford*, 640 F.2d at 154–56.

⁹⁴ See *id.*

⁹⁵ *Footracer*, 189 F.3d at 1061–62.

⁹⁶ *Ortiz*, 1997 WL 608733 at *2.

Wyoming was only 0.71% of the population, the percentage in Fremont County, home to the reservation and where the crime occurred, was 18.48%.⁹⁷ The court displayed its discomfort with the population statistics: “With these statistics, Ortiz raises some troubling questions about the implementation of the Jury Selection and Service Act in Wyoming, which could merit careful consideration if properly raised.”⁹⁸ Ultimately the Tenth Circuit refused to overturn the conviction, because the defense failed to timely raise the Sixth Amendment issue.⁹⁹

Though declining to address the issue, the *Ortiz* court suggested that using the entire population of Wyoming as the jury vicinage in MCA adjudications might violate the Indian defendant’s Sixth Amendment right. The District of Wyoming encompasses the state’s entire population which allows the jury selection to occur from the entire population.¹⁰⁰ However, Wyoming’s federal jury selection rules provide the presiding federal judge with discretion to limit or expand the jury vicinage.¹⁰¹ Additionally, the United States Supreme Court has determined that it is not in violation of the Sixth Amendment to limit the jury vicinage.¹⁰² Therefore, Wyoming federal judges have the ability to limit the jury vicinage in MCA adjudications to accurately reflect the local community impacted—the Indian community.¹⁰³ Indeed, any of the enumerated MCA crimes committed outside of Indian Country would trigger state prosecution, and state law limits the jury vicinage to the county in which the crime occurred, a more accurate representation of the Indian community.¹⁰⁴

⁹⁷ *Id.* Currently the percentage of Indians as a part of the population of the entire district of Wyoming is 2.6% while the percentage of Indians in Fremont County alone is 20.7%. *Fremont County, Wyoming, State and County QuickFacts*, U.S. DEP’T OF COMMERCE: U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/56/56013.html> (last visited May 10, 2013).

⁹⁸ *Ortiz*, 1997 WL 608733 at *2 n.4.

⁹⁹ *Id.* Although the argument was not adjudicated due to a lack of timeliness in raising the defense, this comment presents the arguments supporting a challenge to an over-inclusive jury vicinage. *See infra* notes 170–77 and accompanying text (discussing the over-inclusive argument in further detail).

¹⁰⁰ D. WYO. CRIM. R. 61.8; D. WYO. CT. R., JURY PLAN. The Wyoming federal District jury selection plan permits jury selection from any combination of the four jury selection divisions. D. WYO. CT. R., JURY PLAN. (“The Presiding Judge may direct that names of petit jurors be drawn randomly from all divisions and/or a combination of divisions within the District.”).

¹⁰¹ *Id.*

¹⁰² *Ruthenberg v. United States*, 245 U.S. 480, 482 (1918); *accord* *United States v. Grisham*, 63 F.3d 1074, 1080 (11th Cir. 1995) (“[B]inding precedent interpreting the vicinage provision makes it clear that the Sixth Amendment provides Congress and the courts flexibility in selecting the source of the jury pool.” (citing *Ruthenberg*, 245 U.S. at 482)).

¹⁰³ *See supra* notes 100–04 and accompanying text. *See also* 18 U.S.C. §§ 1152–1153 (2011); Washburn, *supra* note 5, at 717 (“Viewed together, the Indian country definition, the Major Crimes Act, and the General Crimes Act constitute the jurisdictional apparatus for bringing criminal cases in Indian country into federal court.”).

¹⁰⁴ WYO. STAT. ANN. § 7-11-101 (2012); *Id.* § 1-11-101 (“(a) A person is competent to act as juror if he is: (i) An adult citizen of the United States who has been a resident of the state and of the county ninety (90) days before being selected and returned . . .”).

F. The Road to the Tribal Law and Order Act (TLOA)

Following the adoption of the MCA, the United States Supreme Court further restricted tribal sovereignty in *Oliphant v. Suquamish Indian Tribe*.¹⁰⁵ The defendants in *Oliphant* were non-Indian residents of the Port Madison Reservation.¹⁰⁶ Both were arrested during “Chief Seattle Days” held on the Reservation.¹⁰⁷ One was arrested for assaulting a tribal officer and resisting arrest.¹⁰⁸ The other defendant was arrested after a high-speed chase ended in a collision with a tribal officer’s vehicle.¹⁰⁹ Both were charged under the tribal code.¹¹⁰ The tribe argued it retained sovereignty to adjudicate these crimes in tribal court based on the tribe’s status as a “quasi-sovereign”¹¹¹ nation, acknowledging that although “conquered and dependent, [tribes] retain those powers of autonomous states that are neither inconsistent with their status nor expressly terminated by Congress.”¹¹² The Court emphasized imperialistic concepts of conquered Indian tribes’ dependency upon congressional grants of authority when it held: “[E]ven ignoring treaty provisions and congressional policy, Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress.”¹¹³ The Court concluded tribal courts do not *retain* criminal jurisdiction, rather such jurisdiction would have to be affirmatively granted by Congress; effectively stripping the tribal courts of any ability to prosecute crimes committed by non-Indians that directly impact Indian communities.¹¹⁴

¹⁰⁵ 435 U.S. 191 (1978), *superseded by statute*, Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646, *as recognized in* United States v. Lara, 541 U.S. 193, 205–07 (2004).

¹⁰⁶ *Id.* at 194.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *See, e.g.*, Morton v. Mancari, 417 U.S. 535, 554 (1974).

¹¹² *Oliphant*, 435 U.S. at 196.

¹¹³ *Id.* at 208. The Court made a point to question the tribal court’s ability to conform to constitutional standards of due process: “Pursuant to the Indian Civil Rights Act of 1968 . . . defendants are entitled to many of the due process protections accorded to defendants in federal or state criminal proceedings. However, the guarantees are not identical. Non-Indians, for example, are excluded from Suquamish tribal court juries.” *Id.* at 194 (citations omitted). The *Oliphant* Court justified this hesitancy in permitting tribal jurisdiction over non-Indians by relying on prior precedent that the Bill of Rights does not apply to Indian tribal governments. *Id.* at 194 nn.3–4. Furthermore:

The Indian Civil Rights Act of 1968 provides for “a trial by jury of not less than six persons,” but the tribal court is not explicitly prohibited from excluding non-Indians from the jury even where a non-Indian is being tried. In 1977, the Suquamish Tribe amended its Law and Order Code to provide that only Suquamish tribal members shall serve as jurors in tribal court.

Id. (citations omitted) (citing Talton v. Mayes, 163 U.S. 376 (1896)).

¹¹⁴ After *Oliphant*, tribal courts retained jurisdiction only over misdemeanor crimes committed in Indian Country by Indians. *See* Samuel E. Ennis, Comment, *Reaffirming Indian Tribal Court*

The recently adopted federal policy of self-governance supports the argument for refining the MCA adjudicatory processes.¹¹⁵ Furthering this notion, the Obama Administration, with Congress, created the Indian Law and Order Commission¹¹⁶ and enacted TLOA.¹¹⁷ One of the primary intentions of TLOA was to lower the crime rates on reservations.¹¹⁸ The key provision of TLOA for MCA prosecutors and federal court personnel requires AUSAs to “coordinate with applicable United States district courts regarding scheduling of Indian Country matters and holding trials or other proceedings in Indian Country.”¹¹⁹ Now more than ever, the time is ripe to foster more Indian involvement in MCA adjudications.

III. ANALYSIS

The relationship between the federal government and Indian tribes has been tainted with mutual distrust.¹²⁰ Historically, the United States Supreme Court’s emphasis on the Indians’ unwillingness to accept the criminal laws and processes of the United States promotes racist views of the Indians’ criminal justice system.¹²¹ Today, the federal adjudication process fails to effectively serve tribal needs due, in part, to a lack of involvement partially caused by the geographic and community isolation of the Indian tribes.¹²² The Department of Justice, including

Criminal Jurisdiction over Non-Indians: An Argument for A Statutory Abrogation of Oliphant, 57 UCLA L. REV. 553, 563–64 (2009) (concluding that after *Oliphant*, *Duro*, Congress’s *Duro*-fix, and the MCA, “[a]ll tribal criminal laws are completely unenforceable against non-Indians. In light of reservation demographics and the law enforcement situation, [the current] system arguably prevents tribes from maintaining public safety over their land”).

¹¹⁵ See Tribal Self-Governance Act: Policy Statement, 25 C.F.R. § 1000.4 (2013); TLOA, Pub. L. No. 111-211, 124 Stat. 2261 (2010) (codified as amended in scattered sections of 18 U.S.C., 21 U.S.C., 25 U.S.C., 28 U.S.C., and 42 U.S.C.); Washburn, *supra* note 5.

¹¹⁶ 25 U.S.C. § 2812 (2011).

¹¹⁷ TLOA, Pub. L. No. 111-211, 124 Stat. 2261 (2010) (codified as amended in scattered sections of 18 U.S.C., 21 U.S.C., 25 U.S.C., 28 U.S.C., and 42 U.S.C.).

¹¹⁸ TLOA, Pub. L. No. 111-211, § 202, 124 Stat. 2258, 2262–64 (2010) (“Findings; Purposes”).

¹¹⁹ 25 U.S.C. § 2810 (2011).

¹²⁰ See *supra* note 28; *infra* note 143 and accompanying text (discussing the distrust of the federal government in tribal criminal adjudication practices and the historically instituted distrust for the federal government).

¹²¹ See *Keeble v. United States*, 412 U.S. 205, 210 (1976). The Court stated that the adoption of the MCA reflected “that tribal remedies were either nonexistent or incompatible with principles that Congress thought should be controlling.” *Id.* Further, borrowing the language of Representative Cutcheon “If . . . an Indian commits a crime against an Indian on an Indian reservation, *there is now no law to punish the offense except, as I have said, the law of the tribe, which is just no law at all.*” *Id.* at 210–11 (emphasis added); see also *supra* notes 28–38 (discussing *Ex parte Crow Dog* and development of the MCA).

¹²² See Washburn, *supra* note 5, at 733 (“[E]ven for federal prosecutors who are sensitive to cultural differences and concerned enough to make extraordinary efforts, the sheer distance between United States Attorney’s Offices and many of the federal Indian reservations they serve present tremendous obstacles that the average violent crime prosecutor in the state system does not face.”); David Patton, *Tribal Law and Order Act of 2010: Breathing Life into the Miner’s Canary*, 47 GONZ. L. REV. 767, 779 (2011). David Patton wrote:

the United States Attorneys and the Federal Bureau of Investigation, have recently come under serious scrutiny for the increasing rates of unprosecuted MCA crimes in Indian Country.¹²³ The current administration's federal Indian policy, which favors promoting tribal self-governance, creates the ideal stage for reexamining the MCA adjudication process.¹²⁴ Modifying the venue and jury venire selection in MCA adjudications will further tribal self-governance by fostering greater Indian involvement in the MCA process.

The MCA creates a narrow application of federal jurisdiction confined by geographic characteristics of the community impacted and racial-political character of the defendant.¹²⁵ Promoting tribal self-governance in MCA adjudications can be accomplished in two ways. First, the venue for MCA adjudication needs to be in, or at least near, Indian Country.¹²⁶ With venues closer to Indian Country, the adjudication process becomes more accessible to the community directly impacted by violations of the MCA—the specific Indian tribe.¹²⁷ Second, the jury venire needs to be limited to help prevent over-inclusion of non-Indians. The current district-wide jury selection processes prevent the jury venire from accurately reflecting the community directly impacted by a MCA violation—the specific Indian tribe.¹²⁸ Indian communities continue to be hesitant to participate in a system created without their cultural, social, or moral characteristics in mind. However, greater community participation and input will ultimately result in greater ownership of the MCA adjudicatory process, which will likely develop a

Since the cases are tried in federal courthouses, often located hundreds of miles from Indian Country with mostly non-Indian juries, the cultural context of the crime must be translated and the credibility of witnesses to those in the dominant culture must be assessed. Furthermore, as outsiders to the community, federal prosecutors have various difficulties prosecuting crimes in Indian Country that may discourage them from prosecuting cases they might pursue outside of Indian Country. The crime scene, the victim, and the witnesses are often hundreds of miles from the prosecutor. As an outsider, the prosecutor may have difficulty getting witnesses to come forward or to be forthright if they do. The prosecutor rarely has a sense of the tribal values, history, or language in which the crime occurred.

Id. (internal citations omitted).

¹²³ See *supra* notes 1–3 and accompanying text (discussing *New York Times* articles and law reviews criticizing Department of Justice efforts to reduce crime rates and prosecute crimes on reservations).

¹²⁴ See *supra* notes 115–19 and accompanying text (discussing the TLOA policy and self-governance policy).

¹²⁵ See *supra* notes 32–39 (discussing the three requirements that trigger federal jurisdiction under the MCA).

¹²⁶ For example, “near” in the context of Wyoming would include limiting venue and jury venire selection to the Lander-Riverton area.

¹²⁷ See *infra* notes 151–64 and accompanying text.

¹²⁸ See *infra* notes 165–86 (discussing narrowing the jury selection vicinage).

feeling and belief of tribal self-governance.¹²⁹ Under the present self-governance policies, it is a perfect time to involve Indians in the MCA adjudicatory process.

A. *Practical Logistic Problems*

1. Bringing the Mountain to Mohammad¹³⁰

For MCA adjudications, a federal courthouse near the affected reservation represents the missing centerpiece to the federal criminal justice process. Particularly in large western states, like Wyoming, due to the geography and low population density, there is often a great distance between towns. In a MCA prosecution in the District of Wyoming, jurors and witnesses must travel long distances to comply with subpoenas and participate in court proceedings.¹³¹ Other members of the community where the crime has been committed are far removed from the actual proceedings.¹³² These great distances create and perpetuate the social separation between the affected Indian tribe and the federal adjudicative process.¹³³ For example, the abandonment of the Lander courthouse is one of the primary obstacles to holding MCA trials in or near Indian Country.¹³⁴ Nevertheless, the federal government already expends considerable tax dollars

¹²⁹ See *infra* notes 141–50 (discussing tribal resentment).

¹³⁰ In a chapter entitled “Of Boldness” Francis Bacon wrote:

Mahomet [or Mohammed] made the people believe that he would call a hill to him, and from the top of it offer up his prayers for the observers of his law. The people assembled: Mahomet called the hill to come to him again and again: and when the hill stood still, he was never a whit abashed, but said, “If the hill will not come to Mahomet, Mahomet will go to the hill.”

Francis Bacon, *THE ESSAYES OR COUNSELS, CIVILL AND MORALL* 64 (1625).

¹³¹ See *Trip Calculator*, *supra* note 43 (calculating the distances between Lander and Cheyenne and Lander and Casper at 272 and 145 respectively). Furthermore, Lander represents only the southern border of the expansive Wind River Reservation which covers over 2.2 million acres north of Lander. See generally *Wind River Reservation*, WYO.’S WIND RIVER COUNTRY, <http://www.windriver.org/info/communities/reservation.php> (last visited May 10, 2013).

¹³² See *Wind River Reservation*, *supra* note 131 (referencing that many of the Shoshone and Northern Arapaho living in the Winder River Reservation are spread throughout its 2.2 million acre expanse).

¹³³ See generally *Trip Calculator*, *supra* note 43 (calculating the distance between the Wind River Reservation and the court houses in Cheyenne and Casper at 272 and 145 respectively). See also *supra* notes 42–55 and accompanying text (discussing the geography of the Wyoming Federal District).

¹³⁴ As with most governmental closures and cuts, the primary motivator for closing the Lander courthouse can be attributed to an inability to meet the financial commitment to maintain the building. See *Feds Consider closing 60 Court Facilities in 29 States*, NEWSMAX, Mar. 22, 2012, <http://www.newsmax.com/%20Newsfront/federal-courthouse-closings-budget/2012/03/22/id/433585>.

on transporting witnesses, agents, United States Attorney's staff, and jurors to Cheyenne or Casper for proceedings arising from the Wind River Reservation, while also spending money to maintain many federal agencies in Lander.¹³⁵

Consider a hypothetical: Two MCA trials are scheduled for the same week in Cheyenne. More than thirty witnesses for these two cases are congregated in the halls; almost all are either from the Wind River Reservation or the surrounding communities of Riverton and Lander. Officers of the Wind River Police Department are present because of their involvement in one or both of the cases; the County Coroner and one of the deputies is present because one case involves a death; two of the three emergency room physicians from the two hospitals and several EMTs who had been involved in the first response are pulled from their posts. The absence of vital Fremont County emergency and enforcement personnel strains the resources in the local community.¹³⁶ Many Indians are in attendance as victims, victims' relatives, witnesses, or defendants' friends or relatives. Generally, the only people involved in the cases that are not from the Wind River Reservation, or from the surrounding communities, are the judge and court personnel. Essentially, large and vital parts of the Indian community are transplanted to a distant locale, at the expense of the federal government—only to adjudicate a crime that occurred within the Indian community. Of course, reopening a federal courthouse in Lander would require additional funds from a strained federal budget, but in light of increasing Indian self-government and developments such as TLOA, the federal government should reexamine the financial strains in comparison to the effective pursuit of justice to an entire community.

Many logistical issues arise in transporting MCA witnesses and victims to Cheyenne or Casper, particularly because of the standard of living of most

¹³⁵ See *infra* note 155 (discussing the amount of reimbursement per witness for expenses associated with travel and participation in trial). See also Washburn, *supra* note 5, at 768–69 (articulating the necessity for federal assistance in facilitating meaningful community participation in MCA adjudication). One scholar noted:

Consider that witnesses who appear in federal court by subpoena are routinely reimbursed for travel expenses, provided hotel rooms, and paid witness fees, even though the law requires them to appear. In other words, though attendance is mandatory and absence is punishable by contempt proceedings, the federal government subsidizes their appearance. While such payments may well be necessary to vindicate the defendant's Fifth Amendment right to due process and Sixth Amendment right to present witnesses, such payments seem to concede that witnesses sometimes cannot appear without federal assistance. Given the poverty on Indian reservations, it is indisputable that members of the Indian community ordinarily might also be unable to attend federal criminal trials absent financial assistance.

Id.

¹³⁶ In Cheyenne, and perhaps in Casper, they will probably have to stay overnight. At a trial in Lander they would never be more than an hour away from a local emergency.

Indians.¹³⁷ With high rates of poverty on the Wind River Reservation, as is true on most reservations, transportation may not be readily accessible.¹³⁸ Often, the vehicles that are accessible are in no condition to make a six hundred-mile trip.¹³⁹ Additionally, once they are in Cheyenne, in an unfamiliar environment and without the support of their community, witnesses and victims may lose the ability, or courage, to recall events and accurately relay critical testimony.¹⁴⁰ These obstacles can be a significant factor in the AUSA's decision to not prosecute a MCA case.

2. Tribal Resentment

An additional concern arising out of the over-inclusion of non-Indians in MCA adjudication is overcoming the animosity between Indians and non-Indians. The history behind the MCA is controversial. The historical treatment of tribes indicates Indian communities are segregated from federal adjudicatory

¹³⁷ Ethan Freedman, *Poverty Rates Strikingly High Among Indigenous Populations*, INTER PRESS SERV. (June 20, 2012), <http://www.ipsnews.net/2012/06/poverty-rates-strikingly-high-among-indigenous-populations/> (last visited Mar. 22, 2013) (“The latest statistics from the U.S. Census Bureau put Native American poverty levels at 25.3 percent. But in 2010, they found that comparatively, only 15.1 percent of the total population was beneath the poverty line.”); *see also* Tom Rodgers, *Native American Poverty: A Challenge Too Often Ignored*, SPOTLIGHT ON POVERTY AND OPPORTUNITY, <http://www.spotlightonpoverty.org/ExclusiveCommentary.aspx?id=0fe5c04e-fdbf-4718-980c-0373ba823da7> (last visited Mar. 22, 2013). Rodgers wrote:

According to the U.S. Census Bureau, these Americans earn a median annual income of \$33,627. One in every four (25.3 percent) lives in poverty and nearly a third (29.9 percent) are without health insurance coverage Only 36 percent of males in high-poverty Native American communities have full-time, year-round employment. On the Blackfoot Reservation in Montana, for example, the annual unemployment rate is 69 percent. The national unemployment rate at the very peak of the Great Depression was around 25 percent.

Id.

¹³⁸ Rodgers, *supra* note 137.

¹³⁹ *See* Maureen Hensley-Quinn and Kelly Shawn, *American Indian Transportation: Issues and Successful Models*, 5, 7 available at http://www.ctaa.org/webmodules/webarticles/articlefiles/American_Indian_RTAP_Brief.pdf (“Many tribal members have to rely on friends and neighbors for rides. . .” and arguing that reservations are in need of tribal transportation systems because “distances are great and personal transportation is not a reliable or viable option”); Meizhu Lui, *Stalling the Dream*, COMMONDREAMS.ORG, <http://www.commondreams.org/views06/0111-20.htm>. (discussing the racial disparities in car ownership in counties across the United States, in particular in Orleans Parish, New Orleans, LA twenty-six percent of Native Americans are without vehicles as compared to only fifteen percent of Whites).

¹⁴⁰ These cases consider trials held within the community affected by crime and as discussed MCA adjudications do not occur within or near the affected community. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 578 (1980) (“[A] trial courtroom also is a public place where the people generally . . . have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place.”); Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 383 (1979) (“Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to

interest.¹⁴¹ For example, from the signing and ratification of the 1868 Treaty, the Wind River Reservation community has been culturally and geographically separate from the federal government's adjudicatory processes with the exception of MCA proceedings. Considering the historical treatment of Indian tribes, it is not surprising that the Indian community lacks faith or interest in participating in the federal criminal adjudicatory process.¹⁴² The animosity imbedded in the federal-tribal relationship may be a cause of the tribes' unwillingness to participate in the federal adjudicatory process.¹⁴³

Another practical concern arising from the jury selection process is the method of compiling names for jury selection from state voter registration lists.¹⁴⁴ This process completely ignores the general distrust between the Indian community and state governments. *United States v. Kagama*, which confirmed the constitutionality of the MCA, acknowledges the basic conflict of the Indians owing no allegiance to the states, and the states providing no assistance or protection to the Indians.¹⁴⁵ This distrust is historically imbedded.¹⁴⁶ Consequently, tribal members have had

perform their duties more conscientiously, and generally give the public an opportunity to observe the judicial system.”) (citing *Estes v. Texas*, 381 U.S. 532, 583 (Warren, C. J., concurring)). Thus, witnesses lose these benefits of community access.

¹⁴¹ See *supra* notes 37–38 and accompanying text.

¹⁴² See *supra* notes 37–38 and accompanying text.

¹⁴³ Washburn, *supra* note 5, at 735. Washburn noted,

[The federal government's] reputation in Indian country has been forged, in part, by the nineteenth-century cavalry officers who committed atrocious actions, such as murder, and the Indian agents who committed atrocious omissions, such as the withholding of treaty-guaranteed food and supplies in winter. Its reputation was formed by the actions of government officials who used gifts of smallpox-infected blankets to destroy tribal communities and by federal officials who unilaterally violated treaties and encouraged private actors to do the same, and, in more recent years, the federal trustee that lost track of the records of millions and perhaps billions of dollars of Indian assets held by the Department of the Interior in tribal accounts and Individual Indian Money accounts.

Id.; see also *State v. Williams*, 484 P.2d 1167, 1169 (Wash. Ct. App. 1971) (charging Indian parents with manslaughter after failing to obtain medical treatment for their seventeen-month-old son for fear that the baby would be taken from them); *supra* note 28 and accompanying (discussing Congress's perception that tribal courts have insufficient and uncivilized criminal processes).

¹⁴⁴ While most states utilize voter registration rolls, some utilize driver's licenses as well. See generally, e.g., GA. CODE ANN. §15-12-40.1 (2012); N.M. STAT. ANN. § 38-5-3 (2012).

¹⁴⁵ See generally 118 U.S. 375 (1886). For example:

[Tribes] were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the state within whose limits they resided.

Id. 381–82.

¹⁴⁶ See, e.g., *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832).

little interest in participating in state elections.¹⁴⁷ Often tribal members are not registered voters and, therefore, are not included in the jury selection process.¹⁴⁸ Since selection pools are based on voter registration in Wyoming, the inherent distrust between the tribal members and the state government impedes tribal members' participation in the jury selection process. Assistant Secretary of the Interior for Indian Affairs Washburn points out: "[T]o some degree the very purpose of an Indian reservation is to provide a refuge from state governments. Given this . . . it is curious that federal courts would look to state voter rolls to find jurors. It undermines the very nature of a reservation as a sanctuary from state authority."¹⁴⁹

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.¹⁵⁰ 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.

B. Solving the Inconsistencies and Involving the Community

Locating criminal trials far from the affected community creates readily apparent problems. In the MCA context, harmonizing the jury selection process and venue assignment with the MCA's geographic and racial-political constraints, will involve and empower Indian communities—furthering the ultimate goal of tribal self-governance.

1. Venue: Emphasizing the Role of Community Representation

The Wind River Reservation is within the District of Wyoming, however, hundreds of miles separate the trial from the Indian community in which the crime occurred. In many western states, this is a common fact of MCA

¹⁴⁷ See generally Michael Frost, *With Tribal Interests at Stake, Native Americans Ramp Up Voter Recruitment*, <http://thenewvoters.news21.com/young/native-american-voter-recruitment> (last visited on May 5, 2013) (discussing the history of low Native American voter turn out and the work being done to increase Native American voter turn out); Washburn, *supra* note 5 at 748, 756–57 (discussing the reasons for low tribal interest and participation in the state electoral process).

¹⁴⁸ Meteor Blades, *American Indians organize largest Get Out the Vote campaign in history. You can help make it happen*, DAILY KOS, <http://www.dailykos.com/story/2012/07/02/1102913/-American-Indians-organize-largest-get-out-the-vote-campaign-in-history-You-can-help-make-it-happen#> (last visited May 5, 2013) (“Only 40 percent of eligible American Indians were registered to vote in 2008.”).

¹⁴⁹ Washburn, *supra* note 143, at 757.

¹⁵⁰ See *id.* at 748, 761 (discussing the reasons state voter registration alone will not include the Indian community and that the JSSA permits the inclusion of tribal voter registration rolls).

adjudications.¹⁵¹ By moving the adjudicatory venue and holding the MCA proceedings closer to Indian Country, the Indian community is provided greater access to the adjudicatory process and the AUSA may have greater interaction with and feedback from the Indian and surrounding community.

The AUSA should be more focused on the Indian community needs, in a way similar to a local or county prosecutor, rather than focused on the wider perspective of the District of Wyoming.¹⁵² Accordingly, an AUSA may struggle

¹⁵¹ Advocates for the Violence Against Women Act, which recently passed, articulate the primary need to provide tribal courts with jurisdiction over crimes committed in Indian Country. Gwen Moore, a Democrat from Wisconsin, stated during the floor debate concerning the Violence Against Women Act:

REPRESENTATIVE GWEN MOORE: I would say as Sojourner Truth would say: Ain't they women? They deserve protections. We talk about the constitutional rights. Don't women on tribal lands deserve the constitutional right of equal protection, and not to be raped and battered and beaten and dragged back on to Native lands because they know they can be raped with impunity? Ain't they women?

CHANG: Moore has been an emotional supporter for the Senate's VAWA bill and has even shared her own story about being a rape survivor. What she's talking about here is a section in the more expansive Senate bill that lets tribal courts exercise jurisdiction over non-Native American abusers. Right now, cases involving tribal victims and non-tribal suspects have to go to state and federal courts. And that can be a real problem.

Lisalyn Jacobs of Legal Momentum, a women's advocacy group, says cases often go stale when state or federal prosecutors have to drive hours to get to crime scenes on remote Indian reservations.

LISALYN JACOBS: At which point, your witnesses are not there. Your victim may or may not be there.

House Passes Expansion of Violence Against Women Act, PUBLIC RADIO EAST, available at <http://publicradioeast.org/post/house-passes-expansion-violence-against-women-act> (last visited on May 10, 2013). Colorado faces the same geographic challenges Wyoming faces when it comes to the proximity of the capital, Denver, and the location of the reservations for the Southern Ute and the Ute Mountain Ute tribes, Durango. Durango is located 336.82 miles from Denver. Last year when the Durango federal courthouse was on the list of possible federal courthouse closures, many emphasized the detriment such a closure would cause. In particular, Senator Udall, opposing the closure, stated:

"I am particularly concerned about closing the court because the only two Native American tribes in Colorado reside in this region," Udall said. "The unique relationship that these important communities have with the federal government makes continued access to the federal court system paramount." Driving to the federal court in Denver takes a day and is a particularly taxing experience in winter, Udall said.

Dale Rodebaugh, *Udall Opposes Local Federal Court Closure: Durango location is convenient for Ute tribes*, THE DURANGO HERALD, Apr. 16, 2012, available at <http://durangoherald.com/article/20120417/NEWS01/704179934/-1/s>.

¹⁵² See, e.g., *Ferrow v. State*, 14-02-00558-CR, 2003 WL 751007 (Tex. App. Mar. 6, 2003) (stating in his opening statement that as a prosecutor he represents "People that you [the jury] know, your friends, and your family We represent the laws of our State and the community that you live in. . . . Actually, the truth of the matter is Article 2.01 of the Code of Criminal Procedure says the job of the prosecutor is not to get a conviction-did you guys know that? It's to see that justice is done"); *People v. Herr*, 600 N.Y.S.2d 903, 907 (Sup. Ct. 1993), *aff'd*, 203 A.D.2d 927 (1994),

to understand the morals and values of the Indian community because of the geographical distance and cultural differences between the reservation and their own community.¹⁵³ From a retributivist perspective, outsiders to the Indian community often fail to fully comprehend the weight of the harm the defendant inflicted upon the Indian community.¹⁵⁴ Holding court closer to Indian Country provides AUSAs and court personnel access to the affected Indian communities and more importantly provides the Indian community access to the adjudication process. Furthermore, focusing on the national interest furthers over-inclusion because the focus is on the entire United States district's morals and values rather than on the specific morals and values of the impacted Indian community. In MCA adjudications, the AUSA should see himself or herself in a role similar to a county prosecutor—essentially, representing the narrow affected community. Focusing on the affected Indian community would prevent broad and varying national considerations from diluting the prosecution's goals and would help concentrate the AUSA's work on the needs of the community directly involved.

Additionally, venues closer to the impacted community, generally ensures witnesses do not have to be transported vast distances. As referenced above, the statute establishing the District of Wyoming states that court “shall” be held in Lander, *inter alia*.¹⁵⁵ Reading this statute in light of Rule 18 giving “due regard for the convenience . . . any victim, and the witnesses, and the prompt administration of justice,” would seem to make the answer obvious—MCA trials should be held

aff'd, 658 N.E.2d 1032 (1995) (determining the application of an Ethics Committee Opinion the court found that local prosecutors are “manifestly, actually, and by all appearances, representatives of the local municipalities which employ them”); *Sullivan v. State*, 636 A.2d 931, 939–40 (Del. 1994) (holding that victim impact evidence as presented by the local prosecutor to show the “unique loss” and impact on the society, community, family and friends of the victim that was caused by the harm or loss of a victim).

¹⁵³ Washburn, *supra* note 5, at 730. Assistant Secretary of the Interior for Indian Affairs Washburn articulates the community disconnect that AUSAs experience without community access to the trial process, even when geographic proximity is not an issue:

The federal prosecutor's lack of membership in the Indian country community is not the only obstacle she will face in intuiting community values. First, she is not present on a daily basis within the community to participate in ongoing communications about community values and mores. She will not know, firsthand, what the community is talking about or concerned about. Second, since many Indian communities are closed and suspicious of outsiders, it is unrealistic to believe that they will easily confide in a federal prosecutor about matters that are important to them.

Id. While the United States Attorneys have an office in Lander, Wyoming, without exposure to the entire adjudicatory process the community continues to be disconnected. *See id.*

¹⁵⁴ See Ronen Perry, *The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory*, 73 TENN. L. REV. 177, 180–83 (2006).

¹⁵⁵ 28 U.S.C. § 131 (2011). Convenience to those involved, e.g., the attorneys, witnesses, victims, and defendant, would likely be increased if they did not have to travel 150 to 300 miles. According to Title 28 section 1821 of the United States Code, each federal witness is entitled to *per diem*, mileage and subsistence compensation. *Id.* § 1821.

on or near the Wind River Reservation.¹⁵⁶ The local criminal rules for the District of Wyoming specifically provide for special court sessions in Lander.¹⁵⁷ Not only does holding court in Lander make sense for accommodation of witnesses and victims, but also 28 U.S.C. § 131 arguably requires it.¹⁵⁸

Shifting venue and jury venire to reflect the MCA's geographical and racial-political aspects furthers the more recently adopted Federal Indian policy of self-governance.¹⁵⁹ Since the founding of the United States, the general notion of self-governance existed in the criminal adjudication process.¹⁶⁰ Juries form the

Referring back to the hypothetical above, each of the witnesses involved including the emergency response and hospital staff would receive travel expense, subsistence and per diem. *See supra* note 136 and accompanying text. Per diem currently for Cheyenne, Wyoming is \$77 per day and meals and incidental expense is \$46 per day. U.S. GEN. SERVS. ADMIN., TRAVEL AND RELOCATION POLICY, available at <http://www.gsa.gov/portal/content/100715> (last reviewed Apr. 16, 2013). The mileage reimbursement for use of a privately owned vehicle approved for use, which is the situation discussed in this article, is \$.565 per mile. *Id.* Round-trip from Lander to Cheyenne is 545.32 miles and round-trip from Lander to Casper is 291.08 miles. This adds on an additional \$164.46 or \$308.11 per witness to get to the trial. Alternatively, if the judge, AUSA involved, investigator, and court clerk were required to travel to Lander, the federal government would presumably provide a fleet vehicle, which is solely the reimbursement for gas used, or if a private vehicle is used when a government vehicle is available reimbursement is at a rate of \$.24 per mile. *Id.* Outside of the MCA context, in the past proposed federal courthouse closures on the basis of budgetary savings has faced significant pushback. For example, Judge J. Leon Holmes, the chief federal judge of the Eastern District of Arkansas, argued that:

[C]losing court facilities wouldn't make a significant reduction in the federal budget. "If the federal courts close their facilities in these places, the money will quit going from one pocket of the federal government to another pocket of the federal government, but little or no savings to the taxpayers will be seen," Holmes wrote in a letter dated Feb. 23 and sent to local bar associations. "Instead, the taxpayers will be forced to travel longer distances to appear in court as parties, witnesses, or jurors."

Shane Benjamin, *Feds consider closing court sites, including in Durango*, THE DURANGO HERALD, Mar. 23, 2012, available at <http://durangoherald.com/article/20120324/NEWS01/703249974/-1/News01/Feds-consider-closing-court-sites-including-in-Durango>.

¹⁵⁶ See FED. R. CRIM. P. 18 (2012).

¹⁵⁷ D. WYO. CRIM. R. 18.1. The local rule requires:

The Court . . . shall hold special session of court in Sheridan, Lander, Evanston and Jackson, Wyoming, at such times as the judicial workload of the court may warrant. The Court will consider holding sessions of Court in other Wyoming cities for the convenience of litigants and their witnesses, where counsel have arranged for the temporary use of an appropriate State courtroom.

Id. (emphasis added).

¹⁵⁸ 28 U.S.C. § 131 (2011) ("Wyoming and those portions of Yellowstone National Park situated in Montana and Idaho constitute one judicial district. Court shall be held at Casper, Cheyenne, Evanston, Lander, Jackson, and Sheridan.") (emphasis added).

¹⁵⁹ TLOA, Pub. L. No. 111-211, 124 Stat. 2261 (2010) (codified as amended in scattered sections of 18 U.S.C., 21 U.S.C., 25 U.S.C., 28 U.S.C., and 42 U.S.C.); see also Washburn, *supra* note 5, at 714–15 (discussing the shift in federal Indian policy in recent years).

¹⁶⁰ See *supra* notes 61–68 (discussing the framers consideration of local vicinage for jury selection).

primary component of criminal self-governance, but venue, often entwined in the concept of vicinage, plays a significant role.¹⁶¹ Assistant Secretary Washburn provides a compelling reason for holding trial in the community in which the crime is committed: By affording the affected community the opportunity to participate in a process of government, this will provide an experience fostering a respect for law.¹⁶² By building bonds of trust in the federal system of government, the tribes are empowered as a community, to become more involved in this process.

In light of the statutes and policy mentioned above, the courts and the Department of Justice should hold MCA trials in Lander.¹⁶³ The remaining issue is then administrative—the revival of the Lander federal courthouse or the acquisition of a suitable alternative. There will be certain difficulties to overcome—funding the courthouse, etc.—but these difficulties do not necessarily limit what *should* be done. In addition to holding trial in the impacted community, selecting from a limited jury pool reflective of the *locus delicti*¹⁶⁴ of the criminal act would further align the MCA adjudicatory process with the policies of criminal adjudicatory process and the policy of Indian self-governance.

2. Jury Selection: Appropriately Limiting the Bounds of the Jury Vicinage

Community involvement in juries instills a sense of self-governance by providing an opportunity for participation in an inherently democratic process.¹⁶⁵

[T]he jury was an essential democratic institution because it was a means by which citizens could engage in self-government We find corroboration of this public law function in the discussion of criminal cases, in which juries have traditionally been thought of primarily as important guarantors of individual rights. The grand jury, in particular, was intended to operate as an organ for democratic self-government.¹⁶⁶

¹⁶¹ See *supra* notes 65–70 and accompanying text (discussing venue).

¹⁶² Washburn, *supra* note 5, at 743 (“Jury service preserves the democratic element of the law, as it guards the right of parties and ensures continued acceptance of the laws by all the people. It affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for law.”).

¹⁶³ See *supra* notes 154–59 and accompanying text.

¹⁶⁴ Defined as “[t]he place where an offense was committed; the place where the last event necessary to make the actor liable occurred.” BLACK’S LAW DICTIONARY 1025 (9th ed. 2009).

¹⁶⁵ Sanjay K. Chhablani, *Re-Framing the ‘Fair Cross-Section’ Requirement*, 13 U. PA. J. CONST. L. 931, 966 (2011).

¹⁶⁶ Vikram Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 218–19.

The JSSA is one of the federal statutes that apply in MCA adjudication.¹⁶⁷ In Wyoming, the federal district is the entire state.¹⁶⁸ This is a practical concern for MCA adjudications, because citizens from the entire state are considered in the selection pool. Therefore, it is highly unlikely for a jury of peers to represent the unique and distinct community of the Wind River Reservation and its surrounding communities. If the community role as a juror is truly considered fundamental to the application of law, the direct involvement of the specific community harmed by a violation of the MCA is essential. This requires viewing the MCA's requirements of criminal adjudication and other adjudicatory processes in harmony. Notably, the concept of harmonizing legislation with enforcement is not a novel suggestion.¹⁶⁹

At the outset, the argument for narrowing the jury selection vicinage rests on the premise that focusing on an under-inclusion argument is “failing to focus on the proper legal principles.”¹⁷⁰ Rather than focusing on an under-inclusion argument, established in jury selection case law, it is more accurate to view the current jury selection process in MCA adjudications as over-inclusive. In MCA proceedings, non-Indians are *over-represented* because the MCA does not apply to non-Indians and victims outside Indian Country, and a district-wide vicinage captures a broader geographic scope than the scope to which the MCA applies—a crime committed in Indian Country.¹⁷¹ The broad vicinage over-includes individuals who are not members of the impacted community, not subject to the MCA, and significantly dilutes the opportunity for Indian community members to participate in the criminal adjudication process.¹⁷² Thus, when the vicinage is narrowed to the Indian Country community the over-inclusion of the non-Indian community disappears.¹⁷³

¹⁶⁷ 28 U.S.C. § 1861 (2011).

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. (emphasis added).

¹⁶⁸ *See supra* note 100.

¹⁶⁹ “[T]he jury is above all a political institution . . . [and] should be made to harmonize with the other laws establishing that sovereignty. . . .” ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* APP. I 702 (J. P. Mayer & Max Lerner eds. & George Lawrence trans., 1966).

¹⁷⁰ Washburn, *supra* note 5, at 757–60.

¹⁷¹ *See supra* notes 36–37 and accompanying text.

¹⁷² *See supra* notes 36–37 and accompanying text.

¹⁷³ *See supra* notes 99–104 and accompanying text.

If a court determined the JSSA's definition to be an over-inclusive vicinage, it would be permissible to establish a narrower definition—one within the confines of the MCA.¹⁷⁴ The United States Supreme Court has held the Sixth Amendment does not require the jury be drawn from the whole district.¹⁷⁵ Legislation, and in some cases legislative ratification, establishes the reservation and designates federally recognized tribes.¹⁷⁶ 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.¹⁷⁷ 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.

Specifically, the District of Wyoming has implemented a jury selection plan permitting the presiding judge to specifically include names from Fremont County in a division for petit jury selection.¹⁷⁸ Using only this portion of the Jury Selection Plan for MCA cases would not create an unfair cross-section by excluding other Wyoming citizens from across the state, since the MCA itself does not apply to non-Indians and those outside of the Indian Country community.¹⁷⁹ In order to effectively include Indians in the adjudicative process, potential jurors should be limited to the impacted community.¹⁸⁰ To make the jury pool more representative of the affected community, the court could chose to draw names only from Fremont County.¹⁸¹

Narrowing the MCA jury vicinage, can support tribal self-governance by ensuring the affected Indian community will participate in the criminal adjudicatory process. It is essential that individuals sitting on juries be subject

¹⁷⁴ See *supra* note 102 and accompanying text.

¹⁷⁵ *Ruthenberg v. United States*, 245 U.S. 480, 482 (1918).

¹⁷⁶ See *supra* notes 33, 50 and accompanying text.

¹⁷⁷ 18 U.S.C. § 1153 (2011).

¹⁷⁸ D. WYO. CT. R., JURY PLAN. (“(b) *Fremont County*. The Wind River Indian Reservation is located in Fremont County, Wyoming. As a result, Fremont County has a high concentration of Native American population. Fremont County is designated as a fourth division within the District of Wyoming. The presiding Judge may direct that names from Fremont County Division be included in a division or a combination of divisions within the District for petit jury selection.”); D. WYO. CRIM. R. 61.8.

¹⁷⁹ See *supra* notes 77–104 and accompanying text (discussing the jury selection process and common judicial challenges to it).

¹⁸⁰ See *supra* notes 57–59 and accompanying text.

¹⁸¹ See *supra* notes 151–63 and accompanying text.

to the same laws to foster a community's sense of self-governance.¹⁸² The process allows the affected community, through the judgment of a jury, to establish the standards by which they as community members will live, and promotes its right to self-governance by deciding who will receive punishment. By harmonizing the geographical and racial-political confines of the MCA with the jury selection and trial venue process, the policy goal of community self-governance will be furthered.¹⁸³

The MCA creates jurisdiction uniquely based on the racial-political classification of the defendant and *locus delicti* geographical classification.¹⁸⁴ The practical effect of district wide jury selection under the MCA becomes clear when considered in conjunction with the basic tenet that a jury is to reflect a group of peers holding the same legal status in society.¹⁸⁵ Adjudication for a violation of the MCA is different because the prosecution not only has to show all elements of the criminal violation, but also must initially prove that the defendant is an Indian and the crime was committed in Indian Country. This Indian—non-Indian difference divorces the definition of peer from the concept of jury when the selection pool includes members not subject to the same law.¹⁸⁶ In a MCA adjudication, the defendant and all the non-Indian jury members are different in one very significant respect: the defendant is being tried for a crime that the majority of jury members could never be charged with under the MCA because they are non-Indians. In summary, a jury of Indian peers is not trying Indian defendants prosecuted under the MCA, and limiting the jury selection process to a specific geographic area would create such a jury.

IV. CONCLUSION

From the prosecution's prospective, building trust and understanding in the federal adjudicatory process by harmonizing the MCA with adjudicatory procedures, especially jury selection, may help strengthen Indian cooperation in investigating and prosecuting major crimes. The AUSA needs to realize when

¹⁸² Letters From the Federal Framer (IV), in 2 THE COMPLETE ANTI-FEDERALIST 245, 249–50 (Herbert V. Storing ed., 1981) (“The trial by jury in the judicial department, and the collection of the people by their representatives in the legislature . . . have procured for them, in this country, their true proportion of influence, and the wisest and most fit means of protecting themselves in the community.”).

¹⁸³ See generally Exec. Order No. 11399, 33 Fed. Reg. 4245 (Mar. 6, 1968).

¹⁸⁴ See *supra* notes 29–41 and accompanying text (discussing MCA requirements for federal criminal jurisdiction).

¹⁸⁵ *Strauder v. West Virginia*, 100 U.S. 303, 308–09 (1879) (“The very idea of a jury is a body of men 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.”), *abrogated by* *Taylor v. Louisiana*, 419 U.S. 522 (1975).

¹⁸⁶ See *supra* notes 165–69 and accompanying text (outlining jury selection and its requirements).

prosecuting a crime under the MCA, the Indian community is the community he or she is representing. Involvement of the impacted community—the Indian community—in MCA prosecutions is a necessary step toward mitigating mutual distrust for a criminal adjudicatory system created by non-Indians, yet imposed upon the Indians without their input or consent. One possible solution is holding court closer to the Indian Country community affected by the alleged offence. This solution not only creates a sense of community justice and self-governance, but it integrates the Indian community into the federal criminal adjudicatory process. Another solution is reevaluating the jury selection process to refine the vicinage to reflect a better representative group of peers (i.e., by reducing the number of non-Indians in the vicinage).

These solutions discussed show the Indian community that these crimes are being prosecuted and the AUSAs are representing their community. Until the federal government is prepared to hand over the power to the tribal justice systems to fully prosecute these major crimes, the best the government can do is to make the current system of justice harmonious with the underlying policies and with the jurisdiction created by the MCA.

But there is one way in this country in which all men are created equal—there is one human institution that makes a pauper the equal of a Rockefeller, the stupid man the equal of an Einstein, and the ignorant man the equal of any college president. That institution, gentlemen, is a court. It can be the Supreme Court of the United States or the humblest J.P. court in the land, or this honorable court which you serve. Our courts have their faults, as does any human institution, but in this country our courts are the great levelers, and in our courts all men are created equal.

—Harper Lee, *To Kill a Mockingbird*