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An Unfair Cross Section: Federal Jurisdiction for Indian Country Crimes Dismantles Jury Community Conscience

Alana Paris*

ABSTRACT

Under the Sixth Amendment to the United States Constitution, federal jury pools must reflect a fair cross section of the community in which a crime is prosecuted and from which no distinct group in the community is excluded. The community in which a crime is prosecuted varies widely in Indian country based on legislative reforms enacted by Congress to strip indigenous populations of their inherent sovereignty. Under the Major Crimes Act, the federal government has the right to adjudicate all serious crimes committed by one American Indian against another American Indian or non-Indian within Indian country. American Indian defendants under the Major Crimes Act are thus placed in federal district court for a crime that would ordinarily be tried in a local courtroom with a local jury. Instead, the American Indian defendant will receive a jury drawn from the entire federal district, a jury that, by its constitutional guarantee, will reflect a fair cross section of the federal community—one that is mostly, if not entirely, white and non-Indian. This framework is unfair for American Indians. Congress justifies this unique jurisdictional framework by citing the federal government’s own historically exceptional treatment of American Indians as dependent sovereigns, supposedly meant to protect American Indians’ interests. Following that same logic, the federal government should enact legislation to target the fair cross section standard as it applies to American Indians and protect American Indians’ interests in self-governance. Assuming the federal government insists on retaining its jurisdiction in Major Crimes Act cases, it should create a procedural safeguard in cases where the defendant is placed in federal district court based on their designation as an American Indian. This safeguard should ensure that American Indian defendants receive a jury with an indigenous community conscience by locking the number of American Indian jurors that appear on a federal jury trial to at least six, or redefining “community” to mean “Indian country.”

INTRODUCTION

The current standard of United States constitutional law requires a random selection of potential jurors from a fair cross section of the community for the creation of an impartial

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jury.¹ Yet this standard—set forth in *Duren v. Missouri*² and *Berghuis v. Smith*³—fails to acknowledge that many defendants belong to distinct but small groups in the population that will not appear in any substantial numbers on a federal jury venire and thus a federal jury. The standard’s failure is particularly apparent for “American Indians”⁴ who live in “Indian country,”⁵ a distinct but small subsection of the United States population, who are subject to a jurisdictional framework distorted by a federal government and Supreme Court with a history of animus toward indigenous populations.⁶ Congress should consider adopting a new standard in these Indian country cases due to the federal government’s unique legal treatment of American Indians.

Under the Sixth Amendment to the United States Constitution federal jury pools must reflect a fair cross section of the community where a crime is prosecuted and from which no distinct group in the community is excluded.⁷ This jury selection standard applies to the states through the Fourteenth Amendment and is codified in federal law under the “Jury Selection and Service Act” (JSSA).⁸ Specifically, JSSA declares that all litigants in federal courts have the right to juries selected at random from a fair cross section of the community in the district or division in which the court convenes.⁹ This idea of a fair cross section of the community derives from the concept of a jury of one’s peers, as distilled in the Magna Carta.¹⁰ Fair cross section challenges are a battleground for many minorities who are consistently underrepresented in both jury venires and the resulting jury composition.¹¹ However, the battle is often unsuccessful for diverse defendants judged by all-white juries.¹²

The Supreme Court’s standard for selecting jurors from a fair cross section of the community is unfair to American Indian defendants who are charged with committing serious crimes against others in Indian country. Under the Major Crimes Act (MCA),

¹ U.S. CONST. amend. VI; *Berghuis v. Smith*, 559 U.S. 314, 319 (2010).

² *Duren v. Missouri*, 439 U.S. 357 (1979).

³ *Berghuis*, 559 U.S. 314 (2010).

⁴ This Note uses the term “American Indian” to refer to United States indigenous populations because “Indian” is the legal term applied to indigenous populations under United States federal law. *See, e.g.*, 25 U.S.C.A. §71 (West 1988).

⁵ “Indian country” is a term of art defined under federal law 18 U.S.C. § 1151 used generally to refer to a tribe’s territorial jurisdiction. In reality, it has several meanings, but this Note will use it generally as the term of art under 18 U.S.C. §1151 and to refer to a tribe’s territorial jurisdiction. 18 U.S.C. § 1151 (1949). *See* Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 715 (2006).

⁶ *See generally* Troy A. Eid & Carrie Covington Doyle, *Separate but Unequal: The Federal Criminal Justice System in Indian Country*, 81 U. COLO. L. REV. 1067, 1067 (2010) (arguing that the federal criminal justice system in Indian country violates the Equal Protection rights of Native Americans).

⁷ Jordan Gross, *Let the Jury Fit the Crime: Increasing American Indian Jury Pool Representation in Federal Judicial Districts with Indian Country Criminal Jurisdiction*, 77 MONT. L. REV. 281, 282 (2016).

⁸ Jury Selection and Service Act, 28 U.S.C.A. §§ 1861-1878 (West 1968); Julia M. Bedell, *The Fairness of Tribal Court Juries and Non-Indian Defendants*, 41 AM. INDIAN L. REV. 252, 266 (2017).

⁹ 28 U.S.C.A. §§ 1861-1878.

¹⁰ The Magna Carta of 1215, chapter 39, provides: “No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, *except by the lawful judgment of his equals* or by the law of the land.” MAGNA CARTA (1215 ed. & British Library trans.), available at <https://www.bl.uk/magna-carta/articles/magna-carta-english-translation> (emphasis added).

¹¹ *See* TED A. DONNER & RICHARD K. GABRIEL, JURY SELECTION STRATEGY AND SCIENCE § 8-2 (3d ed. 2019).

¹² *See, e.g.*, *Berghuis*, 559 U.S. 314; *United States v. Morin*, 338 F.3d 838 (8th Cir. 2003).

American Indians who commit serious crimes in Indian country are subject to federal jurisdiction and therefore receive a “fair” cross section of the federal community, one that does not reflect their own because it is overwhelmingly white.¹³ In any other region of the United States, a person who commits a serious crime against another person will be tried by the local adjudicator, such as the county court, and his or her jury will actually reflect a fair cross section of this small geographic region.¹⁴ However, when an American Indian commits a serious crime within a reservation, the federal government has the right to adjudicate the crime with a jury drawn from the entire federal district.¹⁵ Additionally, the tribal court still has jurisdiction over the crime, so the defendant is subject to different adjudicators with different concepts of criminal justice.¹⁶ Notably, in federal court, the defendant is unlikely to receive even one juror from their local community, much less their indigenous tribe.¹⁷

The relationship between American Indian tribes and the federal government is historically fraught with animosity. Since recognizing tribes as domestic sovereigns capable of governing themselves, Congress has slowly stripped almost all criminal jurisdiction over major crimes away from American Indian tribes.¹⁸ This Note will examine the creation of this unique jurisdictional structure, ultimately showing that, due to this treatment, the fair cross section standard is failing American Indian defendants subject to federal jurisdiction.

Jury composition in tribal, state, and federal courts is vastly different depending on the population from which the jury is drawn. While tribal jury courts tend to include mostly American Indian jurors, state and federal courts tend to include mostly white jurors.¹⁹ Thus, forcing American Indians into federal jurisdiction for local crimes creates a much larger jurisdictional map from which the jury is drawn and thus distorts the makeup of the fair cross section.²⁰ Furthermore, the strategies federal courts use to create jury venues—combined with a history of animus toward, and suppression of, indigenous communities—makes it particularly difficult for federal courts to create a fair cross section that

¹³ See Indian Major Crimes Act, 18 U.S.C.A. § 1153 (West 2013); Shannon Rogers, *Giving Meaning to Empty Words: Promoting Tribal Self-Governance by Narrowing the Scope of Jury Vicinage and Venue Selection in MCA Adjudications*, 13 WYO. L. REV. 711, 742 (2013) (“In Wyoming, the federal district is the entire state. 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.”).

¹⁴ See Rogers, *supra* note 13, at 723-24 (discussing the significance of location and venue in United States constitutional law).

¹⁵ See 18 U.S.C.A. § 1153.

¹⁶ *Id.*; see also Gross, *supra* note 7, at 281-82 (“[The Major Crimes Act] gives the federal government authority to prosecute and punish enumerated crimes committed by Indians on reservations that are subject to federal criminal jurisdiction. These crimes typically also violate the criminal code of the tribe on whose reservation the crime is committed. This gives rise to concurrent federal and tribal criminal jurisdiction over the same defendant for the same conduct.”).

¹⁷ See, e.g., Gross, *supra* note 7, at 281-82.

¹⁸ See Eid & Covington Doyle, *supra* note 6, at 1072-98.

¹⁹ See B.J. Jones, *Role of Indian Tribal Courts in the Justice System* 11 (2000), <http://www.icctc.org/Tribal%20Courts.pdf>; Rogers, *supra* note 13, at 742.

²⁰ See Gross, *supra* note 7, at 287-95.

appropriately includes American Indians living on tribal lands, even when they make up a large portion of the federal jurisdiction.²¹

Ultimately, Congress should look to its unique treatment of American Indians to implement procedures designed specifically to address underrepresentation of American Indians in federal juries. In particular, Congress could define “community” more narrowly when adjudicating crimes committed by an American Indian that pull that American Indian into a federal jurisdictional framework, or it could look to foreign legal frameworks for recommendations in creating a more harmonious legal relationship with indigenous peoples.

Part I of this Note will provide background information regarding the relationship between the federal government and American Indian tribes, which led to the current jurisdictional framework within Indian country that severely limits tribal court authority. Part I will also describe the Sixth Amendment guarantee to an impartial jury—a guarantee that is failing American Indian defendants who face federal jurisdiction because it subjects them to a federal jury selection, despite the fact that the alleged crimes would ordinarily fall solely under local jurisdiction (in these cases, tribal jurisdiction). Part II argues that Congress should acknowledge the federal government’s unique legal treatment of American Indian tribes to create a different fair cross section standard for selecting jurors in cases where American Indian defendants are subject to federal jurisdiction under the MCA. Finally, Part III suggests specific avenues for reform that truly provide the Sixth Amendment guarantee of “an impartial jury of the State and district wherein the crime shall have been committed” for American Indians subject to MCA jurisdiction.²²

I. THE SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY AND THE SUPREME COURT’S THREE-PRONG FAIR CROSS SECTION STANDARD ARE FAILING AMERICAN INDIAN DEFENDANTS SUBJECT TO FEDERAL JURISDICTION.

Throughout United States history, tribal court sovereignty and the jurisdictional map within Indian country changed as the federal government worked to assert more control over American Indians.²³ Although the United States Constitution recognizes tribes as separate sovereigns, the federal government continues to redefine this relationship, stripping tribes of their legal authority.²⁴ Today, the federal government retains jurisdiction over many of the crimes committed in Indian country, reaching so far as to assert jurisdiction over serious crimes committed by one American Indian against another American Indian in Indian country.²⁵ These crimes would fall squarely within tribal

²¹ See, e.g., Camille Fenton, *A Jury of Someone Else’s Peers: The Severe Underrepresentation of American Indians from the Western Division of South Dakota’s Jury-Selection Process*, 24 TEX. J. ON C.L. & C.R. 119, 136 (2018) (“Native American defendants hailed into federal court in the Western Division of the United States District Court for South Dakota routinely face a venire of potential jurors that fails to include a single Native American . . . This unrepresentative venire is a direct result of a flawed jury-selection process that is in violation of the Sixth Amendment’s fair cross-section requirement . . . As a result of major obstacles to voter registration for Native Americans residing on the Pine Ridge Reservation, Native Americans are severely underrepresented on the master jury wheel.”).

²² U.S. CONST. amend. VI.

²³ See Gross, *supra* note 7, at 284-95.

²⁴ See Katherine Florey, *Beyond Uniqueness: Reimagining Tribal Courts’ Jurisdiction*, 101 CAL. L. REV. 1499, 1499 (2013).

²⁵ Indian Major Crimes Act, 18 U.S.C.A. § 1153 (West 2013).

jurisdiction were it not for special treaties and statutes passed by Congress to exercise control over American Indian tribal courts.²⁶ The resulting jurisdictional map in Indian country is incredibly complicated and forces American Indian defendants in federal and state courts to face non-local juries composed of a community separate from their own.

The Sixth Amendment right to an impartial jury is meant to ensure that a defendant will face a jury chosen from a population of his or her peers.²⁷ However, this concept is foreign for American Indian defendants tried in federal courts because they are charged with committing crimes that remove them from tribal jurisdiction.²⁸ The fair cross section standard assumes that the population from which the jury venire is constructed reflects the vicinage of its citizens within that jurisdictional district, including any diverse racial and political composition.²⁹ Yet the population from which the jury venire is drawn, and the jury's resulting makeup, changes drastically when a defendant is pulled out of tribal jurisdiction and placed in federal court.³⁰ This jurisdictional framework is unique to American Indian defendants and is the result of an extended history of federal attempts to strip American Indians of their land and their sovereignty.³¹

In federal courts, American Indian defendants are thus frequently tried with a jury that does not contain even one American Indian juror, distorting the typical community conscience that a jury pool is meant to represent. The jury "community conscience" is generally understood as the conscience of a jury composed of a fair and impartial community of the defendant's peers.³² For American Indian defendants tried in federal courts under the Major Crimes Act (and thus from within Indian country), a fair and

²⁶ See 18 U.S.C.A. § 1153.

²⁷ See U.S. CONST. amend. VI; *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.").

²⁸ See Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 293 (1998); Washburn, *supra* note 5, at 710-11 ("The federal court operates in a language that is foreign to many Navajos . . . Neither the judge, the court reporter, the prosecutor, the court security officers, the deputy marshals, nor the defense attorney or investigator are likely to be Navajo or even understand or speak the Navajo language. Perhaps even more importantly, the federal jury that hears the evidence is unlikely to include a Navajo, or even an Indian, or any other member of the community where the crime occurred.").

²⁹ Under *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974), the Indian designation is a political one, not racial.

³⁰ See Washburn, *supra* note 5, at 710-11.

³¹ See generally Florey, *supra* note 23 (discussing the dismantling of tribal civil jurisdiction by the Supreme Court based on tribes' unique status with Congress).

³² See *Powers v. Ohio*, 499 U.S. 400, 413 (1991) "The purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair."); *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) ("Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.") (emphasis added). See also *id.* at 529 n.7 ("It must be remembered that the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it. As long as there are significant departures from the cross sectional goal, biased juries are the result—biased in the sense that they reflect a slanted view of the community they are supposed to represent.") (emphasis added) (citations omitted).

impartial community of the defendant's peers must include jury members from Indian country.³³

A. *The Development of Jurisdiction in Indian Country is Shaped by its Exceptional and Often Painful History.*

American Indians occupy a unique space in the United States legal framework. American Indians exercised their own conception of criminal justice before there was a United States government to insert its own vision of justice upon them, and have since suffered the painful reality of colonial conquest by the United States government, resulting in mass atrocities that have changed the ways tribal governments are able to govern.³⁴ In one of the Supreme Court's first extended discussions of the relationship between the federal government and American Indian tribes, Chief Justice Marshall stated, "the condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence," and specifically recognized tribes as "domestic dependent nations."³⁵ The concept of a "domestic dependent nation" highlights the United States' unique legal treatment of its indigenous peoples. For example, when passed in 1866, the Fourteenth Amendment supposedly made all persons born in the United States citizens, but specifically excluded American Indians.³⁶ American Indians did not gain citizenship until the passage of the Indian Citizenship Act in 1924, and they did not gain the right to vote in all states until the Voting Rights Act of 1965.³⁷

³³ See *Taylor*, 419 U.S. at 527 ("A unanimous Court stated in *Smith v. Texas*, 311 U.S. 128 (1940), that '(i)t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.' *To exclude racial groups from jury service was said to be 'at war with our basic concepts of a democratic society and a representative government.'* A state jury system that resulted in systematic exclusion of Negroes as jurors was therefore held to violate the Equal Protection Clause of the Fourteenth Amendment. *Glasser v. United States*, 315 U.S. 60 (1942), in the context of a federal criminal case and the Sixth Amendment's jury trial requirement, stated that '(o)ur notions of what a proper jury is have developed in harmony with our basic concepts of a democratic system and representative government,' and repeated the Court's understanding that the jury "*be a body truly representative of the community' . . . and not the organ of any special group or class.*") (emphasis added). See also *infra* Part III.

³⁴ Florey, *supra* note 23, at 1502 ("[T]ribes are different from other entities because they have suffered the painful history of colonial conquest and the fallout from innumerable hostile or misguided federal policies over the years."). See also William Bradford, "*With a Very Great Blame on Our Hearts*": *Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1, 19 (2003) ("Concealed behind the benevolent facade of the American *mission civilisatrice* is the brutal reality of invasion, slavery, forced relocation, genocide, land theft, ethnocide, and forcible denial of the right to self-determination wholly incompatible with contemporary understandings of U.S.-Indian history and with the notions of justice informing the human rights regime. It is perhaps impossible to overstate the magnitude of the human injustice perpetrated against Indian people in denial of their right to exist, on their aboriginal landbase, as self-determining peoples: indeed, the severity and duration of the harms endured by the original inhabitants of the United States may well exceed those suffered by all other groups domestic and international.").

³⁵ Philip P. Frickey, (*Native*) *American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 437 (2005-2006) (citing *Cherokee Nation v. Georgia*, 30 U.S. 1, 16, 17 (1831)).

³⁶ Native American Voting Rights Coalition, NATIVE AMERICAN RIGHTS FUND (last visited Oct. 31, 2020), <https://www.narf.org/cases/voting-rights/>.

³⁷ *Id.*

Additionally, American Indian tribes are the only small but distinct group within the United States recognized as separate sovereigns.³⁸ The United States Constitution recognizes tribes as sovereign entities, meaning tribes are independent legal entities, separate from the authority of the federal government.³⁹ This recognition is highlighted by the federal government's repeated treaty-making with tribes, a tool used only with separate sovereigns.⁴⁰ In *Worcester v. Georgia*,⁴¹ a landmark Supreme Court case defining the relationship between the federal government and American Indians, the Marshall Court continued to treat tribes as fully separate sovereigns. The Court recognized that a tribe could surrender its sovereignty by treaty only, and that a treaty usually involved a tribal cession of preexisting rights, meaning that "a tribe could be held to have abdicated its sovereignty only if that result had 'been openly avowed' in the treaty."⁴² In 1871, Congress ended treaty-making with tribes,⁴³ but has since continued to treat tribes in exceptional ways.⁴⁴ Significantly, the Supreme Court continues to uphold the constitutionality of statutes passed to change the jurisdictional landscape in Indian country by referencing this unique treatment.⁴⁵

Furthermore, the current legal framework of the federal criminal justice system in Indian country is rooted in the federal government's overarching policy of forced assimilation, a policy reflected in the 1887 General Allotment Act, which intended to eliminate tribal reservations entirely.⁴⁶ The Act established a process whereby federal Indian trust land was divided into individual homestead parcels and converted into private property that could be sold after twenty-five years, at which time American Indian families would receive a patent to the land and the possibility of becoming U.S. citizens.⁴⁷ However, through allotment, lands from American Indian reservations that were previously held in trust for tribes were opened to non-Indian settlement, and roughly 65% of tribal lands left American Indian hands between 1887 and 1934.⁴⁸ Unfortunately, this was just one

³⁸ See U.S. CONST. Art. I, § 8, cl. 3.

³⁹ See *id.*

⁴⁰ Frickey, *supra* note 35, at 438.

⁴¹ *Worcester v. Georgia*, 31 U.S. 515, 554 (1832).

⁴² Frickey, *supra* note 35, at 440.

⁴³ *Id.* at 441.

⁴⁴ Since ending treaty-making, "the federal government and tribes have often negotiated agreements, which become federal law through bicameral approval and presidential signature . . . In the next three decades, the [Supreme] Court attempted to reconcile federal authority and tribal sovereignty in ways that underlined the exceptionalism of federal Indian law . . . in *Talton v. Mayes*, it concluded that tribal prosecution of intratribal crimes was an aspect of retained, preconstitutional authority. *Talton* is squarely consistent with the notion of tribes as self-governing sovereigns. But in two earlier decisions, the Court also considered whether federal criminal law could apply to intratribal crimes - a unilateral intervention into tribal self-government. In the first case, the Court construed a treaty and an agreement as not containing sufficiently clear authorization for the application of federal criminal statutes to intratribal offenses. In reaction, Congress enacted the Major Crimes Act, clearly extending federal jurisdiction to serious crimes committed by Indians on reservations." *Id.*

⁴⁵ The Supreme Court considered the constitutionality of the MCA in *United States v. Kagama*, 118 U.S. 375 (1886), and "lacking a conventional constitutional foundation for the statute, the Court reverted to the exceptionalism of federal Indian law and upheld the statute by reliance on the wardship notion." Frickey, *supra* note 35, at 442.

⁴⁶ Eid & Covington Doyle, *supra* note 6, at 1075.

⁴⁷ *Id.*

⁴⁸ *Id.* at 1076.

Congressional act on a long list of legislation that actively operated against American Indian existence and autonomy.⁴⁹ Accordingly, after enacting policies to dismantle American Indian land control, the federal government worked to strip away American Indian legal authority even further.

B. The Federal Government Stripped Criminal Jurisdiction Over American Indian Defendants From Tribal Courts and Created a Disjointed Jurisdictional Map.

The United States Supreme Court, and the federal government more broadly, recognize American Indian tribes as sovereign entities whose criminal justice systems were initially separate from the federal criminal justice system because of the distinct place tribes hold in the American political and legal landscape.⁵⁰ Recognizing tribes as distinct entities reflects the reality that, as sovereign entities, tribal culture and tribal law are separate from the federal government and federal law. However, this recognition also allows the federal government to severely limit tribal sovereignty and tribal court jurisdiction by using this unique status against tribes.⁵¹

Prior to the restrictions Congress placed on tribal courts, American Indian tribes had full jurisdiction to try and punish all crimes committed on tribal lands, an authority equal to those of federal and state governments.⁵² Congress has since stripped away most of this authority, allocating it to the federal government or to individual states.⁵³ Proponents of limiting tribal jurisdiction argue that these restrictions are necessary because tribal jurisdiction does not incorporate the United States Constitution, and thus does not provide the same protections as the Constitution.⁵⁴ Such an argument reflects, in many ways, an oversimplified understanding of tribal laws and procedures because it does not take into account tribes' rights as sovereigns, including their right to retain an independent criminal justice system. Today, tribal courts generally must operate in accordance with state and federal laws due to congressional impositions on tribal law, including due process requirements, and most of the Bill of Rights.⁵⁵

As part of a series of actions limiting tribal sovereignty and independence, western court systems imposed their structures and values on Indian tribal courts after colonization. These westernized tribal courts began as the Courts of Indian Offenses, which the federal

⁴⁹ See Gross, *supra* note 7, at 286-95. See also General Allotment Act, 25 U.S.C. § 461 (1887); General Crimes Act,

18 U.S.C. § 1152 (2012); Major Crimes Act, 18 U.S.C. § 1153 (2013); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 47, 113th Cong. (2013).

⁵⁰ See Frickey, *supra* note 35, at 438 (“by authorizing Congress to regulate commerce ‘with foreign Nations, and among the several States, and with the Indian Tribes,’ the Constitution places tribes in the same category as acknowledged sovereigns and recognized that tribes are sovereigns distinct from the United States but nonetheless suggests that they are not foreign nations”).

⁵¹ See Florey, *supra* note 23, at 1499.

⁵² Gross, *supra* note 7, at 281.

⁵³ *Id.*

⁵⁴ See, e.g., Bedell, *supra* note 8, at 255-56.

⁵⁵ Indian Civil Rights Act, 25 U.S.C. § 1302 (2012); Bedell, *supra* note 8, at 258. In 1968, Congress passed the Indian Civil Rights Act imposing many of the Bill of Rights, but excluding the equivalent of the Establishment Clause, right to appointed counsel, grand jury indictment requirement, and right to civil jury trial. Further due process requirements were imposed in 2013 within the Violence Against Women Act. *Indian Civil Rights Act*, TRIBAL COURT CLEARINGHOUSE (Mar. 7, 2020), <https://www.tribal-institute.org/lists/icra.htm>. See also discussion *infra* p. 13.

government implemented at the end of the nineteenth century “to keep order on Indian reservations while educating tribal people in the dominant culture’s norms.”⁵⁶ Today, tribal courts vary in structure, jurisdiction, and substantive norms in a way that aligns with the varying traditions of tribes, and is shaped by the requirements of federal and state laws.⁵⁷ Under this framework, tribal courts apply tribal codes, constitutions, customary and common law, as well as federal and state law.⁵⁸

Tribal courts are culturally distinct entities that are capable and just adjudicators. Even when subjected to intense scrutiny by the federal government, as they were, for example, under the Regan-Bush Civil Rights Commission, tribal courts continue to prove their legitimacy.⁵⁹ The Regan-Bush Civil Rights Commission was created to target the supposed lack of enforcement of civil rights on reservations in response to proposals to bring the tribal judiciary under the control of federal courts.⁶⁰ However, the Commission’s Final Report rejected these proposals, and instead concluded that Congress should provide greater financial support for tribal courts.⁶¹ The Report explained that “tribal courts do not dismiss the well-reasoned opinions of the majority culture’s courts but choose, instead, to use these Western principles with their own customary and traditional norms.”⁶² This hybrid model results in a legal system that is “adept at melding the traditions and customs of their cultures with those legal principles guiding the majority culture,” and is thus one that Congress should respect and honor.⁶³ Instead, Congress continues to undermine tribal sovereignty to the point of extinction.

Despite the efficacy of tribal courts, the federal government dismantled tribal sovereignty over non-Indians and American Indians alike.⁶⁴ Over the past two centuries, the federal government stripped American Indian tribes of their power over crimes occurring in Indian country, resulting in a complex jurisdictional map that Congress claims is justified solely by the unique relationship between the federal government and American Indians.⁶⁵ Congress first worked to strip jurisdiction from American Indian tribal courts with the Trade and Intercourse Act of 1790,⁶⁶ which gave federal courts jurisdiction over crimes committed by non-Indians against American Indians in Indian country.⁶⁷ Congress further dismantled tribal court sovereignty over non-Indians in the Indian Trade and Intercourse Act of 1834 by explicitly restricting tribal jurisdiction to crimes committed in

⁵⁶ Newton, *supra* note 28, at 291.

⁵⁷ *Id.* at 291-93.

⁵⁸ *Id.* at 293.

⁵⁹ *Id.* at 287-88.

⁶⁰ *Id.* at 288.

⁶¹ *Id.* at 288-89.

⁶² *Id.* at 353.

⁶³ *Id.*

⁶⁴ See Washburn, *supra* note 5, at 715-17.

⁶⁵ See *United States v. Kagama*, 118 U.S. 375, 383-85 (1886) (“These Indian tribes are the wards of the nation. They are communities dependent on the United States . . . From [tribes’] very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power.”); (“The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers . . . must exist in that government, because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes.”).

⁶⁶ Gross, *supra* note 7, at 286.

⁶⁷ *Id.*

Indian country by one American Indian against the person or property of another American Indian.⁶⁸

Today, the key statutes controlling federal jurisdiction over American Indians are the General Crimes Act (GCA), the Major Crimes Act (MCA), and the Violence Against Women Reauthorization Act (VAWA).⁶⁹ The GCA was initially incorporated through the Indian Country Crimes Act of 1817 as an attempt to address conflict between American Indians and settlers.⁷⁰ It states that the laws of the United States shall extend to Indian country regarding any punishment of offenses committed “within the sole and exclusive jurisdiction of the United States,” but it “shall not extend to offenses committed by one Indian against the person or property of another Indian . . . or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.”⁷¹ The GCA essentially provided that federal laws enacted to apply to locations within the jurisdiction of the federal government also apply to Indian country, unless there is a treaty specifically stating otherwise, or unless the alleged crime was committed by one American Indian against another (thus retaining tribal jurisdiction in Indian-on-Indian crimes).⁷² Ultimately, the GCA gave the federal government power to prosecute American Indians and non-Indians for crimes committed against non-Indians in Indian country, and non-Indians for crimes committed against American Indians in Indian country.⁷³ This largely divested tribal courts of their authority over non-Indians, even those living in Indian country.⁷⁴

Over time, the United States government stripped American Indians of their right to self-govern even further, often contradicting or amending the federal government’s own prior decisions managing the relationship between federal jurisdiction and tribal jurisdiction. In 1883, the Supreme Court upheld tribal ability to self-govern, holding in *Ex parte Kang-gi-shun-ca*⁷⁵ that federal courts did not have jurisdiction over American Indians who commit crimes against other American Indians in Indian country.⁷⁶ However, in direct response to this decision, Congress passed the MCA in 1885, giving the federal government jurisdiction over *all* American Indians who commit serious offenses in Indian country against others, *including against other American Indians*.⁷⁷ The crimes addressed initially included murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny; Congress later added carnal knowledge, assault with intent to commit rape, incest, assault with a dangerous weapon, and assault resulting in serious bodily injury.⁷⁸ Thus, the MCA rolled back the tribal courts’ jurisdiction over cases where both parties involved are American Indian further than the prior standard set forth in the Indian Trade and Intercourse Act of 1834, granting the federal government power over all serious crimes committed by

⁶⁸ *Id.*

⁶⁹ General Crimes Act, 18 U.S.C. § 1152 (2012); Major Crimes Act, 18 U.S.C. § 1153 (2013); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 47, 113th Cong. (2013). See Washburn, *supra* note 5, at 716.

⁷⁰ Washburn, *supra* note 5, at 716-17.

⁷¹ 18 U.S.C. § 1152.

⁷² Washburn, *supra* note 5, at 716.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Ex parte Kang-gi-shun-ca (otherwise known as Crow Dog)*, 109 U.S. 556 (1883).

⁷⁶ *Id.*

⁷⁷ Major Crimes Act, 18 U.S.C. § 1153 (2013).

⁷⁸ *Id.*

American Indian defendants, regardless of the victim.⁷⁹ Thus, between the MCA and the GCA, the federal government has jurisdiction over a large majority of the crimes occurring in Indian country.

The MCA completely changed the jurisdictional landscape for American Indians committing crimes in Indian Country. The MCA encroached on tribal jurisdiction and granted the federal government jurisdiction over serious crimes committed by one American Indian against another American Indian within Indian country—the type of crime that should fall squarely within tribal jurisdiction alone.⁸⁰ This is problematic for several reasons. First, it subjects American Indians to concurrent federal and tribal criminal jurisdiction over the same defendant for the same crime.⁸¹ Second, the FBI has investigative jurisdiction over all of the crimes listed in the MCA, meaning that they are the law enforcement agency tasked with investigating serious crimes that occur in Indian country—a task that appears to be low on their priority list.⁸² Third, requiring an American Indian defendant to appear for trial in federal court leads to a large number of administrative obstacles both for the defendant and the Federal Public Defender who may be appointed to represent the defendant.⁸³ The federal courthouse is often a great distance from the tribal reservation, leading to logistical hurdles in the defense’s ability to meet with their client and gather information on the client’s case.⁸⁴ Federal jurisdiction generally imposes the burden of distance on all federal defendants, but in these cases, federal jurisdiction takes over where local and state criminal courts—likely to be much closer—would ordinarily have jurisdiction. Furthermore, subjecting an American Indian defendant to federal jurisdiction means that almost none of the federal court actors—including the attorneys, the investigators, the judge, the grand jury, or the defendant’s trial jury—will have experience with Indian country or the typically local crimes that arise under this odd jurisdictional map.⁸⁵ Finally, federal sentencing guidelines include mandatory minimum sentences for certain crimes that would not apply were the defendant tried locally, leading to a disproportionate impact of higher sentences on American Indian defendants.⁸⁶

The jurisdictional landscape in Indian country is further complicated by the Violence Against Women Reauthorization Act of 2013 (VAWA), which re-extended tribal court jurisdiction over non-Indians to cases involving couples living on reservations, where one

⁷⁹ See Washburn, *supra* note 5, at 717 (“The Major Crimes Act [] intruded into an area of exclusive tribal sovereignty and made federal law enforcement officers the primary agents for adjudicating serious crimes on Indian reservations.”). The MCA also created concurrent jurisdiction over American Indian defendants charged with such serious crimes, allowing limited tribal jurisdiction to prosecute in these cases. See Gross, *supra* note 7, at 281-82.

⁸⁰ See *id.*

⁸¹ Gross, *supra* note 7, at 281-82.

⁸² See Washburn, *supra* note 5, at 718. (“[T]hough the offenses are “major” and often tremendously important in the communities where these crimes occur, almost all of the crimes are routine, local and simple cases involving violent crimes that, in another context, would be characterized as “common street crimes” and that would not be investigated by federal officials but for the Indian country nexus. Given the FBI’s many other responsibilities, such as counterintelligence, terrorism prevention, and the investigation of other serious offenses, such as organized crime and complex narcotics conspiracies, Indian country crimes rarely rank high among the FBI’s priorities.”).

⁸³ *Id.* at 721.

⁸⁴ *Id.* at 722.

⁸⁵ *Id.*

⁸⁶ *Id.* at 724.

partner is American Indian and the other is not.⁸⁷ VAWA was meant to address criticisms against the federal government for failure to exercise its jurisdiction in prosecuting non-Indian offenders in Indian country, particularly in rape and domestic violence cases.⁸⁸ In 2012, rape and murder rates in Indian country were more than twenty times the national average, with crimes by non-Indians against American Indians accounting for a substantial portion of these offenses.⁸⁹ This statistic highlights the need for tribal jurisdiction over local crimes because it demonstrates the type of violence against indigenous communities that many speculate is at least partially caused by the lack of federal investment in prosecuting non-Indian offenders in Indian country, as demonstrated by advocates for VAWA. VAWA also underscores the federal government's ability to manipulate jurisdiction in Indian country as it so desires.

Some commentators fear that giving tribal courts jurisdiction over non-Indians will subject non-Indians to a biased jury because tribal law and tribal courts differ too drastically from federal and state court laws, particularly because tribal law does not incorporate the United States Constitution.⁹⁰ However, this fear is largely unfounded because tribal courts must operate in accordance with due process requirements under VAWA and have incorporated most of the Bill of Rights.⁹¹ Additionally, those who are convicted by tribal courts have the right to go to federal court after appealing through the tribal court system, ensuring ultimate protection of their constitutional rights.⁹² In contrast, American Indians do not have the ability to appeal to their own tribal courts after being convicted in federal court, nor can they remove their case from federal court to tribal court, as out-of-state defendants can in state courts under certain circumstances.⁹³

The GCA, MCA, and VAWA are not the only federal statutes complicating the jurisdictional relationship between tribal courts and federal and state courts. Specifically, Public Law 280 allowed Congress to give its federal jurisdiction over American Indian matters to certain states.⁹⁴ As a general rule, federal jurisdiction over American Indian matters is exclusive except to the extent that Congress has given its consent to the states to exercise their jurisdiction under Public Law 280.⁹⁵ Public Law 280, passed in 1953, relinquished federal criminal jurisdiction over Indian country and granted it to those states enumerated in the statute.⁹⁶ Public Law 280 states are therefore responsible for enforcing criminal law in Indian country, assuming responsibilities that would otherwise belong to the federal government.⁹⁷

⁸⁷ Cynthia Castillo, *Tribal Courts, Non-Indians, and the Right to an Impartial Jury After the 2013 Reauthorization of VAWA*, 39 AM. INDIAN L. REV. 311, 311 (2014).

⁸⁸ *Id.* at 313.

⁸⁹ Florey, *supra* note 23, at 1503-04.

⁹⁰ Bedell, *supra* note 8, at 255-256.

⁹¹ *Id.* at 265; *Indian Civil Rights Act*, TRIBAL COURT CLEARINGHOUSE (Mar. 7, 2020), <https://www.tribal-institute.org/lists/icra.htm>. *See also* Frickey, *supra* note 35.

⁹² B.J. Jones, *Role of Indian Tribal Courts in the Justice System* 11 (2000), <http://www.icctc.org/Tribal%20Courts.pdf>.

⁹³ *Id.*; Florey, *supra* note 23, at 1530.

⁹⁴ Samuel E. Ennis, *Reaffirming Tribal Court Criminal Jurisdiction over Non-Indians: An Argument for a Statutory Abrogation of Oliphant*, 57 UCLA L. REV. 553, 562 (2009).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

In addition to granting certain states jurisdiction over many Indian country crimes, Congress passed the Indian Civil Rights Act (ICRA) in 1968, further limiting tribal jurisdiction by limiting the types of crimes tribal courts could adjudicate. ICRA imposed Bill of Rights protections over tribal court defendants while simultaneously limiting the penalty a tribal court can impose over a defendant.⁹⁸ Specifically, the ICRA limits the penalty a tribal court can impose over a defendant for any single crime to one year of incarceration and a \$5,000 fine, which can be extended to three years and a \$15,000 fine if the defendant has previously been convicted for the same or similar offense.⁹⁹ The ICRA effectively stripped tribal courts of any remaining authority they had over punishing their own tribal members for any type of serious crime. Considering these limitations, it is imperative that American Indian defendants who become subject to federal jurisdiction, which occurs automatically for any serious crime, be guaranteed a jury of their peers—a jury including American Indians.

C. The Supreme Court's Fair Cross Section Standard is Unfair to Minorities.

In its discussions of jury composition and the fair cross section standard, the Supreme Court consistently refers to concepts of community and equality, but often fails to enforce these concepts when it comes to diverse groups of the population.¹⁰⁰ The fair cross section standard, as initially set forth in *Taylor* and refined in *Duren* and *Berghuis*, establishes that juries “must be drawn from a source fairly representative of the community,”¹⁰¹ and to prove a violation of this standard, the defendant must show (1) that the group alleged to be excluded is a “distinctive” group in the community; (2) that the representation of this group in 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.¹⁰² On its face, this rule appears to make the case for underrepresentation of racially and politically distinct groups in jury venires somewhat straightforward. However, without a clear definition of “community” or a standard by which underrepresentation rises to the level of systematic exclusion, the test becomes more ambiguous.

In *Berghuis*, the Court held that an African American defendant who was tried by an all-white jury did not establish a violation of the fair cross section requirement because a decline in comparative underrepresentation from 18% to 15.1% was “no large change” and did not prove that such underrepresentation “had a significantly adverse impact on the representation of African Americans on Circuit Court venires.”¹⁰³ Distinguishing this defendant’s case from the defendant who succeeded under a fair cross section challenge in *Duren*, the Court stated that *Duren* “demonstrated systematic exclusion with particularity because he proved that women’s underrepresentation was persistent – occurring in every weekly venire for almost a year – and he identified the two stages of the jury selection process ‘when the systematic exclusion took place.’”¹⁰⁴ In *Duren*, women’s representation on the final jury venire was 14.5%, despite women comprising approximately 53% of the

⁹⁸ *Id.* at 558-59.

⁹⁹ Gross, *supra* note 7, at 291.

¹⁰⁰ See e.g., *Taylor v. Louisiana*, 419 U.S. at 527. *But see Berghuis v. Smith*, 559 U.S. 314, 331 (2010).

¹⁰¹ *Taylor*, 419 U.S. at 538.

¹⁰² *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

¹⁰³ *Berghuis*, 559 U.S. at 317.

¹⁰⁴ *Duren*, 439 U.S. at 366.

forum county.¹⁰⁵ This 39.5% disparity was substantial enough to establish systematic exclusion of women, thereby violating the Constitution's fair cross section requirement.¹⁰⁶ Under this extreme standard, it is difficult to imagine what would constitute a violation for any minority population within a large forum, as minority populations by definition do not constitute 50% of the population. Accordingly, the fair cross section standard is clearly failing minority populations seeking more equitable representation on jury venires because there is no way for minority populations to meet the standard set in *Duren*. In particular, the fair cross section standard fails American Indian defendants who find themselves facing juries drawn from the population of an entire federal district.

D. Jury Composition in Tribal, State and Federal Courts With Jurisdiction Over American Indian Defendants Leads to Vastly Different Results Under the Fair Cross Section Standard.

Because of the differing procedures for jury selection in tribal and federal courts, as well as the size of the jurisdictional unit, American Indian defendants living in Indian country will not be tried by a jury composed from their community in federal courts. American Indian defendants see vastly different cross sections of the community, depending on the alleged crime and resulting jurisdiction. An American Indian defendant tried in tribal court for a crime committed in Indian country will have a jury drawn from a pool of people with some connection to the reservation.¹⁰⁷ If the same defendant is tried in state court, though, the jury pool will be drawn from an area that includes the reservation and nearby state counties; and, if the defendant is tried in federal court, the jury pool will be drawn from an area that can be as large as the entire federal district.¹⁰⁸

In a state court, the jury pool will include potential jurors from nearby counties and will naturally contain fewer American Indians than the tribal court.¹⁰⁹ In federal court, the jury pool will be drawn from a district that can encompass an entire state, or a division, which is typically larger than state jurisdictional units.¹¹⁰ Based on geographical size alone, it is rare that an American Indian defendant will have even one American Indian juror if they are subject to state or federal jurisdiction.¹¹¹ For an illustration of these complicated jurisdictional maps, one can look to California, a Public Law 280 state with the largest

¹⁰⁵ *Id.* at 362.

¹⁰⁶ *Id.* at 368.

¹⁰⁷ *See* Gross, *supra* note 7, at 305.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 306.

¹¹⁰ *Id.* For example, in Colorado, where the federal district court covers the entire state, the American Indian and Alaska Native population alone is just 1.6% of the population, meaning the jury venire needs only to contain approximately 1.6% of American Indians to meet fair cross section standards, which realistically translates to zero

American Indian jurors. *QuickFacts: Colorado; United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/CO,US/RHI325218> (last visited Mar. 14, 2020). For a discussion of why this translates to zero American Indian jurors, *see* discussion *infra* subpart I(E). This is just one example of a state that is not a Public Law 280 state and whose federal district covers the entire state. It is not meant to be illustrative of all states in the same position.

¹¹¹ *See* Gross, *supra* note 7, at 302-03.

indigenous population in the United States.¹¹² In California, every offense in Indian country, whether committed by an Indian or non-Indian defendant, is subject to multiple jurisdictions and sometimes concurrent jurisdictions.¹¹³ For example, where the offender is American Indian and the victim is American Indian, “[g]enerally, state has jurisdiction exclusive of federal government (unless federal government has reassumed jurisdiction under Tribal Law and Order Act, or unless specific federal crimes are involved) but tribe may exercise concurrent jurisdiction.”¹¹⁴ This framework illustrates the vast complexities that arise just in determining what jurisdiction can and should adjudicate the crime, and points to the problematic concurrent jurisdiction issue that often arises for crimes committed by American Indians in Indian country.

Furthermore, the way each jurisdiction—whether tribal, state, or federal—creates its jury venires differs, as does the number of jurors serving on the panel. In many tribal courts, defendants are entitled to ask for a jury trial of at least six persons whenever the crime they are charged with carries the possibility of a jail sentence.¹¹⁵ In contrast, federal and most state courts guarantee a panel of twelve jurors to decide a case.¹¹⁶ While a twelve person jury is generally viewed more favorably than a six person jury, the composition of the jury often determines perceptions of fairness and impartiality.¹¹⁷ For most American Indian tribal courts, the courts differ in their rules regarding who can serve as a juror,¹¹⁸ with jurors usually drawn from tribal election rolls.¹¹⁹ Some tribal courts allow any American Indian who resides on the reservation to serve on the tribal jury, while others do not restrict who can serve on the jury as long as the person lives on the reservation.¹²⁰ This process guarantees that tribal juries will be composed mostly of members of the defendant’s tribe, or at least of people who live on the reservation.

¹¹² California has roughly 14% of the entire United States’ indigenous population. CAL. TRIBAL COURT-STATE COURT FORUM, CAL. COURTS, JURISDICTIONAL ISSUES IN CALIFORNIA REGARDING INDIANS AND INDIAN COUNTRY 1 (2015), https://www.courts.ca.gov/documents/Jurisdiction_in_California_Indian_Country.pdf.

¹¹³ See *id.* at 3. In a table titled “California Criminal Jurisdiction in Indian Country pursuant to Public Law 280” that breaks down jurisdiction based on the offender’s status as Indian or non-Indian, each jurisdiction listed includes several layers of possibilities. *Id.*

¹¹⁴ *Id.*

¹¹⁵ Jones, *supra* note 92, at 10.

¹¹⁶ *Id.*

¹¹⁷ See Leslie Ellis & Shari Siedman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033, 1037-38 (2003) (“If diversity on the jury enhances its ability to consider a variety of perspectives in evaluating the evidence at trial, that ability is reduced when juries fail to reflect the diversity in the community from which they are drawn. Lost are the differing life experiences and potentially differing expectations and predispositions that can influence the assessments of the evidence, including judgments about witness credibility, that characterize the impartial jury But an additional cost can arise if juries fail to reflect a fair cross-section of the community. Regardless of any direct effects on verdict, unrepresentative juries potentially threaten the public’s faith in the legitimacy of the legal system and its outcomes.”).

¹¹⁸ See Jones, *supra* note 92, at 11.

¹¹⁹ *Id.*

¹²⁰ *Id.*

E. American Indians' Attempts to Bring Fair Cross Section Challenges Consistently Fail.

Pursuant to the MCA, American Indians who allegedly commit serious crimes against other American Indians in Indian country find themselves being judged in a court of law where the jury is drawn from a pool of mostly white, non-Indian Americans who do not live in Indian country.¹²¹ Yet, United States law provides that a defendant should be tried in a district that is representative of the defendant's community.¹²² In *Taylor*, the Court held that the presence of a fair cross section of the community on lists from which the jury pool is drawn "is essential to the fulfillment of the Sixth Amendment's guarantee of an impartial jury trial in criminal prosecutions."¹²³ The Court went on to state that it has "unambiguously declared that the American concept of the jury trial contemplates a jury drawn from a fair cross section of the community" and that "it is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community."¹²⁴ The community is typically defined by the division from which the trial jury is selected,¹²⁵ and thus tends to be defined broadly in federal court.

In an attempt to fight the compositional imbalance created by the MCA, American Indian defendants have brought numerous challenges under the fair cross section standard in different states, arguing that the composition of their jury pool systematically excluded American Indians.¹²⁶ Combined, the Eighth, Ninth, and Tenth Circuits compose the majority of Indian country jurisdiction in the United States.¹²⁷ In an Eighth Circuit case where an American Indian defendant was convicted by an all-white jury, the defendant demonstrated that the division from which the jury was selected was 15.6% American Indian and that, on average, each jury had 46% fewer American Indians over a two-year period than it should, based on the 15.6% composition of American Indians in the division's general population.¹²⁸ However, the court held that this disparity was not substantial enough to constitute a violation of the JSSA or the Sixth Amendment.¹²⁹ The court's analysis tracked the general three-step *Duren* approach, with the defendant's case failing on the second factor, addressing "whether the group's representation is 'fair and reasonable in relation to the number of such persons in the community.'"¹³⁰ As a result, the court did not reach the third step of the analysis and did not address whether the underrepresentation was due to systematic exclusion.¹³¹

In 2016, another American Indian defendant in the Eighth Circuit who faced a federal district jury without any American Indian jurors brought a fair cross section challenge.¹³² The Eighth Circuit relied on its previous holding in *United States v. Greatwalker*,¹³³ stating

¹²¹ See Indian Major Crimes Act, 18 U.S.C.A. § 1153 (2013).

¹²² See, e.g., *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975).

¹²³ *Id.* at 526.

¹²⁴ *Id.* at 527.

¹²⁵ Washburn, *supra* note 5, at 758.

¹²⁶ See Washburn, *supra* note 5, at 751-55.

¹²⁷ *Id.* at 755.

¹²⁸ *Id.* at 752 (citing *United States v. Clifford*, 640 F.2d 150 (8th Cir. 1981)).

¹²⁹ *Id.*

¹³⁰ *Id.* (citing *Duren v. Missouri*, 439 U.S. 357, 364 (1979)).

¹³¹ *Id.*

¹³² *United States v. Garcia*, 674 Fed. Appx. 585, 587 (2016).

¹³³ *United States v. Greatwalker*, 356 F.3d 908, 911 (8th Cir. 2004).

that the District of North Dakota's jury selection process, which draws its pools of prospective jurors randomly from lists of persons who voted in the last presidential election, does not systematically exclude American Indians.¹³⁴ The Eighth Circuit stated, "absent proof that American Indians, in particular, face obstacles to voter registration in presidential elections, ethnic and racial disparities between the general population and jury pools do not by themselves invalidate the use of voter registration lists and cannot establish systematic exclusion of allegedly under-represented groups."¹³⁵ Notably, the Ninth and Tenth Circuits have similarly declined to recognize a significant disparity in the jury pool for American Indian defendants faced with an all-white, non-Indian jury.¹³⁶ Ultimately, no American Indian defendant has successfully challenged the fair cross section standard in any of these three Circuits.¹³⁷

As a result of this imbalance, American Indian defendants and their lawyers are so aware that they will not be tried by a jury of their peers in federal court that many will not request a jury trial.¹³⁸ Even if an American Indian defendant were to succeed under a fair cross section challenge in one district, and generate a jury selection process that is more inclusive of American Indians, in most districts the percentage of American Indians in the population will remain so small as to be insignificant. American Indians and Alaskan Natives make up only 1.7% of the entire United States population, realistically translating to zero American Indian jurors in any judicial district outside Indian country.¹³⁹ Although jury composition will vary widely depending on the size and location from which the jury pool is drawn, equating to higher populations of American Indians in certain areas, the jury venire will still fall short of ensuring even one American Indian juror in most cases.

II. THE FAIR CROSS SECTION STANDARD MUST BE APPLIED DIFFERENTLY TO AMERICAN INDIAN DEFENDANTS IN MCA CASES.

Due to the unique status of indigenous people living in Indian country, it is particularly difficult for federal courts to create a fair cross section that includes American Indians, even when they do consist of enough of the population to potentially impact the composition of the jury venire.¹⁴⁰ American Indians consist of such a small proportion of the overall population that the chance their federal district jury will include members of the indigenous community is very low. Additionally, there are distinct historical and legal differences in the way the United States treats its indigenous populations compared to the way it treats other socially distinct groups that further limits their numbers on jury venires.¹⁴¹ Therefore, Congress should consider creating a special rule for American Indian defendants who are subject to MCA jurisdiction.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Washburn, *supra* note 5, at 755.

¹³⁷ *Id.*

¹³⁸ Fenton, *supra* note 21, at 121-22.

¹³⁹ UNITED STATES CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION 3 (2012).

¹⁴⁰ *See, e.g.*, Fenton, *supra* note 21, at 136 ("By populating the master jury wheel exclusively with names from the voter-registration list, too few Native Americans are included in the master jury wheel. This results in too few Native Americans receiving the juror-qualification questionnaire, which then results in too few Native Americans making it onto the qualified jury wheel. The end product is a venire that underrepresents Native American jurors.").

¹⁴¹ *Id.* at 139-40.

A. *Federal Jurisdiction in Indian Country Distorts the Concept of a Fair Cross Section of the Community for American Indian Defendants.*

The fair cross section standard is not unfair simply because it does not address the fact that American Indians only constitute a small portion of the population, but because it does nothing to address the disparity that occurs when American Indian defendants are pulled out of tribal jurisdiction. This jurisdictional framework creates a jury composition akin to using a state jury pool to adjudicate an out-of-state local crime—one which is difficult to justify as a matter of criminal justice and would violate state constitutional standards in the non-Indian context in many states.¹⁴²

Federal jurisdiction over American Indian defendants naturally distorts the meaning of a fair cross section of the “community.” For instance, in *Taylor*, the Court noted that “communities differ at different times and places” and “what is a fair cross section at one time or place is not necessarily a fair cross section at another time or a different place.”¹⁴³ This statement is particularly applicable when defining “community” for American Indians. A fair cross section for most Americans may not be a fair cross section for American Indians because tribal “community” likely means something different to indigenous populations than it does under federal criminal law (where “community” for fair cross section standards essentially just means jurisdictional geographic location¹⁴⁴). At the very least, “community” in the tribal criminal justice context can mean exclusively “indigenous community,” as seen by tribal courts’ own conceptions of jury members as tribal court members.¹⁴⁵ Although the Court in *Taylor* also cites the holdings in *Fay v. New York*¹⁴⁶ and *Apodaca v. Oregon*¹⁴⁷ that “defendants are not entitled to a jury of any particular composition,” none of the foundational cases addressing fair cross section requirements or jury compositions specifically address the American Indian situation.¹⁴⁸

The federal government’s unique treatment of American Indians and Indian country raises the question of what a fair cross section of a community really means in MCA cases. The constitutional notion of an impartial jury “presupposes a jury drawn from a pool broadly representative of the community,” one which “is not provided if the jury pool is

¹⁴² See Florey, *supra* note 23, at 1530 (“the Court suggested that the defendants—as nonmembers in tribal court—were in a situation analogous to that of out-of-state defendants in state court, who are permitted to remove cases to federal court in order to avoid prejudice, a device unavailable in the tribal system.”); Frickey, *supra* note 35, at 459 (“Generally, a person sued in an out-of-state court by an in-state plaintiff can remove the case to federal court. Congress ‘forgot’ to pass a similar removal statute allowing nonmember defendants to remove from tribal courts, so the Court fixed this ‘omission’ by creating a common law rule denying tribal court jurisdiction in the first place.”).

¹⁴³ *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975).

¹⁴⁴ See Gross, *supra* note 7, at 304-305 (“[The Supreme Court] hasn’t mandated how to define the reference community against which the representativeness of the jury pool will be measured. Rather, it has left the task of delineating the size and contours of the judicial units from which courts draw jury pools (and which, consequently, becomes the reference ‘community’ for fair cross section purposes) to individual court jurisdictions.”).

¹⁴⁵ See Jones, *supra* note 92, at 11 (“A frequent criticism of tribal court jury trials is that only tribal members can sit on juries. . . . One obvious problem tribes confront when deciding who should be allowed to sit on tribal juries is that a non-Indian cannot be prosecuted by a tribe for violating his sworn duties as a juror and this may convince tribes not to allow them to sit.”).

¹⁴⁶ *Fay v. New York*, 332 U.S. 261 (1947).

¹⁴⁷ *Apodaca v. Oregon*, 406 U.S. 404 (1972).

¹⁴⁸ *Taylor*, 419 U.S. at 538.

made up of only special segments of the populace.”¹⁴⁹ In instances where American Indian defendants are subject to federal jurisdiction, the jury pool will be made up of only a special segment of the mostly-white population because it will encompass all of the predominately white federal district rather than the defendant’s local community.¹⁵⁰ It is unlikely that a cross section of the community drawn from an entire federal district, where American Indians will naturally compose only a tiny portion of the population, actually represents a fair cross section of the American Indian defendant’s community where the crime was committed.

It is irrational for the Supreme Court to claim that a jury pool can be under-inclusive without also recognizing the reality that in exceptional circumstances it may also be over-inclusive to the point of discrimination. In the traditionally discriminatory under-inclusive pool, diverse members will be excluded from the venire, and thus fail to reflect the community because diverse members will appear in lower numbers than their actual percentage in the community’s population. In an over-inclusive pool, diverse members will not be excluded from the venire, but the geographic bounds of the venire will be increased to include more white people, and thus fail to reflect the community because the overall percentage of diverse members will be diluted. In both instances, the composition of the federal district jury pool whitewashes the otherwise predominantly American Indian jury pool, distorting the concept of a fair cross section.

B. There are Distinct Historical and Legal Differences in the United States’ Treatment of Indigenous Populations Compared to Other Populations in the United States Who May Bring a Fair Cross Section Challenge.

The Supreme Court has consistently identified American Indian tribes as distinct legal entities, stating that tribes occupy a “unique status under our law.”¹⁵¹ One commentator has even stated that the Supreme Court has a “bifurcated, if not fully schizophrenic approach to tribal sovereignty,” and that “in matters involving jurisdiction on Indian reservations, we often are unable to know what the law is until the United States Supreme Court tells us.”¹⁵² The Supreme Court has developed jurisdictional doctrines designed to accommodate different legal values and contexts in multi-jurisdictional disputes (namely, personal jurisdiction) and yet, the Court continues to develop doctrines “untethered to the broader doctrines that govern judicial jurisdiction in other contexts . . . in a way that has worked decisively to tribes’ detriment.”¹⁵³ In particular, the Supreme Court decides cases “according to its own ideas and prejudices about Indian country,” promoting “the idea that tribes are exotic entities harboring different ideas of jurisdiction and justice than do other governments—a notion that is at odds with the realities of modern tribal judiciaries.”¹⁵⁴ Additionally, failing to reckon with the “different conceptual frameworks” between tribal and state jurisdictions “makes reciprocity troublesome: one can hardly expect states and tribes to work out efficient mechanisms for enforcing each

¹⁴⁹ *Id.* at 530.

¹⁵⁰ See Washburn, *supra* note 5, at 723 (“The [federal] venire from which the jury is selected is unlikely to have a single member of the Indian community in which the crime occurred.”).

¹⁵¹ Florey, *supra* note 23, at 1502 (quoting *Nat’l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985)).

¹⁵² Frickey, *supra* note 35, at 435.

¹⁵³ Florey, *supra* note 23, at 1504-05.

¹⁵⁴ *Id.* at 1505.

other's orders or applying each other's laws when their courts are bounded by mutually alien jurisdictional doctrines."¹⁵⁵ If the United States continues to insist on treating indigenous populations differently, it should take more affirmative steps to ensure that federal and state laws adapt and respond to the distinct status of American Indians.

The United States government's insistence on limiting tribal jurisdiction over non-Indian defendants highlights the federal government's distrust in their ability to judge each other in a court of law. In *Ex parte Crow Dog*, which upheld American Indian jurisdiction over American Indians, the Justices were clear about the differences they perceived between whites and American Indians in a courtroom:

It [federal criminal law] 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.¹⁵⁶

Although *Ex parte Crow Dog* retained tribal sovereignty in cases of Indian-on-Indian crime, its bigoted reasoning reveals the Supreme Court's distrust of tribal courts to adjudicate cases involving non-Indians. Nonetheless, under the MCA, Congress believes federal courts are entitled to judge cases involving solely American Indian parties.

Congress consistently limited tribal authority over non-Indian defendants who commit crimes in Indian country, even if the victim is American Indian, going back to the GCA.¹⁵⁷ Historically, the Supreme Court also found that American Indians lack inherent authority to regulate the criminal conduct of non-Indians.¹⁵⁸ Notably, although the Supreme Court and Congress have so far declined to alter jury venires in federal or state courts based on a defendant's racial or political composition, the Supreme Court and Congress had no issues defining jurisdiction in Indian country based on the racial-political composition of American Indian versus non-Indian.¹⁵⁹

C. It is Particularly Difficult for Federal Courts to Create a Fair Cross Section that Includes American Indians Who Live on Tribal Lands Based on the Current Compilation of Jury Wheels.

Both state and federal courts primarily use voter registration lists to construct jury venires.¹⁶⁰ When a jury wheel is populated exclusively with names from the voter-registration list, a disproportionately small amount of American Indians are included in the

¹⁵⁵ *Id.*

¹⁵⁶ *Ex parte Kan-Gi-Shun-Ca*, 109 U.S. 556, 571 (1883).

¹⁵⁷ See Washburn, *supra* note 5, at 715-18.

¹⁵⁸ See Jones, *supra* note 92, at 11.

¹⁵⁹ See Jacinta M. Gau, *A jury of whose peers? The impact of selection procedures on racial composition and the prevalence of majority-white juries*, Univ. Cent. Fla. J. CRIME & JUST. 1, 2 (2015); Rogers, *supra* note 13, at 714 (“[T]he MCA, unlike any other criminal statute, explicitly draws geographic and racial-political boundaries.”).

¹⁶⁰ See Fenton, *supra* note 21, at 136; Gross, *supra* note 7, at 307; Washburn, *supra* note 5, at 748-49.

master jury wheel.¹⁶¹ Unfortunately, many geographic, socioeconomic, and historic obstacles prevent American Indians from appearing on federal voter registration lists in numbers equal to their proportion in the population.¹⁶² A 2018 case study of the Western Division of the United States District Court for South Dakota, which uses federal voter-registration lists as the sole source of names for prospective jurors, details obstacles faced by American Indians in registering to vote,¹⁶³ including, for example, socioeconomic disadvantages that result in travel and transportation obstacles to in-person voter registration venues; the failure of the “current jury-selection process in the Western Division to follow up with jurors” as required; and “the jury selection process ‘do[ing] nothing specific to engage Native Americans who live under traditionally hard-to-reach circumstances.’”¹⁶⁴ Historically, an entrenched history of racial discrimination and hostility toward American Indians prevented them from voting until 1965—an insidious pattern that continues today through state suppression of the American Indian vote.¹⁶⁵

Additionally, national statistics from 2014 show that low voter registration directly correlates with low income, and South Dakota’s reservations are marked by poverty, with one-fifth of the most impoverished counties in the United States.¹⁶⁶ Poverty is an enduring experience for many American Indians that leads to underrepresentation.¹⁶⁷ According to a Deputy Federal Public Defender in South Dakota, American Indian defendants are so severely underrepresented in the Western Division of South Dakota that many American Indian defendants in federal court do not exercise their constitutional right to a jury trial because they know that they are unlikely to receive a jury with a single American Indian juror.¹⁶⁸

Furthermore, due to the General Allotment Act of 1887, American Indian tribal lands are splintered and in many instances the population, even within tribal reservations, is overcome by non-Indians.¹⁶⁹ Therefore, even if federal district courts ensured that American Indian representation within the jury pool was equal to the percentage of American Indians in the community from which it was drawn (such as a large portion of the state), based on the dilution of American Indians throughout the general population, that jury would still contain at most one or two American Indian jurors. When American Indian defendants make up a disproportionate percentage of the criminal caseload in court (as is true in South Dakota, Montana, North Dakota, Minnesota, and the Eastern District of Oklahoma¹⁷⁰), they should be able to rely on receiving a jury that represents their community. A federal jury pool that produces a jury of an American Indian defendant’s peers, however, is currently a fiction.

¹⁶¹ Fenton, *supra* note 21, at 136.

¹⁶² *See id.* at 147-49.

¹⁶³ *Id.* at 148.

¹⁶⁴ *Id.* at 142, 143-44.

¹⁶⁵ *See id.* at 139; American Indian Voting Rights Coalition, AMERICAN INDIAN RIGHTS FUND (last visited Dec. 18, 2019), <https://www.narf.org/cases/voting-rights/>.

¹⁶⁶ Fenton, *supra* note 21, at 139.

¹⁶⁷ Washburn, *supra* note 5, at 747-48.

¹⁶⁸ Fenton, *supra* note 21, at 119.

¹⁶⁹ *See* Eid & Covington Doyle, *supra* note 6, at 1075-76.

¹⁷⁰ Gross, *supra* note 7, at 310.

D. The United States Should Use its Unique Relationship with American Indians to Create a Jury System that Protects American Indian Defendants.

The United States should look to its unique treatment of American Indians as dependent sovereigns to implement a jury system that protects American Indian defendants. When a test appears on its face to protect underrepresentation of certain members of the population, as the fair cross section standard is meant to, and yet fails in even extreme cases,¹⁷¹ it is time for the legislative branch to take action and create a new test. It is nearly impossible for American Indians to make a strong fair cross section challenge because the test is not designed to address their unique sovereign status. Assuming the federal government insists on retaining its jurisdiction in MCA cases where one American Indian commits a serious crime against another American Indian in Indian country, it should create a procedural safeguard that will ensure a jury with an indigenous community conscience.

The Supreme Court's fear of asserting tribal jurisdiction over non-Indians illuminates the imbalance of subjecting American Indian defendants to state and federal jurisdiction, particularly when the very crimes pushed into federal court are those that have the most serious impact on the community. While there is no precedent in American law for creating a jury based on the defendant's racial or political designation, the same could be said for much of the legislation surrounding the federal government's treatment of American Indian tribes. The Supreme Court has specifically cited the special relationship between the federal government and American Indians to uphold special laws that address American Indians, such as the MCA, claiming that "literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the [Bureau of Indian Affairs], single out for special treatment a constituency of tribal Indians living on or near reservations."¹⁷² The Court concluded that Congress's power to specifically address American Indians in legislation stemmed from American Indians' historically unique status and Congress's role in protecting American Indians' interests.¹⁷³ Following that same logic, then, the federal government should enact legislation to target the fair cross section standard as it applies to American Indians.

III. CONGRESS SHOULD IMPLEMENT PROCEDURES TO INCREASE AMERICAN INDIAN REPRESENTATION IN MCA JURIES TO UPHOLD STANDARDS OF FAIRNESS AND GRANT AMERICAN INDIAN DEFENDANTS THE COMMUNITY CONSCIENCE TO WHICH THEY ARE ENTITLED.

In light of the federal government's unique treatment of American Indians, Congress should adopt legislation to increase the likelihood and number of American Indian jurors in federal cases where one American Indian is alleged to have committed a serious crime against another under the MCA. Congress could consider two different options for

¹⁷¹ See TED A. DONNER & RICHARD K. GABRIEL, *JURY SELECTION STRATEGY AND SCIENCE* § 8-2 (3d ed. 2019) ("The Court also held that a finding of less than 15% disparity was insufficient. The Court found that, 'a general examination of cases on this issue indicates that [violations have been found where there is] a showing of an absolute disparity in the neighborhood of twenty or more percentage points.'")

¹⁷² *Morton v. Mancari*, 417 U.S. 535, 552 (1974).

¹⁷³ Jacqueline F. Langland, *Indian Status Under the Major Crimes Act*, 15 J. GENDER, RACE & JUST. 109, 113 (2012).

increasing the number of American Indian jurors on MCA juries. First, Congress could look to its unique treatment of American Indian tribes to redefine “community” for crimes occurring in Indian country. Second, Congress could look to recent reforms adopted in the Argentine provinces of Chaco and Neuquén that require half of the jury to belong to the defendant’s original tribe in cases where the defendant is indigenous.¹⁷⁴ While both systems are problematic because they place greater burdens on indigenous populations in serving on juries, such burdens are impossible to avoid when the goal is increasing American Indian representation on juries. Even so, both solutions offer a path forward in combatting the serious underrepresentation of American Indian jurors in federal district jury trials hearing purely tribal matters. Additionally, implementing either reform will promote fairness and ensure that American Indians receive a jury with a community conscience actually representing their own.

A. *Congress Could Define “Community” as “Indian Country” in MCA Cases.*

As Washburn emphasizes in *American Indians, Crime, and the Law*, “attempting to achieve ‘a fair cross section of the community’ begs the most important question: what community?”¹⁷⁵ Courts often focus on antidiscrimination and integration principles in defining a fair cross section of the community, but “integration principles are not the appropriate norms for addressing a legal regime affecting Indians in Indian country” because the foundation of American Indian legal principles is that tribes are separate sovereigns. Thus, the goal should be “preservation of the tribal right to remain separate and to avoid integration.”¹⁷⁶ While this may seem like a strange argument for carving out an “American Indian exception” in federal jury cases, it is no stranger than the other arguments for treating American Indian tribes differently throughout the nation’s history.

Federal courts tend to construe “community” as the judicial district where the offense occurred—a definition at odds with the jurisdictional loophole in cases where American Indians are subject to federal jurisdiction under the MCA.¹⁷⁷ Looking forward, “defendants should make the straightforward argument that jurors in Indian country cases cannot be drawn from addresses outside Indian country because ‘Indian country’ is the community that the law is designed to protect.”¹⁷⁸ Applying that community definition one step further, Congress could enact a law stating that, in cases where one American Indian commits a serious crime against another American Indian in Indian country, and is thus subject to federal jurisdiction under the MCA, the “community” from which the jury pool is constructed includes only those living within the Indian country boundaries where the offense occurred. The MCA already applies only to crimes committed “within Indian country,” thus a jury requirement tying the community to potential jurors from “within Indian country” is a logical outgrowth of this jurisdictional loophole created by the MCA

¹⁷⁴ See Vanina G. Almeida, Denise C. Bakrokar, Mariana Bilinski, Natali D. Chizik, Andrés Harfuch, Lilián Andrea Ortiz, Maria Sidonie Porterie, Aldana Romano, & Shari Seidman Diamond, *The Rise of the Jury in Argentina: Evolution in Real Time* (forthcoming in Kutnjak Ivkovich, S., S.S. Diamond, V.P. Hans, & N.S. Marder (eds.) (in press) *JURIES, LAY JUDGES, AND MIXED COURTS: A GLOBAL PERSPECTIVE*, Cambridge University Press) (on file with author).

¹⁷⁵ Washburn, *supra* note 5, at 757.

¹⁷⁶ *Id.* at 758.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 759.

itself.¹⁷⁹ This conception of community would uphold the constitutional ideal that American Indian defendants be judged by a jury of their peers under the Sixth Amendment and would allow federal courts to retain jurisdiction as desired by the MCA.

B. Congress Could Implement Procedures to Construct Juries Specifically for Indigenous Populations, Similar to Those in the Argentine Provinces of Chaco and Neuquén.

The Argentine provinces of Chaco and Neuquén recently implemented procedures for constructing juries that are specifically designed to protect their respective indigenous populations from unrepresentative juries that do not contain at least one member of a defendant's tribe.¹⁸⁰ In Argentina, the jury trial itself is a new institution, despite a constitutional mandate for juries dating back to 1853.¹⁸¹ The country's failure to implement juries despite this constitutional mandate inspired provinces to create and implement their own procedures for jury trials.¹⁸² Several Argentine provinces have distinct, yet small, indigenous populations.¹⁸³ Although all indigenous citizens are registered on electoral lists because all Argentine citizens are required to vote, and therefore appear on jury pools, the statistical probability that any of them will be selected for a jury is very low due to their low numbers in the population, similar to the United States.¹⁸⁴ Recognizing that racial minorities are strongly underrepresented in other countries, the new jury laws in those provinces require that half of the members of the twelve person jury be individuals from the defendant's original tribe.¹⁸⁵ This method of jury selection ensures that members of indigenous populations receive a true jury of their peers.

Implementing special juries for indigenous populations may begin to combat the recurring problems of racism and underrepresentation in juries that many common law countries face, including the United States.¹⁸⁶ The issues that led several Argentine provinces to implement the requirement that half the jury members belong to the same tribe as the indigenous defendant are similar to those that indigenous defendants in the United States face under federal jurisdiction.¹⁸⁷ The same patterns of dissatisfaction with the justice system expressed by many criminal reform advocates in the United States were present in Argentina prior to the implementation of this new criminal procedure for indigenous defendants.¹⁸⁸ In Argentina, an average of two-thirds of those surveyed in multiple national opinion polls evaluated the performance of the judicial branch as bad or very bad.¹⁸⁹ Similarly, the recent United States 2020 Gallup poll of Confidence in Institutions revealed that 36% of people nationwide said they had "very little" to "no"

¹⁷⁹ *Id.* at 762.

¹⁸⁰ Andrés Harfuch, Mariana Bilinski and Andrea Ortiz, "El Jurado Indígenas en Argentina [Argentina's Indigenous Jury]," 25 *Juicio por Jurados y Procedimiento Penal*, (2016), available at <http://inecip.org/wp-content/uploads/JxJ-JusBaires-JuradoIndigena.pdf> (the English version is available at <http://inecip.org/wp-content/uploads/Argentina%C2%B4s-Indigenous-jury-by-Harfuch-Bilinski-and-Ortiz-6.pdf>).

¹⁸¹ Almeida, *supra* note 174.

¹⁸² *Id.*

¹⁸³ Harfuch, *supra* note 180.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *See id.*

¹⁸⁸ Almeida, *supra* note 174.

¹⁸⁹ *Id.*

confidence in the criminal justice system, with only 24% of people claiming they had “quite a lot” to a “great deal” of confidence in the criminal justice system, the remaining opinions falling somewhere in between.¹⁹⁰

So far, American courts have refused to accept a legal framework embracing quota-conscious methods of selecting and summoning minority jurors for diverse defendants.¹⁹¹ However, due to American Indians’ unique status as dependent sovereigns, such a reform is worth considering. There are possible drawbacks to insisting that jury compositions meet certain quotas, particularly when the quota could place a larger burden on minority populations, but in this case, the benefits likely outweigh the drawbacks.¹⁹² Assuming the federal court system insists on retaining jurisdiction over American Indians for crimes defined under the MCA, requiring half of the members of the twelve person jury be individuals from the defendant’s tribe will be an efficient and straight-forward way to ensure that American Indian defendants actually receive a jury of their peers. It will prevent future litigation challenging the fair cross section standard, while reducing the impact of exclusion of American Indian jurors due to racially motivated peremptory strikes.

Although one could argue that requiring the jury to include six American Indian jurors would lead to inefficiencies and impose hardships on American Indians required to serve as jurors in federal courts (which are often located far from Indian Reservations¹⁹³), there are ways to reduce those costs. First, if half the jury comes from Indian country, the federal judge could travel to Indian country and use the state or tribal courthouse to conduct proceedings. This would reduce costs for the defendant and cut down on travel costs and potential barriers for indigenous jury members. Second, requiring half the jury to belong to the defendant’s original tribe helps avoid the pitfall that comes with “token jurors,” a phenomenon that occurs when minorities constitute a very small fraction of the whole.¹⁹⁴ Token minorities on juries experience feelings of marginalization and alienation, and will have little or no impact on outcomes.¹⁹⁵ It is only when a numerical minority achieves a sizeable representation that the benefits of diversity are realized.¹⁹⁶ Ultimately, implementing a rule where American Indians make up more than a small number of the total jury composition is important to achieving a true community conscience.

C. Implementing Procedures Designed to Address the Underrepresentation of American Indians in Juries Upholds Standards of Fairness and Gives American Indian Defendants the Community Conscience They Are Entitled to Under the Sixth Amendment.

Allowing juries with a higher proportion of American Indian jurors to hear cases with American Indian defendants in federal district courts is an efficient way to uphold standards of fairness and prevent discriminatory outcomes resulting from severe underrepresentation

¹⁹⁰ *Confidence in Institutions*, GALLUP, <https://news.gallup.com/poll/1597/confidence-institutions.aspx> (last visited Nov. 1, 2020).

¹⁹¹ Gau, *supra* note 159, at 2.

¹⁹² *See infra*, Part III.C, discussing the benefits of diverse juries, including enhanced decision-making abilities among the jury, such as problem-solving; and conversely, preventing the ongoing pattern created by all-white juries of being more punitive against defendants of color.

¹⁹³ *See Washburn*, *supra* note 5, at 710-11.

¹⁹⁴ Gau, *supra* note 159, at 4.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

in federal jury venires. Having more American Indian jurors participate in federal trials will lead to an improved sense of communal fairness and offer American Indians an increased sense of the benefits from participating in federal democracy.¹⁹⁷ The federal government does not have to relinquish any authority, and the defendant will still be subject to federal law. However, there will be an additional assurance for all parties in knowing the jury will judge the defendant solely for the defendant's actions, not the color of the defendant's skin.

Empirical studies regarding racial composition of juries show diverse juries are perceived as more fair by the public.¹⁹⁸ Beyond perception, studies demonstrate that diverse juries are better equipped for deliberating because they increase the quality of discussion by enhancing innovation and problem-solving.¹⁹⁹ Increasing jury diversity could also dispel negative consequences discussed by research that has found predominately white juries to be more punitive toward defendants of color.²⁰⁰ As Abramson states in *We, The Jury*, "trial by jury is about the best of democracy and about the worst of democracy," and the criminal jury in particular is the "premier body translating democratic ideals into everyday practice."²⁰¹ When American Indians are excluded from participating in jury trials that contain members of their community, they are also excluded from American democracy. Implementing a scheme that entitles indigenous defendants to a larger percentage of indigenous jurors will ensure that the benefits of a diverse jury are realized, including greater perceptions of fairness in the community, more indigenous participation in federal democracy, and positive relations between tribal courts and federal courts.

IV. CONCLUSION

The jury's role as the community conscience should represent the American Indian community when all parties to the crime are American Indian and when the crime took place in Indian country. Although the federal government has historically exploited its unique relationship with indigenous tribes to assert more power over tribal criminal justice and limit tribal ability to self-govern, Congress could now use this power to restore a modicum of fairness by implementing a jury system that fully embraces the ideals of a jury of one's peers. The phrase "a jury of one's peers," originally derived from the principles set forth in the Magna Carta, has become a colloquial term for the more technical standard of a fair cross section of the community.²⁰² Yet, the fair cross section standard does not actually create a jury of one's peers for American Indian defendants.

Restoring a community conscience to federal juries overseeing MCA crimes is necessary for accomplishing the goals of the initial fair cross section standard:

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

¹⁹⁷ See *id.* at 2; Ellis & Diamond, *supra* note 117, at 1046-48.

¹⁹⁸ Gau, *supra* note 159, at 2.

¹⁹⁹ *Id.* at 3.

²⁰⁰ See *id.* at 3.

²⁰¹ J. ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 1, 4 (2000).

²⁰² See *e.g.*, Fenton, *supra* note 21, at 124-25.

professional or perhaps overconditioned or biased response of a judge. [] This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or *excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.*²⁰³

Thus, restricting jury service in federal district courts to primarily white persons, and excluding the chance for an American Indian defendant to receive a jury consisting of indigenous members from the same tribe (or at least from within the same bounds of “Indian country” that fall within a federal district) cannot square with the constitutional ideal or judicial construct of a fair cross section. The effects of the MCA harm American Indian defendants, indigenous communities, and the federal criminal justice system by placing greater burdens on federal officers to investigate and prosecute such crimes. As domestic dependent sovereigns, indigenous populations consistently receive exceptional legal treatment. The same constitutional loopholes that allow Congress to dictate specific rules over indigenous tribes, as demonstrated in legislation such as the GCA, MCA, and VAWA, should also allow Congress to restructure the fair cross section standard as it applies to American Indian defendants when they are tried in federal court despite committing purely local crimes against another member of their tribe.

Implementing new procedures that allow for a larger percentage of jury members to come from the same locale as the defendant will preserve the community conscience, leading to better results for all involved. Unfortunately, this solution places a higher burden on indigenous populations to serve on juries. Yet, as long as the federal government insists on retaining MCA jurisdiction over purely local crimes committed in indigenous communities, increasing American Indian jurors in MCA cases is the best solution to provide American Indian defendants with a jury of their peers. Requiring federal courts to change the definition of “community,” or change the composition of the jury based on the defendant’s identity in MCA cases, restores the concept of “community conscience” for indigenous defendants, ultimately leading to higher standards of fairness, higher likelihood of future democratic involvement by jury members, and better relations between the United States federal government and its indigenous populations.

Finally, if Congress implements more representative jury systems for American Indian defendants, it could open the door for creating more representative juries for all minorities. Specifically, a similar “community” analysis could arise in situations where crimes allegedly committed in a distinct locality are subject to a large federal district court where the jury pool is overwhelmingly white; this is an issue that occurs frequently for people of color. While this Note does not delve into the myriad ways such legislation could be applied more broadly, it is worth recognizing that American Indian defendants are not alone in this problem, despite the uniqueness of their situation.

²⁰³ Taylor v. Louisiana, 419 U.S. 522, 530 (1975); Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968) (emphasis added).