

The Perfect Crime

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INTRODUCTION

You may have daydreamed about it: some forgotten constitutional provision, combined with an obscure statute, that together make it possible for people in the know to commit crimes with impunity. Whether you were looking for opportunities to commit crimes or afraid that somebody else was, the possibility of a constitutional “perfect crime” was too compelling to ignore. This Essay represents the fruits of my own daydreams, combined with the fact that lately I have spent my lucid moments mulling over one particular forgotten constitutional provision: the Sixth Amendment’s vicinage requirement.

The courts may or may not agree that my loophole exists, and in any case this Essay is not intended to inspire anyone to go out and commit crimes. Crime is bad, after all. But so is violating the Constitution. If the loophole described in this Essay does exist it should be closed, not ignored.

I. A CONSTITUTIONAL RUSTY NAIL

Venue (the place a trial is held) and vicinage (the place from which jurors are drawn) are at the root of our problem; they have let people get away with murder before. In England before

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1548, it “often happene[d]” that a murderer would strike his victim in one county, and “by Craft and Cautele” avoid punishment by making sure that the victim died in the next county.¹ An English jury could only take cognizance of the facts that occurred in its own county, so no jury would be able to find that the killer had committed all of the elements of murder.²

Given a choice between maintaining common-law formalities and preventing murder with impunity, England sensibly chose the latter: A 1548 law gave juries the power to pursue cross-county homicides.³ In the centuries that followed, the British made exceptions to the rule that a case must be tried by a jury from the county in which the crime was committed.⁴

In the rebellious American colonies, the principle of local jury trial persisted more strongly. In part, this was because of a law that brought British soldiers who killed colonists back to England for trial,⁵ and other laws that removed colonists’ trials to England, or Nova Scotia at least.⁶

¹ An Act for Trial of Murders and Felonies Committed in Several Counties, 2 & 3 Edw. 6, c. 24 (1548) (Eng.). “Cautele” means caution.

² *See id.*; *see also* 4 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 530 (3d ed. 1945) (describing history of English common law of venue).

³ *See* 2 & 3 Edw. 6, c. 24.

⁴ *See* William Wirt Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 MICH. L. REV. 59, 62–63 (1944) (listing exceptions). The exceptions involved crimes committed in Wales, treason, malicious destruction of turnpikes, and other things. *See id.*

⁵ This law, the Act for the Impartial Administration of Justice, was one of the so-called Intolerable Acts. *See* Steven A. Engel, *The Public’s Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658, 1683–85 (2000) (describing Act and opposition to it in the colonies). The Act was passed even though the British soldiers involved in the Boston Massacre had been tried remarkably fairly before a local jury in Boston; most were acquitted. *See id.* at 1681–83.

⁶ *See* Blume, *supra* note 4, at 63–64 (discussing English efforts and colonial resistance); Engel, *supra* note 5, at 1680–81 (same); Matthew P. Harrington, *The Legacy of the Colonial Vice-Admiralty Courts (pt. 2)*, 27 J. MAR. L. & COM. 323, 334–35 (1996) (discussing jurisdiction of Stamp Act cases in Halifax, Nova Scotia).

Having just fought a revolution to win (among other things) the right to try local crimes before local juries,⁷ it was important to the Framers to make this principle indelible. Therefore, they required in Article III, Section 2 of the Constitution that “[t]he Trial of all Crimes . . . shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed.”⁸ Some sticklers then noted that the Framers had provided for local trials and jury trials, but not local juries,⁹ spurring the Sixth Amendment’s requirement that the jury must be “of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.”¹⁰

The Sixth Amendment thus left it to Congress to draw up the districts and decide the scope and bounds of the vicinage right. In the contemporaneous Judiciary Act of 1789, Congress provided thirteen state-sized districts for the eleven states then extant.¹¹

In the years that followed, the Sixth Amendment’s vicinage right largely faded from view. People worried more about the Sixth Amendment’s impartiality requirement. Jury trials

⁷ See THE DECLARATION OF INDEPENDENCE paras. 17, 20–21 (U.S. 1776) (giving as grounds for independence that Crown had “protect[ed soldiers] by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States,” “depriv[ed colonists] in many cases, of the benefits of Trial by Jury,” and “transport[ed colonists] beyond Seas to be tried for pretended offences”).

⁸ U.S. CONST. art. III, § 2, cl. 3. One could be forgiven for thinking that the replacement of county with state indicated that the Americans had loosened the traditional English county-level understanding of venue and vicinage. In terms of area and population, however, the English county was closer in scope to the American state than to the American county. *Cf.* *State v. Lewis*, 55 S.E. 600, 609 (N.C. 1906) (Brown, J., dissenting) (making similar point based on then-current numbers).

⁹ See Drew L. Kershen, *Vicinage (pt. 1)*, 29 OKLA. L. REV. 801, 816–17 (1976) (discussing ratification debates).

¹⁰ U.S. CONST. amend. VI.

¹¹ Judiciary Act of 1789, § 2, 1 Stat. 73, 73 (1789). The states with two districts were Massachusetts (whose second district was what is now Maine) and Virginia (whose second district was what is now Kentucky). *Id.*

became scarce as guilty pleas came into vogue,¹² and the cross-section requirement emerged as the main repository (albeit a confusing one) of proper community representation.¹³ But the vicinage requirement is still there, it is unambiguous, and it waits like a rusty nail to infect the unwary.

II. A STATUTORY BARE FOOT

The “zone of death” that motivated this Essay sits at the perimeter of Yellowstone National Park. The problem with Yellowstone is that it does not quite fit in Wyoming: Nine percent of the park overflows into Montana (about 260 square miles worth) and Idaho (about 50 square miles). The park was established in 1872, well before the three states were added to the Union in 1889 and 1890.¹⁴ When the states were admitted, each ceded exclusive jurisdiction of its portion of Yellowstone to the federal government.¹⁵ Yellowstone is a federal enclave, in other words, and the states cannot enforce state law there.¹⁶

¹² See Susan C. Towne, *The Historical Origins of Bench Trial for Serious Crime*, 26 AM. J. LEGAL HIST. 123, 124 (1982) (noting recent development of significant use of bench trials, in “parallel [with] development of plea bargaining”).

¹³ The leading articles criticizing the decline of the vicinage requirement are Engel, *supra* note 5; Kershen, *supra* note 9; and Drew L. Kershen, *Vicinage (pt. 2)*, 30 OKLA. L. REV. 1 (1977). I have criticized the cross-section requirement in Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 75–88 (2003).

¹⁴ See Act of Dedication, ch. 24, § 1, 17 Stat. 32 (1872) (codified at 16 U.S.C. § 21 (2000)) (establishing Yellowstone National Park). Interestingly, the act establishing the park does not seem to realize that the boundaries it defines include part of Idaho. See *id.* (referring to the “tract of land in the Territories of Montana and Wyoming”).

¹⁵ See IDAHO CODE § 58-701 (2002); MONT. CODE ANN. § 2-1-207 (2003) (referring to land “in the state of Montana now embraced in the Yellowstone national park”).

¹⁶ See 16 U.S.C. § 24 (2000) (declaring exclusivity of federal jurisdiction over Yellowstone National Park); *cf.* U.S. CONST. art. I, § 8, cl. 17 (giving Congress power to “exercise exclusive Legislation” over federal land ceded by states); *id.* art. IV, § 3, cl. 2 (giving Congress power to make “needful Rules” regarding “Property belonging to the United States”).

When Congress set up the United States District Court for the District of Wyoming, it must have seemed too much trouble to divide Yellowstone between Wyoming and two other districts, especially when crime was rampant in the park and going unpunished.¹⁷ Therefore, in a constitutionally fateful decision, Congress put the entire park in the District of Wyoming.¹⁸ The Districts of Montana and Idaho were defined to exclude the parts of those states that were in

¹⁷ The nineteenth-century legislative history of Yellowstone—which nowhere engages the vicinage problem—has been collected very helpfully by Jim Macdonald at *The Magic of Yellowstone: Yellowstone History Guide*, at <http://www.yellowstone-online.com/history.html> (last visited May 21, 2004).

Initially, the Wyoming territorial government took it upon itself to enforce the law in the park. This did not work very well. *See* Press Release, National Park Service, Law and Justice Come to Yellowstone, *available at* <http://www.geocities.com/jsmacdonaldjr/nov-03pr.htm> (Nov. 3, 1997) (describing history of law enforcement in Yellowstone). Then as now, federal criminal law was spotty in its coverage, so in 1894, Congress filled in these gaps by incorporating Wyoming state law into federal law inside the park. Act of May 7, 1894, ch. 72, § 3, 28 Stat. 73. The law did not distinguish between the three states in the park; it incorporated only Wyoming law for these purposes. Not surprisingly, this was the same law that first put the entirety of the park in the District of Wyoming. *See id.* § 2. *See generally* H.R. REP. NO. 53-658 (1894) (describing history of lawlessness in park that led to legislation).

Today, this incorporation of state law is done more generally, for all federal enclaves, by the Assimilative Crimes Act, 18 U.S.C. § 13 (2000). The laws of the state in which the federal “place is situated” are incorporated. *Id.* In Yellowstone, this is applied so that actions in the Idaho portion of the park are covered by Idaho law, not Wyoming law. *See* Telephone Interview by Joseph Tirrell with Beth Vachon, Administrative Clerk, U.S. District Court office in Yellowstone National Park (Mar. 19, 2004) (discussing policy in park); Telephone Interview by Jeff Jocks with John R. Barksdale, Criminal Chief, U.S. Attorney’s office, District of Wyoming (Mar. 24, 2004) (discussing policy in Wyoming U.S. Attorney’s office in Cheyenne).

¹⁸ 28 U.S.C. § 131 (2000); *see also supra* note 17 (describing legislative history). Others have noted the anomaly that this is the only federal district that includes more than one state, but they have not noted the dangerous interaction this creates with the Sixth Amendment’s vicinage requirement. *See, e.g.*, 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3505 & n.3 (2d ed. 1984) (referring to District of Wyoming as “insignificant exception”); Thomas E. Baker, *An Assessment of Past Extramural Reforms of the U.S. Courts of Appeals*, 28 GA. L. REV. 863, 898 n.142 (1994) (noting effect of District of Wyoming’s anomaly on Tenth Circuit’s borders); Martha J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11, 44 n.184 (noting uniqueness of District of Wyoming); Peter Nicolas, *American-Style Justice in No Man’s Land*, 36 GA. L. REV. 895, 1002–07 (2002) (noting oddity of District of Wyoming’s borders in context of civil litigation).

Yellowstone.¹⁹ This makes the District of Wyoming the only district court that includes land in multiple states.²⁰

From an administrative standpoint, this may be an uncommonly sensible law. But the issue is not whether the law is wise; rather, it is whether it is incompatible with the United States Constitution. And it is.

Say that you are in the Idaho portion of Yellowstone, and you decide to spice up your vacation by going on a crime spree. You make some moonshine, you poach some wildlife, you strangle some people and steal their picnic baskets. You are arrested, arraigned in the park, and bound over for trial in Cheyenne, Wyoming before a jury drawn from the Cheyenne area.²¹ But Article III, Section 2 plainly requires that the trial be held in Idaho, the state in which the crime was committed. Perhaps if you fuss convincingly enough about it, the case would be sent to Idaho. But the Sixth Amendment then requires that the jury be from the state (Idaho) and the district (Wyoming) in which the crime was committed. In other words, the jury would have to be drawn from the Idaho portion of Yellowstone National Park, which, according to the 2000 Census, has a population of precisely zero.²² (The Montana portion—should you choose to

¹⁹ See 28 U.S.C. § 92 (Idaho); *id.* § 106 (Montana).

²⁰ See *supra* note 18.

²¹ See 16 U.S.C. § 30 (mandating construction of jail and magistrate judge's office in Yellowstone); Telephone Interview with Beth Vachon, *supra* note 17 (describing court's process for sending jury trials to Cheyenne); Telephone Interview by Joseph Tirrell with Deborah Nielson, U.S. District Court office in Cheyenne, Wyoming (Mar. 22, 2004) (describing Cheyenne division's jury selection policies and its monopoly on jury trials in District of Wyoming).

²² Complete census data are available at <http://factfinder.census.gov>. The Idaho portion of the park is in Fremont County, Idaho, census tract 9701, block group 2 (despite having no population, the block group is subdivided into several blocks).

rampage there—has an adult population of a few dozen, which might nevertheless present Sixth Amendment problems as well.²³)

The Constitution entitles you to a jury trial and an impartial jury of inhabitants of the state and district where the crime was committed. The U.S. Code steps on the rusty nail; it makes it impossible to satisfy both provisions in the case of the Yellowstone State-Line Strangler. Assuming that you do not feel like consenting to trial in Cheyenne, you should go free.

III. INTERPRETIVE TETANUS SHOTS THAT WILL NOT TAKE

Can this really be? Is there a swath of Idaho where you can violate the law with impunity? This Part will go through two obvious constitutional arguments for allowing prosecution, and will reject both. Some more practical solutions and some knottier constitutional questions are left for Part IV.

A. THEY COULD SAY IT IS NOT PART OF A STATE (BUT IT IS)

In 1888, a group of murderers killed four people in what is now the Oklahoma panhandle, but what was then—owing to sloppy legislating—a No Man’s Land that was part of no state, and assigned to no federal district court.²⁴ The killers apparently thought that this would make it impossible to prosecute them,²⁵ but they were wrong: After the massacre, Congress assigned the

²³ See *infra* text accompanying notes 52–53.

²⁴ See *Cook v. United States*, 138 U.S. 157, 173 (1891). It could have been argued that the area was in the Northern District of Texas, but this seems not to have been the sense of things in the No Man’s Land or in Washington. *Id.* at 173–74 (“[I]f congress intended by the act of 1883 to annex the Public Land Strip to the northern district of Texas, it was informed by these documents that that act was not so construed by certain officers of the government.”).

²⁵ See *Nicolas*, *supra* note 18, at 897 (describing “Massacre of Wild Horse Lake”).

No Man's Land to the Eastern District of Texas, retroactively.²⁶ The killers protested that this violated Article III and the Sixth Amendment.²⁷

In *Cook v. United States*, the Supreme Court rejected the killers' arguments, but it did so in a way that tees up our present crime spree opportunity. The *Cook* Court reasoned that Article III sets federal venue in the state of the crime, and the Sixth Amendment refines that provision by requiring that the jurors be from the right district in the state, defined *ex ante*.²⁸ But if a crime is not in *any* state, then the remainder of Article III, Section 2 applies: "[T]he Trial shall be at such Place or Places as the Congress may by Law have directed."²⁹ In such cases, the Court reasoned, the Sixth Amendment's refinements do not apply because the Amendment refers explicitly to a "state."³⁰ Though this points to poor draftsmanship in the Sixth Amendment,³¹ it makes sense that the Sixth Amendment's "state and district" vicinage provision would be inapplicable outside of a state, and that Congress would have unfettered discretion in such cases.

So, once you have been apprehended for your Yellowstone, Idaho crime spree, the prosecution might claim that your crime was committed in a federal enclave, not really in any state. Under this argument, the Sixth Amendment would be rendered inapplicable just as it was in *Cook*, and Congress's assignment of the case to Wyoming would be constitutionally kosher. But this is specious. The Idaho section of Yellowstone really is part of Idaho. If you decided to live there (instead of just going there to kill people) you would vote as an Idahoan, be

²⁶ See *Cook*, 138 U.S. at 180.

²⁷ See *id.* at 181; Nicolas, *supra* note 18, at 1007.

²⁸ *Cook*, 138 U.S. at 181. The killers also made an Ex Post Facto Clause claim, which was rejected too. See *id.* at 183.

²⁹ U.S. CONST. art. III, § 2.

³⁰ *Cook*, 138 U.S. at 181–82.

represented in Congress as an Idahoan, and so on. Similarly, the few people who live in the Montana portion of the park are Montanans.³²

When Idaho and Montana gave the federal government exclusive jurisdiction over their portions of Yellowstone, they did not cause that land to become some federal territory that is not part of any state.³³ The Constitution provides for three sorts of places where the federal government can have exclusive jurisdiction: a small federal district that is the seat of government (Washington D.C.), “Places purchased by the Consent of the Legislature of the State in which the Same shall be,”³⁴ and “Territory and other Property belonging to the United States.”³⁵ If Yellowstone is anything, it is either the second or the third, but in neither case does the federal government’s power vis-à-vis the state change the fact that the lands are still part of one state or another.³⁶ Indeed, there is no question that Yellowstone is subject to exclusive federal jurisdiction; the issue is the Sixth Amendment, which after all applies with full force to federal cases occurring in states.

The federal government knows that these lands are parts of their respective states, and has acknowledged the same in other ways. The statute that establishes the District of Wyoming

³¹ See Edward Hartnett, *A “Uniform and Entire” Constitution; or, What If Madison Had Won?*, 15 CONST. COMMENT. 251, 261 (1998) (noting this particular hiccup in Sixth Amendment’s language).

³² See *infra* text accompanying notes 52–53.

³³ See IDAHO CODE § 58-701 (2002) (referring to “lands within the state” in Yellowstone ceded to federal government control); MONT. CODE ANN. § 2-1-207 (2003) (referring to land “in the state of Montana now embraced in the Yellowstone national park”).

³⁴ U.S. CONST. art. I, § 8, cl. 17.

³⁵ *Id.* art. IV, § 3, cl. 2.

³⁶ In the case of “Places purchased,” the Constitution makes clear that such lands “shall be” part of the state that gave them away, not that they “used to be.” In the case of “Property belonging,” nothing changes the fact that these lands are still “within the States” and subject to the Bill of Rights. See, e.g., *Kleppe v. United States*, 426 U.S. 529, 540 (1976) (distinguishing between federal territories and “public land within the States”).

defines it as comprising “Wyoming and those portions of Yellowstone National Park *situated in Montana and Idaho.*”³⁷ The District of Idaho includes “Idaho, exclusive of Yellowstone National Park,” a construction that is necessary only if the Yellowstone part of Idaho is indeed part of Idaho.³⁸ The statute establishing the District of Montana uses similar language.³⁹ Finally, when state law issues arise in the park, the federal authorities figure out which state’s portion of the park is at issue, and apply that state’s law—including Idaho law in the Idaho portion.⁴⁰

In sum, when Congress set up this park and admitted these three states, it made a mistake. Congress can be forgiven on the park side because Yellowstone was the world’s first national park and there was no precedent. But Congress should have known how to set up states, having done it forty times before. It should either have shrunk the park or made Wyoming bigger to include all of the park. All other things being equal, it is nice that Wyoming looks like a rectangle (or trapezoid, more precisely), but all other things are *not* equal. Regular shapes are less important than full protection under law.⁴¹ Failing all of that, Congress should have bucked up and divided the park into three districts, without making a district court that could include a depopulated enclave in another state and a sparsely populated one in a third.

B. THEY COULD JUST CHANGE THE DISTRICT AFTER THE FACT (EXCEPT THEY CAN’T)

Perhaps Congress would redefine the boundaries of the District of Wyoming after you go on your spree, and transfer the scene of the crime to the District of Idaho, calling it the “Prevent the Yellowstone State-Line Strangler from Going Free Act,” or PYSLSFGFA for short. In the

³⁷ 28 U.S.C. § 131 (2000) (emphasis added).

³⁸ *Id.* § 92.

³⁹ *Id.* § 106.

⁴⁰ *See supra* note 17 (discussing current park policy).

1888 massacre in the Oklahoma panhandle, after all, the Supreme Court allowed Congress to set up a federal district after the fact, holding that it was not an ex post facto law and did not violate the Sixth Amendment's requirement that the jurors be drawn from a previously ascertained district.⁴² But Congress was able to ignore the Sixth Amendment in that case only because the crime was committed outside of any state—no such luck in Yellowstone.

Our crime fighters would keep trying. Just because the Previous Ascertainment Clause *applies* does not mean that it is necessarily *violated* by PYSLSFGFA. In *United States v. Louwsma*,⁴³ the Eleventh Circuit considered a crime committed in Florida in a county that was transferred before trial from the Southern District to the new Middle District. The court rejected the defendant's argument that trying him in the new district deprived him of his "previous ascertainment" right.⁴⁴ If he had been tried in the new Southern District, from which the county of the crime had been excised, he would not have had a jury from the scene of the crime; enforcing the previous ascertainment requirement would defeat the purpose of the vicinage requirement.⁴⁵ This missed the point: The defendant deserved a Sixth Amendment trial in the *old* Southern District—which included the scene of the crime—not the new one.⁴⁶

⁴¹ Besides which, we would still have trapezoidal Colorado.

⁴² *See supra* Part III.A.

⁴³ 970 F.2d 797 (11th Cir. 1992).

⁴⁴ *Id.* at 801–02.

⁴⁵ *Id.*

⁴⁶ Of course, our case is distinguishable anyway, because neither the old District of Wyoming nor the new District of Idaho would draw any people from the Idaho parkland (there aren't any). Because of differing policies in the two districts, if there *were* a large population in the Idaho parkland, it would only be included in the jury venire if the trial were held in Idaho. *See supra* note 21 and accompanying text (describing District of Wyoming policies of trying all criminal cases in Cheyenne and drawing jurors from Cheyenne vicinity only); Telephone Interview with Joanne Cook, Jury Administrator, District of Idaho (Mar. 24, 2004) (describing District of Idaho policy of trying criminal cases from Fremont County in Pocatello, with venire that includes residents of Fremont County).

Back to our case. One point that the *Louwsma* court did not miss was that having the trial in a newly created district might be unconstitutional if the shift was intended to change the outcome of a pre-existing case.⁴⁷ Another circuit has agreed.⁴⁸ That is exactly what PYSLSFGFA would do, so our case would be constitutionally suspect under these precedents.⁴⁹ It is one thing to make a mockery of the Sixth Amendment, quite another to pretend that the Amendment is not even there. If “previous” just means previous to the trial rather than previous to the crime, then the Previous Ascertainment Clause would be rendered almost meaningless. If the clause means anything, it means that PYSLSFGFA would be unconstitutional.

IV. DON’T GO KILLING ANYONE JUST YET: SOME MORE PROMISING CURES

It is unclear—indeed, perplexing—why no one has challenged the District of Wyoming’s borders before. This does not mean the district is constitutional, though. More likely, it reflects the fact that people and courts just do not think much about vicinage. It might also reflect the fact that there are numerous constitutional ways, discussed below, for the government to punish our hypothetical Yellowstone State-Line Strangler. Even if none of these methods is available, moreover, some people in the Department of Justice and the Article III judiciary might use legal arguments, also discussed below, that render our perfect crime imperfect. Not every rusty nail causes tetanus.

⁴⁷ *Louwsma*, 970 F.2d at 801.

⁴⁸ *See Zicarelli v. Dietz*, 633 F.2d 312, 323 (3d Cir. 1980) (stating that clause “was designed as a check on Congress, which . . . cannot constitute or reconstitute a district to affect a criminal case after commission of the alleged offense”).

⁴⁹ The Act would also violate the principle of the ban on attainder, if not its letter. *See* U.S. CONST. art. I, § 9, cl. 3. Congress should probably have chosen a more subtle name for the Act.

A. THEY COULD CHARGE YOU WITH OTHER CRIMES THAT ARE NOT A PROBLEM

The constitutional problems in this Essay arise only if you commit a crime *solely* in the Idaho (or maybe Montana) portion of the District of Wyoming. In many cases, though, it would be hard to limit your criminality to that small space. Perhaps you decide after reading this Essay to go out to Idaho for your crime spree. Before you go, you enlist some friends to help, buy your supplies, and make your way out to Yellowstone. In other words, you commit conspiracy, and you do it in states and districts where there are no Sixth Amendment vicinage problems. You might also have committed a state or federal firearm violation along the way. The possibilities are nearly endless. The biggest prize for prosecutors may be your murderous picnic-basket-stealing frenzy, but even if they cannot constitutionally prosecute you for that, they can probably prosecute you for something.

Another possibility is for prosecutors to concentrate on lesser offenses—those with maximum sentences of less than six months—that do not require a jury trial.⁵⁰ Again, these misdemeanors may be lesser charges than the ones to which you would be subject in other districts, but they are better than nothing, they will dissuade some criminals, and, most important, they can be prosecuted constitutionally.⁵¹

A third possibility is civil liability: Even if the government could not prosecute you, your victims and their families could sue you in tort. Of course, if they get wind of your constitutional

⁵⁰ See *Callan v. Wilson*, 127 U.S. 540, 557 (1888) (excepting “petty offenses” from constitutional jury requirements); see also 18 U.S.C. § 19 (2000) (defining petty offenses as being no more serious than Class B misdemeanor); *id.* § 3581(b)(7) (setting maximum punishment for Class B misdemeanor at six months).

⁵¹ One possibility that probably would not be brought to bear is state prosecution. The federal government has exclusive jurisdiction over Yellowstone, see *supra* notes 16–17 and accompanying text, so allowing state prosecution would require new federal legislation. Such

argument before you leave the scene of the crime, they could just give you a dose of your own medicine, administering vigilante justice with similar impunity.

But if a criminal is very careful, he could commit crimes without conspiring or smuggling anything illegal outside the Idaho parkland. He could commit crimes for which there are no lesser-included petty crimes, or for which the only possible petty punishments are worth the risk. He could concentrate on victimless crimes for which there is no potential for civil liability or self-help remedies. Nevertheless, these alternative possibilities do mitigate our Yellowstone loophole.

B. THEY COULD HAVE JURORS MOVE INTO THE AREA

The problem with prosecuting crimes in the Idaho portion of Yellowstone is not that it is inherently unconstitutional to have a federal district that crosses state lines. Rather, the problem is that it is impossible to form a jury solely from the residents of the Idaho parkland, because no such people exist. This problem could be solved by redrawing the district lines, but it could also be solved by adding people to the jury pool.

The latter solution would also mitigate the more limited problems in the Montana portion of Yellowstone. Montana's 260-odd square miles of Yellowstone have forty-one adult residents. It would be cutting things rather close, but this might be enough to yield a jury of twelve after a good round of voir dire, with a few strikes for cause and a few more peremptories.⁵² (This assumes, of course, that the prospective jurors are not disqualified by virtue of being witnesses or

changes could only be prospective, to avoid ex post facto problems. Given these obstacles, it would make more sense just to redraw the district lines.

federal employees or some such.) Of course, if you have a few associates who don't mind committing unrelated crimes to help you out, some of you might go free. Those who draw the short straws would be tried first, but by the time the forty-one Yellowstone Montanans finished with those trials, the others might be well beyond the requirements of the Speedy Trial Act.⁵³

In encouraging new residents to move to the vicinage, the federal government would need to be careful to avoid partiality and other problems. To attract enough people to make trials work, the government might have to offer to cover the administrative and moving expenses of the new residents. Impartiality might be a problem if the government were paying people to be on a jury, but it need not be so long as it is clear that the selection process and the payment process are in no way dependent upon the verdict that the jury renders. Then again, this is a far cry from ordinary juror pay and sequestration compensation. Moreover, courts are wary of people who strain to get onto a jury, and that wariness would be particularly warranted in this extreme a case.

Mostly, though, it is just hard to imagine large groups of people moving to the Idaho parkland for this (or any other) purpose. Overall, this solution would be more complicated, more disruptive, and more fraught with potential unconstitutionality than simply redrawing the district boundaries. Cumbrously moving jurors would only be preferable to redrawing the district's boundaries if the move could be done after the crime, but impartiality and attainer problems make that very difficult.

⁵² Complete census data are available at <http://factfinder.census.gov>. The Montana portion of the park is in Gallatin County, Montana, census tract 14 (26 adults), and Park County, Montana, census tract 6 (15 adults).

⁵³ See 18 U.S.C. § 3161 (2000) (mandating short time limits for bringing indictments and beginning trials); see also *id.* § 3174 (providing for limited extensions in emergencies).

There is a further statutory barrier to retrospective juror migration: Federal law requires that jurors have lived within the district for at least one year.⁵⁴ This is not fatal, of course, but if the government is seeking retrospective or prompt prospective application, it should limit the possible migrants to those already living in the district: Montanans from inside the park and Wyomingites. Focusing further on just those Wyomingites who already live inside the park would help.⁵⁵ Though there might be partiality and administrative concerns associated with relocating large numbers of park employees to be on juries, these would be the people for whom moving would be simplest. They would not have to move very far, nor would they be leaving the federal enclave that they already call home. To the extent that there is a “community” that the jury should ideally represent,⁵⁶ residents of the park would seem to be its best representatives.

In sum, moving people to the Idaho parkland would close the loophole, and it might even do so retrospectively. But it would face large practical and legal problems. Willing and impartial volunteers would be needed immediately, and the nature of the act—a group of mainly federal employees moving to a new state in order to be a juror in a specific case—means that their willingness and their impartiality might be mutually exclusive. The better solution is just to change the statute, even if it means letting a Strangler or two go free.

C. THEY COULD USE THOSE CREATIVE INTERPRETIVE SKILLS THEY LEARNED IN THEIR CONSTITUTIONAL LAW CLASSES

⁵⁴ 28 U.S.C. § 1865(b)(1) (2000).

⁵⁵ Complete census data are available at <http://factfinder.census.gov>. The Wyoming portion of the park is in Park County, Wyoming, census tract 9953, block group 1 (270 adults), and Teton County, Wyoming, census tract 9976, block group 1 (166 adults).

⁵⁶ The notion of the vicinage requirement as being about community self-government is a compelling one. *See generally* Engel, *supra* note 5.

There is a final possibility: that the Sixth Amendment, properly interpreted, allows prosecutions for Yellowstone, Idaho crime sprees. The interpretations in Part III were rejected because they were not plausible. The interpretations presented in this section are.

The argument goes as follows. The Yellowstone loophole only exists if one takes a hyper-literalistic view of the Sixth Amendment. The purpose of the Sixth Amendment's vicinage requirement is to prevent federal prosecutors from shopping for an antidefendant venue and drawing the jury from there.⁵⁷ An overlapping purpose is to guarantee that communities govern themselves in the criminal justice process through jury participation, deciding for themselves what is and is not a crime in their own backyards, as opposed to someone else's.⁵⁸ Some additional benefits, if not purposes, of the vicinage requirement are that it guarantees that a trial will take place close to where the facts occurred, minimizing inconvenience and helping to ensure that the finder of fact will be a representative body with superior knowledge of local customs and norms.

If we take this view of the Sixth Amendment, then placing an unpopulated part of Idaho in the District of Wyoming is not a problem. First of all, the district is pre-existing (fulfilling the other part of the vicinage requirement), so it is not as if trying the case in Cheyenne would be a calculated, manipulative, extemporized act by the prosecution that blindsides the defendant. As for letting the community govern itself, there *is* no community in the Idaho parkland, so no public interest in self-government would be infringed. If we have to link the Idaho parkland to a community, it makes good sense, given the discretion the Sixth Amendment gives Congress, to link it to the "community" of the rest of the federal enclave rather than to the rest of Idaho.

⁵⁷ See Kershen, *supra* note 9, at 838–50 (discussing intentions of instigators and framers of Sixth Amendment).

Administrative convenience and local knowledge are not countervailing factors either, as it is *more* convenient to govern the park as one unit, and the people with the best knowledge of the norms of the park would be other residents of the park, not other Idahoans.⁵⁹

This interpretation of the Sixth Amendment might receive some votes in court, maybe even enough votes to carry the day. But it misses the point. If Congress is to ignore the strict text of a straightforward constitutional provision—whatever that provision’s purposes—it must have compelling justification. The burden in such a case, in other words, is to justify the statute’s departure from the clear terms of the Constitution. But the only reason that Congress can give for putting portions of Idaho in the District of Wyoming is convenience. While impossibility or genuine hardship might be enough to justify an unconstitutional statute, mere inconvenience is not.⁶⁰ There are plenty of other units in the National Park system that have small spillovers into another state,⁶¹ but none of these other areas are shoehorned into a single federal district, and no undue travesties have resulted. In Yellowstone, moreover, federal prosecutors already take the time to treat crimes differently based on the state in which they are committed.⁶²

⁵⁸ See *supra* note 56.

⁵⁹ At present, no resident of the park is ever on a jury in a case involving a crime in the park. See *supra* note 21 and accompanying text.

⁶⁰ Cf. *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) (“[O]ne might fairly say of the Bill of Rights in general . . . that [it was] designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.”).

⁶¹ Some examples include Great Smoky Mountains National Park in Tennessee and North Carolina; Death Valley National Park in California and Nevada; Big South Fork National River & Recreation Area in Kentucky and Tennessee; Bighorn Canyon National Recreation Area in Montana and Wyoming; and dozens of others. A list of units and their locations is available at National Park Service, *National Park Guide*, available at <http://data2.itc.nps.gov/parksearch/atoz.cfm> (last visited Jul. 19, 2004).

⁶² See *supra* note 17 (discussing application of Assimilative Crimes Act in Yellowstone).

If the Sixth Amendment and Article III, Section 2 draw any bright lines at all, they are state lines. State lines are not mere technicalities in our federalist system, after all.⁶³ In standing up for the principle of trial in the locale of the crime, by the residents of that locale, the Constitution specifically defines the notion of a locale along state lines. While the Sixth Amendment does give Congress the power to refine these bounds further, along district lines, it would be odd if that refinement allowed Congress to run roughshod over state borders in the manner that it has here.

Another way to close the loophole would be to say that the Sixth Amendment requires an impartial jury of the vicinage, but that impartiality trumps vicinage. While this is true as a practical matter, it does not solve our problem here. Courts have allowed impartiality to trump venue and vicinage primarily because they view these as rights of the defendant; if a defendant would rather have an impartial jury than a local one, we let him make that choice and waive the latter right.⁶⁴ Our problem, however, assumes that the defendant does not waive his right to a local trial or a local jury.

The troublesome interaction between impartiality and vicinage is not an accident, moreover, and it further illuminates why our Yellowstone statute is unconstitutional. The two rights are mentioned in the same constitutional breath, and impartiality was a critical topic in the

⁶³ This is not to say that Article III and the Sixth Amendment completely preclude districts from crossing state lines. If Congress wanted to combine all of Wyoming, all of Montana, and all of Idaho into the single District of Wyotanaho, it could do so, as long as the district held trials in the right state, with juries from the right state. *But see supra* text accompanying note 28 (noting precedent for reading districts as necessarily being subdivisions of states).

⁶⁴ *See generally* Scott Kafker, Comment, *The Right to Venue and the Right to an Impartial Jury*, 52 U. CHI. L. REV. 729 (1985) (discussing conflict between venue and impartiality rights). Courts may presume that a defendant who refuses to waive his venue right is implicitly agreeing that the local jury is impartial, but this is illogical, and at least one court, agreeing that no

debate over vicinage during the drafting of the Sixth Amendment.⁶⁵ In his original draft of the amendment, James Madison provided for county-level vicinage, with exceptions only when rebellion in a county might interfere with empanelling an impartial jury.⁶⁶ On the other extreme, some participants in the ratification debates opposed requiring juries of the vicinage altogether, because it was rooted in an outdated notion of jurors bringing local knowledge into their jobs, instead of the participants' preferred notion of juries as blank slates.⁶⁷ When the final version of the Sixth Amendment emerged, it answered both Madison's and his critics' concerns by giving Congress the power to define the extent of the vicinage right. Madison's concern was addressed because Congress could (and did⁶⁸) draw district lines so wide that any small localized rebellion would not threaten impartiality; at the same time, Congress could always decide to make districts smaller in area as the population grew. The critics of vicinage were placated by the initially large districts and by the requirement of impartiality, which, combined in the jury selection process, guaranteed that a subset of disinterested jurors would be drawn from the broader population of a large area.

Here is the point. Granting to Congress the power to define districts and vicinage solved these problems, but it presented another one: Congress might not do a good job of drawing the district lines. And that is precisely the issue here. The Yellowstone loophole is not a result of

impartial local jury could be drawn, dismissed such a case. *See id.* at 735–40 (discussing case law).

⁶⁵ There are numerous worthwhile accounts of the history of the Sixth Amendment. *See, e.g.,* Zicarelli v. Gray, 543 F.2d 466, 476–78 (3d Cir. 1976); FRANCIS H. HELLER, THE SIXTH AMENDMENT (1951); Kershner, *supra* note 9, at 837–60.

⁶⁶ *See* Kershner, *supra* note 9, at 818.

⁶⁷ *See id.* at 835.

⁶⁸ *See supra* note 11 and accompanying text.

some inherent flaw in the concept of vicinage that should lead courts to eviscerate the right. Rather, the cause is that Congress was sloppy when it created the District of Wyoming.

The goals of the Sixth Amendment are not advanced by trying an Idahoan killer in Wyoming by Wyomingites; only the goal of punishing a killer is. But both goals could be advanced easily and simply by trying our killer in Idaho by Idahoans. Congress deserves no deference for its decision not to use its Sixth Amendment powers in this more sensible way; if our case ever arises, the courts should have no hesitation in declaring the District of Wyoming statute unconstitutional.

CONCLUSION

Our Yellowstone loophole highlights some interesting things about the Constitution. First, nobody really pays much attention to vicinage. If anybody did, this gap would have been closed already, either by a court or by Congress.

Second, just because a statute has been around and in regular use for over a century does not mean that it is constitutional. It bears emphasis that the flaw here is really with the District of Wyoming statute, not with the Sixth Amendment. The solution is to fix the statute, not eviscerate the Constitution. If we do it quickly enough, no one will get hurt.

If courts are convinced by the Sixth Amendment counterarguments offered in Part IV, then perhaps no one will get hurt anyway, or at least not with impunity. One should not, however, overestimate the willingness of our courts to accept an argument and redefine the Constitution solely to avoid letting one criminal go free. Indeed, courts let people get away with heinous crimes all the time under, say, the exclusionary rule—and that “get out of jail free” card

is not even in the Constitution.⁶⁹ To take a slightly different and more directly analogous example, the government should not be able to avoid the Court's warrant requirement simply by refusing to provide for the appointment of any neutral magistrates. There is no reason to reward Congress's playing fast and loose with the Sixth Amendment. The best solution to the Yellowstone loophole is to close it, not to pretend it is not there.

⁶⁹ *See* United States v. Calandra, 414 U.S. 338, 348 (1974). To be sure, there is a countervailing "bad act" by police in exclusionary rule cases, but that does not change the fact that a guilty person is going free even though the Constitution does not require it.