American Indian Law Review

Volume 39 | Number 1

2015

Tribal Courts, Non-Indians, and the Right to an Impartial Jury after the 2013 Reauthorization of VAWA

Cynthia Castillo
U.S. District Court for the Western District of Texas

Tribal Courts, Non-Indians, and the Right to an Impartial Jury after the 2013 Reauthorization of VAWA

Cover Page Footnote

First-place winner, 2013–14 American Indian Law Review Writing Competition. Law Clerk, U.S. District Court for the Western District of Texas, El Paso, Tex. J.D., 2014, University of Virginia School of Law; M.S., 2009, University of Pennsylvania; B.A., 2007, University of Texas at Austin.

SPECIAL FEATURE

TRIBAL COURTS, NON-INDIANS, AND THE RIGHT TO AN IMPARTIAL JURY AFTER THE 2013 REAUTHORIZATION OF VAWA*

*Cynthia Castillo***

Introduction

In February 2013, Congress passed the Violence Against Women Reauthorization Act of 2013 (VAWA).[1] The previous version of the bill lapsed in 2011 while lawmakers argued over several controversial provisions. One particularly controversial provision of the Act now extends tribal court jurisdiction over non-Indians[2] in cases involving couples living on a reservation when one partner is Indian and the other partner is not. [3] This provision leads some to fear that non-Indians subjected to tribal court jurisdiction will face biased juries.

Juries are fundamental to our system of justice, and whether the public views tribal court proceedings over non-Indians as fair will depend on the composition of tribal court juries. The fears about tribal court jurisdiction under the VAWA highlight how the racial composition of a jury can affect the perceived fairness of a trial. While concerns are valid, because the VAWA requires tribes to draw their jurors from sources that mirror a fair cross-section of the community,[4] in most cases the non-Indians subject to tribal court jurisdiction will have access to juries composed of Indians and non-Indians. Thus, these juries will likely meet the constitutional test for

---

* First-place winner, 2013–14 *American Indian Law Review* Writing Competition.

** Law Clerk, U.S. District Court for the Western District of Texas, El Paso, Tex. J.D., 2014, University of Virginia School of Law; M.S., 2009, University of Pennsylvania; B.A., 2007, University of Texas at Austin.

1. Ashley Parker, *House Renews Violence Against Women Measure*, N.Y. TIMES, Feb. 28, 2013, http://www.nytimes.com/2013/03/01/us/politics/congress-passes-reauthorization-of-violence-against-women-act.html?pagewanted=all&_r=0.

2. A note on terminology: I will use the terms "Indian" and "non-Indian" in this paper rather than "Native American" and "American" as those are the terms used in the relevant statutes, Supreme Court cases, and scholarship.

3. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, sec. 904, § 204(b)(4)(B), 127 Stat. 54, 122.

4. *Id.* sec. 904, § 204(d)(3)(A), 127 Stat. at 122.

determining whether a jury is impartial that the Supreme Court set forth in *Duren v. Missouri.*

Many of the fears about subjecting non-Indians to an unfamiliar judicial system with different norms and potential cultural and language barriers are equally applicable when Indians are tried in federal courts; yet Indians who have argued that they were subject to partial juries in federal courts have not prevailed under the *Duren* test.[5] It may be that many of the systems the *Duren* test has upheld, while constitutionally fair, would not meet other standards of fairness. While tribal court jurisdiction over non-Indians may be fair under our current constitutional standard, there may be other fairness concerns that cause us to evaluate how protective our current constitutional standard actually is.

The VAWA's grant of tribal court jurisdiction is needed, but it presents (at least) two challenges. First, the VAWA further complicates an already complex jurisdictional scheme by granting jurisdiction to tribal courts in a narrow class of cases, while leaving the remaining cases under federal (and sometimes state) jurisdiction. Second, the VAWA presents complex constitutional and federal common law issues. Whether the VAWA can provide the right to an impartial jury is only one of the many legal questions the Act's tribal court jurisdiction provision raises.

Part I of this note provides a background for the discussion by describing the relevant provisions of the VAWA, providing necessary background and summarizing Supreme Court precedent regarding tribal court jurisdiction. Part II reviews the Sixth Amendment right to an impartial jury, the fair cross-section requirement and examines the fair cross-section challenges brought by Indians in federal court to determine the scope of this requirement. Part III analyzes whether non-Indians will receive impartial juries. Finally, Part IV looks at how the racial composition of juries can affect the perceived fairness of trials.

I. Tribal Court Jurisdiction over Non-Indians

On February 28, 2013, the Republican-led House of Representatives passed the VAWA after a long, partisan debate.[6] The bill had already passed the Senate, but Republican concerns about the VAWA's provisions expanding tribal court jurisdiction over non-Indians and extending protections to lesbian, gay, bisexual, and transgender victims and

5. *See infra* Part II.B.
6. Parker, *supra* note 1.

undocumented immigrants jeopardized its passage in the House.[7] The House Republican's own version of the bill, which ultimately failed to gain enough support, had deleted those controversial provisions.[8]

Tribal court jurisdiction over non-Indians has been a subject of much debate since the Supreme Court ruled in *Oliphant v. Suquamish Indian Tribe* that tribal courts *could not* exercise jurisdiction over non-Indians under existing law.[9] That decision left the federal government with the responsibility of prosecuting non-Indians who commit crimes in Indian country. According to those who advocated for the passage of the VAWA, however, the federal government had been lax in exercising its jurisdiction and prosecuting non-Indian offenders, especially in rape and domestic violence cases.[10] To those advocates, the VAWA is a step in the right direction because it gives Indian women the protection and justice they deserve, and it gives tribes more control over their territories.[11] Critics of the provision, however, fear that non-Indians subject to tribal court jurisdiction may face uncertainty, bias, and violations of their constitutional rights.[12]

A. Violence Against Indian Women: The Problem and Solution

Prosecuting sexual violence in Indian Country has proven difficult. For one thing, determining which government has criminal jurisdiction in "Indian country"[13] is complicated. Some scholars have described Indian

---

7. Tom Cohen, *House Passes Violence Against Women Act After GOP Version Defeated*, CNN (Feb. 28, 2013, 5:26 PM), http://www.cnn.com/2013/02/28/politics/violence-against-women/.

8. *Id.*

9. 435 U.S. 191 (1978); *see infra* Part II.B.

10. Louise Erdrich, *Rape on the Reservation*, N.Y. TIMES, Feb. 27, 2013, at A25 (stating that "prosecutors decline to prosecute 67 percent of sexual abuse cases" and that more than 80% of sex crimes committed on reservations are committed by non-Indians).

11. *See, e.g., NCAI Praises Passage of Protections for All Women; Tribal Courts Gain Jurisdiction over Non-Indian Domestic Violence Perpetrators*, NAT'L CONGRESS OF AM. INDIANS (Feb. 28, 2013), http://www.ncai.org/news/articles/2013/02/28/house-passes-violence-against-women-act.

12. *See, e.g.,* Tom Gede, *Criminal Jurisdiction of Indian Tribes: Should Non-Indians Be Subject to Tribal Criminal Authority Under VAWA?*, ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS, July 2012, at 40.

13. Indian country is a term of art that is defined as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the

country as a "jurisdictional maze."[14] The federal government exercises criminal jurisdiction for all crimes committed by non-Indians in Indian country.[15] When the perpetrator is Indian, the federal government exercises criminal jurisdiction for "major crimes," while tribal courts exercise jurisdiction for "minor crimes."[16] A few states have jurisdiction over some crimes committed in Indian Country, but they rarely exercise this jurisdiction.[17] The VAWA creates an exception to the rule that tribal courts cannot exercise jurisdiction over non-Indians.[18] Under the VAWA, tribal courts *may* exercise jurisdiction over non-Indians in "special domestic violence" cases.[19]

Before discussing the text of the VAWA, it is important to understand why such a provision is necessary and why it is limited to "special domestic violence" cases. One might wonder why tribal courts need jurisdiction over non-Indians if federal prosecutors, and in some cases state prosecutors, already have the ability to prosecute these crimes. The answer is that crimes of sexual violence are under-enforced for a number of reasons. Sexual violence crimes are generally harder to prosecute than other crimes because physical evidence is often unavailable. Because rape and domestic violence crimes typically fall under state jurisdiction, federal prosecutors may lack experience prosecuting these types of crimes. Federal prosecutors also have

---

> original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Indian Country Crimes Act, 18 U.S.C. § 1151 (2012).

14. *See, e.g.*, Amanda M.K. Pacheco, *Broken Traditions: Overcoming the Jurisdictional Maze to Protect Native American Women from Sexual Violence*, 11 J.L. & SOC. CHALLENGES 1 (2009).

15. 18 U.S.C. § 1152 (2012).

16. *See* Major Crimes Act, 18 U.S.C § 1153 (2012). The statute classifies "murder, manslaughter, kidnapping, . . . felony child abuse or neglect, arson, burglary, [and] robbery" as major crimes. *Id.*

17. The text of the Major Crimes Act gives states authority over the crimes not specifically enumerated in 18 U.S.C. § 1153(a), *see id.*, but such jurisdiction is rarely exercised. For a discussion of why states may choose to not exercise jurisdiction in Indian country, see Pacheco, *supra* note 14, at 23–29. *See also* 18 U.S.C. § 1162 (giving certain states jurisdiction over offenses committed by or against Indians in Indian country).

18. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, sec. 904, § 204(b)(4)(B), 127 Stat. 54, 122.

19. *Id.*

limited resources, which makes travel to remote reservations impractical.[20] Moreover, there is often a cultural barrier between the federal prosecutor and the Indian community.[21] This barrier may make victims and witnesses more reluctant to confide in federal prosecutors.[22] There may also be a language barrier making communication with the federal prosecutor more difficult.[23] Prosecutors may also consider domestic violence crimes to be minor compared to the other crimes that fall under their jurisdiction. Finally, the complex jurisdictional structure may cause confusion between law enforcement agencies over who has jurisdiction, since jurisdiction depends on the race or tribal membership of the defendant and the severity of the crime.

Whatever the reasons may be for the under-enforcement of these crimes, sexual violence crimes are rampant in Indian country. According to the Department of Justice, Indian women are more than twice as likely to experience rape or sexual assault than women of other races.[24] Non-Indian men commit anywhere from 60% to 80% of sexual assaults on Indian women.[25] These statistics are not particularly surprising considering that non-Indians make up 77% of the residents in Indian country.[26] Since non-Indians cannot be prosecuted by tribes, and are often not prosecuted by federal and state courts, sexual violence crimes are grossly under-prosecuted in Indian country.[27] This startling reality of the dangers Indian

---

20. *See* Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 729 (2006).

21. *See id.* at 710–11.

22. *See id.* at 729.

23. *Id.*

24. PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUSTICE, OFFICE OF JUSTICE PROGRAM, U.S. DEP'T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN 23 (2000), *available at* http://www.ncjrs.gov/pdffiles1/nij/183781.pdf ("A recent study by the Bureau of Justice Statistics found that the rate of violent victimization for Native Americans was more than twice the rate for the Nation (124 versus 50 per 1,000 persons age 12 and older).").

25. *See* Laura E. Pisarello, Comment, *Lawless by Design: Jurisdiction, Gender and Justice in Indian Country*, 59 EMORY L.J. 1515, 1517 (2010) (citing statistics showing that 4 out of 5 assaults are committed by non-Indian males and that over 70% of assaults are committed by non-Indian males); Erdrich, *supra* note 10 (stating that more than 80% of assaults are committed by non-Indians).

26. TINA NORRIS ET AL., U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, at 14 (2012).

27. Amy Radon, *Tribal Jurisdiction and Domestic Violence: The Need for Non-Indian Accountability on the Reservation*, 37 U. MICH. J.L. REFORM 1275, 1278 (2004).

women face led Congress to consider expanding tribal court jurisdiction for these types of cases.[28]

Despite the enormity of the problem, the jurisdiction provided by the VAWA is fairly narrow. Congress has provided concurrent federal and tribal jurisdiction over all persons only for "special domestic violence" cases.[29] Jurisdiction is not authorized if both the victim and the defendant are non-Indian or if the defendant lacks ties to a participating Indian tribe.[30] A defendant has ties to a tribe if he:

> (i) resides in the Indian country of the participating tribe;
>
> (ii) is employed in the Indian country of the participating tribe; *or*
>
> (iii) is a spouse, intimate partner, or dating partner of—
>
> (I) a member of the participating tribe; or
>
> (II) an Indian who resides in the Indian country of the participating tribe.[31]

This language substantially narrows the non-Indian population subject to tribal prosecution to those with substantial relationships to Indians or Indian country. It excludes non-Indians who commit acts of sexual assault within Indian country, but who do not live or work in Indian country and are not in any type of romantic relationship with their victims.[32] The limited nature of the bill ensures that those who fall under tribal jurisdiction will be at least somewhat familiar with the prosecuting tribe and its customs.

---

28. *Hearing on S. 1763, S. 872, and S. 1192 Before the S. Comm. on Indian Affairs*, 112th Cong. 4 (2011) (statement of Sen. Diane Feinstein) ("[W]e heard that domestic violence and sexual assault against Native women is still an epidemic . . . . In response, I introduced . . . [the] SAVE Native Women Act.").

29. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, sec. 904, § 204(b)(4)(B), 127 Stat. 54, 122.

30. *Id.*

31. *Id.* (emphasis added). The statute is gender neutral, but I will use the male pronoun throughout this note as the statistics show that there is a high rate of non-Indian males sexually ssaulting Indian females.

32. This definition would exclude one potential type of defendant—the one specifically highlighted by Erdrich. She states that the number of sexual assaults that take place in Indian country increases during hunting season. *See* Erdrich, *supra* note 10. Presumably these hunters do not have the required ties to Indian country that would bring them under tribal court jurisdiction.

The VAWA also narrowly defines the type of conduct that subjects defendants to tribal jurisdiction.[33] A tribe may only exercise jurisdiction if a defendant commits an act of "domestic violence or dating violence," or if the defendant violates a protective order enforceable by the tribe while in Indian country.[34] As defined by the statute, dating violence is "violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim . . . ."[35] Domestic violence is violence committed by the "current or former spouse or intimate partner of the victim, by a person who the victim" (1) shares a child with, (2) cohabitates with (or has previously cohabited with), or (3) "by a person similarly situated to a spouse of the victim under the domestic- or family-violence laws of an Indian tribe that has jurisdiction over the Indian country where the violence occurs."[36] The definitions of domestic and dating violence imply that, in most cases, there must be an existing relationship between the victim and the defendant, even though the Act states that a relationship is only one of three ways to come under tribal jurisdiction. It appears that the only situation where the statute does not require a pre-existing intimate or romantic relationship is where the victim has received a protective order against someone who works or lives within Indian country.

The statute also affords defendants all applicable rights provided under the Indian Civil Rights Act (ICRA), which provides most, but not all, of the rights guaranteed in the Constitution.[37] There are a few key Constitutional protections missing from the ICRA, however, including the right to an impartial jury and the right to a grand jury.[38] In recognition of this shortfall, the VAWA requires "the right to a trial by an impartial jury."[39] This jury must be drawn from sources that "reflect a fair cross section of the community" and "do not systematically exclude any distinctive group in the community, including non-Indians."[40] Tribal courts must also provide defendants with "all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and

33. *Id.*

34. *Id.* § 204(c)(1)

35. *Id.* § 204(a)(1)

36. *Id.* § 204(a)(2)

37. *See* 25 U.S.C. § 1302 (2012) (titled "Constitutional Rights"); *see also* Carla Christofferson, Note, *Trial Courts' Failure to Protect Native American Women: A Reevaluation of the Indian Civil Rights Act*, 101 YALE L.J. 169, 169 n.5 (1991).

38. *See* 25 U.S.C. § 1302.

39. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, sec. 904, § 204(d)(3), 127 Stat. 54, 122.

40. *Id.* sec. 904, § 204(d)(3)(A), 127 Stat. at 122.

affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant."[41] At the very least, these provisions try to address the concerns of critics by disallowing jurisdiction if non-Indians are barred from serving on juries.

B. Tribal Court Jurisdiction: The History and the Controversy

Tribal court jurisdiction over non-Indians has been a controversial issue since long before the debate over the VAWA. In *Oliphant v. Suquamish Indian Tribe*, decided in 1978, the Supreme Court held that tribal courts do not have jurisdiction to try non-Indians who commit crimes in Indian Country "absent affirmative delegation of such power by Congress."[42] The Court stated that the sovereignty of Indian tribes is diminished, and that tribes hold the territory that they do "with the assent of the United States, and under its authority."[43] Moreover, the Court also stated that: "[b]y submitting to the overriding sovereignty of the United States, Indian tribes . . . necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress."[44] The basic theme of the Court's reasoning, therefore, is that Indian tribes operate under the authority of the federal government and they have only the power that Congress grants them.

To support its holding, the *Oliphant* Court emphasized the cultural and racial differences between Indians and non-Indians.[45] It cited to *Ex parte Crow Dog*, an 1883 Supreme Court decision that addressed whether federal courts had jurisdiction over Indians who committed crimes against other Indians, and held that they did not.[46] In so holding, the *Ex parte Crow Dog Court* noted that by subjecting non-Indians who committed crimes against other non-Indians to federal law, the United States was *not* trying Indians "by their peers, nor by the customs of their people, nor the law of their land" but rather *by a different race*. The *Oliphant* Court found this language persuasive and stated that this reasoning applies equally in the situation of tribal court jurisdiction over non-Indians as it does to federal jurisdiction over Indians.[47] By re-affirming this language from *Ex parte Crow Dog*, the

41. *Id.* sec. 904, § 204(d)(4), 127 Stat. at 122.
42. 435 U.S. 191, 208 (1978).
43. *Id.* at 209 (quoting United States v. Rogers, 45 U.S. 567, 571 (1846)).
44. *Id.* at 210.
45. *Id.* at 210–11 (quoting *Ex parte* Crow Dog, 109 U.S. 556, 571 (1883)).
46. 109 U.S. 556 (1883). This case came before passage of the Major Crimes Act, 18 U.S.C. § 1153 (2012), which gave federal courts this jurisdiction.
47. *Id.*

Court seems to be saying that Indians and their laws and customs are so different from non-Indian, American laws and customs, that any trial in which one group asserts their law over the other would be unfair. Thus, the *Oliphant* Court (if not our current Supreme Court) would appear to agree with the critics of the VAWA who are concerned about how fair a tribal court exercising jurisdiction over a non-Indian can really be.

Most criticism of the VAWA's jurisdictional provision, and tribal court jurisdiction over non-Indians in general, has centered over whether tribal court juries can be impartial.[48] In reaction to the VAWA's tribal court provision, Senator Chuck Grassley stated, "[y]ou've got to have a jury that is reflective of society as a whole, and on an Indian reservation, it's going to be made up of Indians, right? So the non-Indian doesn't get a fair trial."[49] This issue was also a key factor in *Oliphant* as the Court noted with concern that non-Indians were not allowed on juries by Suquamish Tribe.[50]

Although Congress tried to allay the fears expressed by both the *Oliphant* Court and Senator Grassley by including a requirement of an impartial jury representing a fair cross-section of the community, there is still fear about how tribal court juries will treat non-Indian defendants, especially when the non-Indian is charged with violence against an Indian woman. In a heated exchange with an Indian advocacy group for sexual assault survivors, U.S. Congressman Kevin Cramer (R-N.D.), who voted for the VAWA, stated that he thought due process concerns would ultimately lead the Supreme Court to overturn the Act.[51] According to the account of an activist, Congressman Cramer also stated that as a non-Indian, he now fears walking onto a reservation.[52] It is notable that these concerns are similar to those that long have been expressed by other minority groups tried in state and federal courts.

II. The Fair Cross-Section Requirement

Juries are a fundamental element of our system of criminal adjudication, so it is no wonder that critics of the VAWA focus their concerns on tribal court juries. As the Supreme Court stated in *Glasser v. United States*, "the

48. See, for example, Senator Grassley's comment regarding the jurisdictional provisions in Erdrich, *supra* note 10.

49. Erdrich, *supra* note 10.

50. *Oliphant*, 435 U.S. at 194.

51. Luke Johnson, *Kevin Cramer, North Dakota Congressman, Regrets Berating Native American Counselors*, HUFFINGTON POST (updated Mar. 29, 2013, 10:23 AM), http://www.huffingtonpost.com/2013/03/28/kevin-cramer-north-dakota-native- american_n_2974676.html.

52. *Id.*

notion of what a proper jury is has become inextricably intertwined with the idea of jury trial."[53] The right to a jury trial is a "fundamental right" that protects criminal defendants from government oppression.[54] The Constitution does not stop there; the Sixth Amendment requires a trial "by an *impartial jury* of the State and district wherein the crime shall have been committed . . . ."[55] The Supreme Court has interpreted this clause to require that juries be "'truly representative of the community,' and not the organ of any special group or class."[56] Thus, the Constitution is not satisfied with just any jury. Rather, the people who comprise the jury determine whether a given jury is impartial.

Congress codified this requirement, also known as the fair cross-section requirement, into federal law in the Federal Jury Selection and Service Act of 1968 (JSSA).[57] The JSSA states in part: "It is the policy of the United States that all litigants in Federal Courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes."[58] The fair cross-section requirement does not require that juries be "representative of society as a whole,"[59] but only that juries be drawn from sources that are representative of the community.

A. Challenges to Discrimination in Jury Selection

The Supreme Court began to address racial discrimination in jury selection soon after the Civil War.[60] Prior to the extension of the Sixth Amendment to the states, defendants brought challenges to discriminatory jury selection practices under the Equal Protection clause. In *Strauder v. West Virginia*, the Supreme Court overturned the murder conviction of an African-American man because the state's exclusion of African-Americans from jury service violated the Equal Protection Clause.[61] In *Norris v. Alabama*, the Court held that Jackson County denied an African-American defendant equal protection of the law. In that case, even though African-

53. Glasser v. United States, 315 U.S. 60, 85 (1942).

54. Duncan v. Louisiana, 391 U.S. 145, 154 (1968) (holding that the Due Process Clause of the Fourteenth Amendment requires that states provide the right to a jury trial in serious criminal cases).

55. U.S. CONST. amend. VI (emphasis added).

56. *Glasser*, 315 U.S. at 85–86.

57. 28 U.S.C. §§ 1861–1869 (2012).

58. *Id.* § 1861.

59. *See* Erdrich, *supra* note 10.

60. Washburn, *supra* note 20, at 745.

61. 100 U.S. 303 (1879).

American males were not expressly prohibited from serving on juries, no African-American had ever served on a jury in Jackson County.[62]

The Court first applied the fair cross-section requirement to the states in *Taylor v. Louisiana*, where it found a violation of the fair cross-section requirement in a law that excluded women from jury service unless they filed a written declaration asking to serve. In holding the law unconstitutional, the Court said, "petit juries must be drawn from a source fairly representative of the community."[63]

A few years later, in *Duren v. Missouri*, the Court overturned a similar law that granted exemptions from jury service to women who requested them. This law resulted in a jury venire that consisted of only 14.5% women in a county where women made up 54% of the general population.[64] In finding the law unconstitutional, the Court stated, "any category [of exemptions] expressly limited to a group in the community of sufficient magnitude and distinctiveness . . . such as women . . . runs the danger of resulting in underrepresentation sufficient to constitute a prima facie violation of that constitutional requirement."[65]

Duren was a landmark case because it provided the framework for all future Sixth Amendment fair cross-section challenges. In order to make a showing of such a prima facie violation, the *Duren* Court held that a 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.[66]

Unfortunately, while it provides the necessary framework, *Duren* serves as a poor model for other fair cross-section challenges. As Indians who have brought fair-cross section challenges in federal courts have come to learn, it is difficult to make a prima facie showing of a fair cross-section violation

62. 294 U.S. 587, 591 (1935).
63. Taylor v. Louisiana, 419 U.S. 522, 538 (1975).
64. Duren v. Missouri, 439 U.S. 357, 362–63 (1979).
65. *Id.* at 370.
66. *Id.* at 364.

because "the underrepresentation [in *Duren*] was so extreme" that it "offers little guidance for closer cases."[67]

B. Fair Cross-section Challenges Brought by Indians in Federal Court

Although the subject of this paper is tribal court jurisdiction over non-Indians, the fair cross-section challenges brought by Indians tried in federal court are useful for understanding how courts have applied *Duren*. As discussed earlier, Indians who are charged with committing major crimes in Indian country are tried in federal court. As one scholar has noted:

> [T]he venire from which the jury is selected is unlikely to have a single member of the Indian community in which the crime occurred. At trial, neither the prosecutor, the defense attorney, the marshals, nor the court security officers, the court reporter, the judge, or law clerks are likely to live within the community where the offense occurred. In many cases, the only other tribal member in the courtroom will be the interpreter, if one is needed, and the witnesses. In that sense, the tribunal may seem alien to the defendant, and he may not feel that he is being judged in any sense by his own community.[68]

These issues may also be present for non-Indians facing trial in tribal courts; however, these concerns have not persuaded judges that Indians tried in federal court receive unfair trials. So far, no Sixth Amendment fair cross-section challenge brought by an Indian defendant has been successful.[69]

Of course, non-Indians who bring fair cross-section challenges may achieve different results. One major difference between these two situations is that Indians are citizens of the United States. This is still true even when they live in a quasi-sovereign territory. As citizens, they can vote in elections and otherwise participate in the governance of the United States. Non-Indians, by definition, are not members of a tribe. Although they may live or work in Indian country, non-Indians may not be involved with the governance of Indian country.

---

67. Cynthia A. Williams, *Jury Source Representativeness and the Use of Voter Registration Lists*, 65 N.Y.U. L. REV. 590, 598 (1990).

68. Washburn, *supra* note 20, at 723–24.

69. *Id.* at 755 ("[T]he Ninth Circuit joins the Eighth and Tenth Circuits in never having entertained a successful challenge by an Indian to an Indian country prosecution for lack of a jury constituting a 'fair cross-section' of the community.").

However, it is also true that Indians tried in federal court are often tried a long distance away from the communities where their crimes were allegedly committed.[70] Non-Indians tried in tribal courts will be presumably tried in the locality or vicinity of the crime they allegedly committed. Because non-Indians must have some relationship to Indian Country before jurisdiction can be imposed, non-Indians who are tried in tribal courts *may* have some familiarity with the tribe and the culture due to their relationship with a member of the tribe or the fact that they lived or worked in Indian country. Despite these differences, the cases challenging the lack of Indians in federal court jury venires may be predictive of the outcomes in cases challenging tribal court jurisdiction under the VAWA.

The first requirement under *Duren* is to show that there is a distinctive group in the community that is being underrepresented in, or excluded from, jury selection.[71] The Supreme Court did not describe what makes a group distinctive in *Duren*. In fact, the Court's sole statement about what constitutes a distinct group was that women "are sufficiently numerous and distinct from men."[72] The "sufficiently numerous" statement suggests that a group has to constitute a large part of the community, but it is not clear that size *must* be a factor.

Courts have spent little time discussing whether Indians are considered a distinctive group in the community. There are two reasons for the dearth of analysis on this point. Either the government will not dispute that Indians are a distinctive group, or a court will assume without discussion that Indians are a distinctive group.[73] The size of the Indian population in a particular community has not factored in the analysis of this prong of the test, but that could be because fair cross-section challenges brought by Indians are often brought in states with large Indian populations (relative to other states).

The second prong of the *Duren* test requires underrepresentation of a distinctive group that is not fair and reasonable in relation to the number of such persons in the community.[74] Courts use an absolute disparity calculation to determine whether the representation of a group in the jury

---

70. *See* Washburn, supra note 20, at 711–12.

71. *Duren*, 439 U.S. at 363.

72. *Id.* at 364.

73. *See* United States v. Morin, 338 F.3d 838, 843 (8th Cir. 2003) ("The government does not dispute that Native Americans are a distinctive group in North Dakota."); United States v. Yazzie, 660 F.2d 422, 426 (10th Cir. 1981) ("There is no question that Indians constitute a distinctive group in the community . . . .").

74. *Duren*, 439 U.S. at 366.

venire is fair and reasonable.[75] Absolute disparity is "the percentage of [people within the group] on the list of persons eligible for petit jury service . . . subtracted from the percentage of [people within the group] in the general population . . . ."[76] In *United States v. Clifford*, the Eighth Circuit found that the "8.4% Indian representation on petit juries [was] fair and reasonable when related to their 15.6% proportion of the total population . . . ."[77] The court calculated these numbers to show "7.2% underrepresentation (15.6% - 8.4% = 7.2%)" of Indians in the petit jury.[78] Since the Supreme Court has held that underrepresentation of as much as 10% does not equal substantial underrepresentation, the defendant could not establish a prima facie case of unfair representation.[79] The court dismissed the argument that it would be extremely difficult to show a disparity greater than 10% where Indians only make up 15% of the population.[80]

Under *Duren*, successful challenges to jury makeup have involved much higher disparities. For example, *Duren* involved a 40% actual disparity, and *Castaneda v. Partida*, an equal protection case challenging the make-up of a grand jury, involved a 39.5% actual disparity.[81] Both *Duren* and *Castaneda* involved underrepresentation of groups that were the majority in their communities.[82] Women made up slightly over 50% of the population in the county in *Duren*, and Mexican-Americans made up over 70% of the population in the county in *Castaneda*.[83] Because these cases involved the underrepresentation of majority groups, these cases fail to aid in determining what type of disparity is "fair and reasonable" for minority groups.

The third requirement of the *Duren* test is that the group's underrepresentation must be due to systematic exclusion.[84] Many fair cross-section lawsuits brought by Indians address the use of county voter rolls as a source for jury members.[85] Indians tend to be less likely to register to vote because, in general, they may be more invested in tribal government than

75. *See* United States v. Clifford, 640 F.2d 150, 155 (8th Cir. 1981).
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* (citing Swain v. Alabama, 380 U.S. 202, 208–09 (1965)).
80. *Id.* at 155–56.
81. Duren v. Missouri, 439 U.S. 357, 365–66 (1979); Castaneda v. Partida, 430 U.S. 482, 487 (1977).
82. *Duren*, 439 U.S. at 365–66; *Castaneda*, 430 U.S. at 487.
83. *Duren*, 439 U.S. at 359; *Castaneda*, 430 U.S. at 486.
84. 439 U.S. at 364.
85. United States v. Morin, 338 F.3d 838, 843–44 (8th Cir. 2003).

the state or federal government,[86] and because they face higher poverty rates, which makes them more likely to have moved since registering.[87] Courts, however, have not found that relying on voter rolls amounts to a systematic exclusion. In *United States v. Morin*, the Eighth Circuit said: "[a]bsent proof that Native Americans, in particular, face obstacles to voter registration in presidential elections, '[e]thnic and racial disparities between the general population and jury pools do not by themselves invalidate the use of voter registration lists and cannot establish the systematic exclusion of allegedly under-represented groups.'"[88] Other courts have also upheld the use of voter rolls as lawful under the JSSA.[89]

In *United States v. Etsitty*, an Indian defendant on trial for murder alleged that the trial court's systematic transfer of cases from the Prescott Division (an area with a large Indian population) to the Phoenix Division (an area with a smaller Indian population) violated his right to an impartial jury.[90] The Ninth Circuit found nothing wrong with the trial court's decision to transfer cases from Prescott to Phoenix in this instance, but warned that the case for finding a *Duren* prima facie case would be stronger if there had been proof of a systematic transfer of cases.[91] The court found a written policy stating that "'all civil and criminal cases founded upon causes of action in the Phoenix and Prescott Division shall be tried in Phoenix'" was concerning, but, decided that the rule was not an issue in this case because the presiding judge had transferred the trial for other reasons.[92] These cases show that defendants bringing fair cross-section challenges face a heavy burden. The fact that a particular defendant faced a jury venire or petit jury without Indians is not *in itself* a violation.

III. Tribal Courts and Non-Indians

The fact that tribal courts lack jurisdiction over non-Indians is problematic because non-Indians make up a majority of the population in Indian country. About 4.6 million people live in Indian country.[93] Only 1.1

86. United States v. Clifford, 640 F.2d 150, 155 (8th Cir. 1981).

87. Washburn, *supra* note 20, at 748.

88. United States v. Morin, 338 F.3d 838, 844 (8th Cir. 2003) (quoting United States v. Sanchez, 156 F.3d 875, 879 (8th Cir. 1998)).

89. *See, e.g.*, United States v. Pino, 708 F.2d 523 (10th Cir. 1983).

90. United States v. Etsitty, 130 F.3d 420, 425 (9th Cir. 1997), *opinion amended on denial of reh'g*, 140 F.3d 1274 (9th Cir. 1998).

91. *Id.*

92. *Id.* at 426.

93. NORRIS ET AL., *supra* note 26, at 13.

million of them, or 23%, identify as Indian.[94] While Indian country is overall populated by more non-Indians than Indians, the particular demographics vary by reservation. For example, the two largest reservations by population are the Navajo Nation in Arizona, New Mexico, and Utah, and the Osage Reservation in Oklahoma.[95] Over 97% of those living in Navajo Nation identify as Indian or part Indian.[96] In contrast, only 20% of those on the Osage Reservation identify as Indian or part Indian.[97] Some Indian reservations remarkably contain only a few dozen Indians. For example, in *Oliphant*, the Port Madison Reservation, the home of the Suquamish Indian Tribe, "'contained over 2900 non-Indians and only fifty [tribal] members.'"[98]

A. A Brief History of Indian Country and Tribal Courts

The demographics of Indian country can be readily explained by history. The General Allotment Act of 1887 divided reservations up into allotments for tribal members with left over land to be used by non-Indian homesteaders.[99] The goal of the program was to force Indians to assimilate into American society. Congress thought that "[r]eservations would disappear over time, and the 'Indian problem' would be solved."[100] That never happened. Instead, allotment led to reservations with large non-Indian populations.[101] "Years later, after the allotment process was abandoned, Congress 'uncoupled reservation status from Indian ownership' by defining 'Indian country' to encompass all reservation lands, including that owned by non-Indians."[102] It was also during allotment that many Indians became citizens of the United States.[103] Congress finally declared that all Indians were citizens in 1924.[104]

Although run by tribal governments, the justice system that non-Indians face under the VAWA will not be wholly unfamiliar because tribal courts are highly regulated by Congress and many tribal courts are modeled after

94. *Id.*
95. *Id.* at 14.
96. *Id.*
97. *Id.*
98. Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 15 (1999).
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id*. at 17.
103. Duro v. Reina, 495 U.S. 676, 692 (1990).
104. *Id.*

the American judicial system.[105] The background of *Ex Parte Crow Dog* illustrates how tribal court systems developed. The case arose after a member of the Lakota Indian Tribe murdered another Lakota on the Lakota Reservation in South Dakota.[106] A federal territorial court, unhappy with the tribe's method of solving the dispute, brought criminal charges against the defendant, Crow Dog, but the Supreme Court overturned the conviction because the federal territorial court lacked jurisdiction over the defendant.[107] Following this decision, Congress enacted the Major Crimes Act, which gave the federal government jurisdiction over "major crimes" that occurred in Indian country.[108] To deal with minor crimes, the Department of the Interior set up Courts of Indian Offenses.[109]

The federal government continued to have a role in tribal courts long after it helped establish them. In 1968, Congress passed the ICRA. As the Supreme Court noted, "a central purpose of the ICRA and in particular of Title I was to 'secure for the American Indian the broad constitutional rights afforded to other Americans,' and thereby to 'protect individual Indians from arbitrary and unjust actions of tribal governments.'"[110] The ICRA guarantees Indians tried in tribal courts enjoy the same constitutional protections guaranteed under the Constitution, with a few exceptions.[111] The ICRA also places limits on the penalties that tribal courts can impose. Generally, tribal courts cannot sentence defendants to more than one year of incarceration and a five thousand dollar fine for any one offense, unless the person has been previously convicted for the same or similar offense by the United States.[112] In cases where the person has been previously convicted, tribal courts cannot sentence defendants to incarceration for more than three years, or impose more than fifteen thousand dollars in fines.[113] As already discussed, the ICRA also requires that defendants have a right to a trial by

105. *See* B.J. Jones, Chief Judge, Sisseton-Wahpeton Sioux Tribal Court, Role of Indian Tribal Courts in the Justice System (Mar. 2000), *available at* http://www.icctc.org/Tribal%20Courts.pdf (unpublished manuscript).

106. *Ex parte* Crow Dog, 109 U.S. 556, 557 (1883).

107. *Id.*; *see also* Jones, *supra* note 105.

108. Jones, *supra* note 105, at 4 n.9.

109. *Id.* at 4.

110. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 61 (1978) (quoting S. REP. NO. 90-841, at 5–6 (1967)).

111. *See* 25 U.S.C. § 1302 (2012).

112. Indian Civil Rights Act, 25 U.S.C. § 1302 (2012).

113. *Id.*

jury, but it only requires a jury of six people and does not require an impartial jury.[114]

B. Tribal Courts and Non-Indian Jurors

While the Supreme Court noted in *Oliphant* that the Suquamish Indian Tribe did not allow non-Indians to serve on juries,[115] many Indian tribes do not have such restrictions. The Navajo Nation not only allows non-Indians to serve on its juries, it even has a procedure in place to ensure than non-Indians are called to serve.[116] Similar to federal courts, the Navajo Nation uses its own voter rolls to draw jurors.[117] To ensure that non-Indians are represented, the tribal court clerk "also select[s] a series of names that [do] not appear to be Navajo from the county voter registration rolls."[118] The Navajo Nation has this system in place even though it is not required by the ICRA.[119]

The Navajo Nation is not the only tribe that actively tries to recruit non-Indians to serve on juries. The Tulalip Tribes, a union of several tribes in the Puget Sound region, draw their potential jurors from enrollment and employment records. In order to qualify for service, jurors must either be a "Tulalip Tribal member living on or near the Tulalip Indian Reservation, a resident of the Tulalip Indian Reservation, or an employee of the Tulalip Tribes or any of its entities, agencies, or subdivisions for at least one continuous year."[120] Although not explicit, this policy presumably allows non-Indians to serve on juries.

Not all tribal courts, however, currently allow non-Indians to serve on juries. The Osage Tribe in Oklahoma, which has one of the largest reservations by population, does not currently allow non-Indians to serve on juries.[121] Similarly, the Oglala Sioux Tribe in North Dakota draws potential

114. *Id.*

115. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 193 (1978).

116. Washburn, *supra* note 20, at 761.

117. *Id.*

118. *Id.*

119. *See* 25 U.S.C. § 1302 (2012) (containing no requirement that tribal court juries call non-Indians for service); NORRIS ET AL., *supra* note 26, at 14 (showing that the Navajo Nation has a total population of 173,667 and that 169,213 of that population identifies as American Indian "alone or in combination").

120. *A Juror's Guide to Tulalip Tribal Court*, TULALIP TRIBES, http://www.tulaliptribes-nsn.gov/Home/Government/Departments/TribalCourt/JuryInformation.aspx (last visited Apr. 3, 2013).

121. Bill No. ONCA 11-41, Osage Nation Congress, 2d Cong., 2d Sess. (Apr. 6, 2011).

jurors only from the tribe's pool of membership.[122] While it does not expressly prohibit non-Indians from serving on juries, by drawing jurors from membership pools, it effectively prohibits non-Indians from serving. Although some tribes prohibit non-Indians from serving on juries, the language of the VAWA clearly requires that non-Indians be allowed to serve on tribal courts juries (for the VAWA's jurisdictional provision to take effect), as long as non-Indians comprise a distinctive group.[123]

C. A Hypothetical Duren Challenge

Although in most cases non-Indians will have access to juries made up of both Indians and non-Indians, there may be cases where an all-Indian jury tries and convicts a non-Indian defendant, even when non-Indians are not prohibited from serving on juries. It is important to determine how a court might evaluate such a case. Although the Sixth Amendment does not apply to tribal court proceedings,[124] the text of the VAWA is modeled after the Sixth Amendment fair cross-section requirement and the JSSA,[125] so a court will likely use Sixth Amendment fair cross-section cases as a guide to interpret the statute.

Similar to the first *Duren* requirement,[126] the VAWA states that jurors must be drawn from sources that "do not systematically exclude any *distinctive* group in the community, including non-Indians," but it does not define distinctive group in further detail.[127] There are two possible interpretations of this language. First, Congress could have meant that non-Indians will always be a distinctive group, and that they can never be systematically excluded. Second, Congress might expect that federal courts would look to case law to define the term "distinctive." Federal courts generally take it for granted that Indians are a distinctive group in the community, which may be the approach that federal courts take with non-Indians. Even if a federal court reads the statute to mean that non-Indians must be present in significant numbers in order to be considered a

122. *Oglala Sioux Tribe: Law and Order Code – Chapter 14: Rules of Court*, NAT'L INDIAN L. LIBR., http://www.narf.org/nill/Codes/oglala_sioux/chapter14-rulesofcourt.htm (last visited Apr. 3, 2013).

123. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, sec. 904, § 204(d)(3)(B), 127 Stat. 54, 122.

124. *See* 25 U.S.C. § 1302 (2012).

125. *See* Talton v. Mayes, 163 U.S. 376 (1986) (holding that the Constitution does not apply to tribal courts because they were not created pursuant to the Constitution).

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

127. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, sec. 904, § 204(d)(3)(B), 127 Stat. at 122.

distinctive group, the demographics of Indian country would mean that they are almost always a distinctive group. Even in Navajo Nation, where over 97% of the population is Indian, there are over four thousand non-Indian residents.[128] That could still be a significant number. Therefore, in most cases this requirement should be fairly simple to satisfy.

The second *Duren* requirement, whether the disparity is fair and reasonable, depends on the percentage of the total population of non-Indians eligible for jury service within the particular community. As the *Clifford* case demonstrates, it is difficult for minority groups to show a significant disparity.[129] In the Navajo Nation, it would be difficult, if not impossible, for non-Indians to bring a successful challenge because they make up less than 3% of the overall population.

Meeting this requirement might be easier on a reservation where non-Indians outnumber Indians, like the Port Madison Reservation. In 1978, while the Suquamish tribe litigated *Oliphant*, Indians made up less than 2% of the population of the Port Madison Reservation.[130] An absolute disparity of near 40% could be much easier to find in a community with similar demographics. If non-Indians eligible to serve on a jury made up 98% of the population on the reservation, but only 50% of those called to serve on juries, there would be a 48% absolute disparity.

Most cases will probably fall somewhere in between these two examples. Of course, it is impossible to determine exactly how this analysis will be resolved without knowing the specific demographics of the tribe involved and the percentage of non-Indians that will actually serve on a particular jury. Nonetheless, where non-Indians are a substantial majority, meeting this requirement could be fairly easy.

Finally, like *Duren*, the VAWA only prohibits *systematic* exclusions.[131] In order to find systematic exclusion, there would have to be evidence that *the system* of calling jurors to service effectively excludes all or most non-Indians.[132] While federal courts have not found that using county voter rolls in order to draw jurors in federal trials amounts to a systematic exclusion

128. NORRIS ET AL., *supra* note 26, at 14.

129. *See* Part II.B.

130. Frickey, *supra* note 98, at 15.

131. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54.

132. *See* United States v. Morin, 338 F.3d 838, 843–44 (8th Cir. 2003) (evaluating whether an exclusion is systematic by looking at how the District of North Dakota calls jurors for service).

registering to vote,[133] the same logic would not apply to tribal courts using only tribal membership rolls because non-Indians are excluded from tribal membership rolls. Therefore, in order to exercise jurisdiction, a tribal court *must* use an alternative or additional source for selecting jurors.

Because the practices used by the Navajo Nation and the Tulalip Tribes are designed to incorporate non-Indians, they are unlikely to amount to systematic exclusions. However, because the Navajo system relies on a tribal court clerk to select names from the county voter rolls that do not appear to be Navajo,[134] it may be susceptible to fraud and error. But, the *chance* of fraud or error, without evidence of such, is likely not enough to amount to a systematic exclusion.[135]

One issue that may lead to a systematic exclusion of non-Indians is a tribal court's inability to compel non-Indians into jury service. In state and federal court systems, jurors are compelled to attend jury duty by law unless they are able to receive an exemption.[136] In *Navajo Nation v. MacDonald*, the Navajo Supreme court recognized that tribal courts face difficulties when it comes to getting non-Indians to serve as they "may not feel compelled to appear when summoned for tribal jury duty."[137] Since tribal courts only have jurisdiction over non-Indians in a limited set of circumstances, non-Indians cannot be prosecuted or penalized for failing to attend jury duty. Nothing in the VAWA gives tribal courts a method for compelling non-jurors to attend.

B.J. Jones, the Chief Judge of the Sisseton-Wahpeton Sioux Tribal Court, suggests that the tribal courts' inability to exercise criminal jurisdiction over non-Indians is one reason that (he believes) non-Indians are (sometimes) excluded from serving on tribal court juries.[138] "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."[139] The inability to compel non-Indians to serve on tribal

133. *Id.*

134. Washburn, *supra* note 20, at 761.

135. *See* United States v. Etsitty, 130 F.3d 420, 426 (9th Cir. 1997).

136. For an example of such a law, see 38 OKLA. STAT. § 28 (2011) ("It is the policy of this state that all citizens qualified for jury service pursuant to this section have an obligation to serve on petit juries when summoned by the courts of this state, unless excused.").

137. Washburn, *supra* note 20, at 761.

138. Jones, *supra* note 105, at 10. Of course, as already noted, not all tribes exclude non-Indians from serving on juries.

139. *Id.*

court juries may amount to a systematic exclusion. Even so, the reasoning used by courts suggests that this will not amount to a systematic exclusion. The Ninth Circuit has said that absent evidence that Indians "face obstacles to voter registration in presidential elections," the use of voter rolls did not amount to a systematic exclusion, because Indians *could* register to vote.[140] The same logic may be used here. Because nothing prevents non-Indians from attending jury service when they are summoned, a court may find that there is no systematic exclusion.

Accordingly, it will be extremely difficult for non-Indians to prevail in a *Duren* challenge over tribal court jurisdiction. Although a successful challenge is unlikely, and therefore juries may be legally "fair," determining *actual fairness* is much more difficult.

IV. Race, Jury Selection, and Fairness

The assumption underlying the concern over the VAWA's expansion of tribal court jurisdiction is that Indians will usually side with other Indians, and will convict non-Indians even when there is less than proof beyond a reasonable doubt. There is, however, evidence that this level of bias will not occur. First, tribal leaders have been working to regain jurisdiction over non-Indians since *Oliphant* was decided in 1978. As noted by Louise Erdrich, an advocate of the VAWA, "[t]ribal judges know they must make impeccable decisions. They know that they are being watched closely and must defend their hard-won jurisdiction. Our courts and lawyers cherish every tool given by Congress. Nobody wants to blow it by convicting a non-Indian without overwhelming, unshakable evidence."[141] Thus, because Congress can divest tribes of jurisdiction over non-Indians through future legislation, tribal leaders may have reason to be especially protective of the rights of non-Indians.

Another reason to doubt that non-Indians will inevitably face bias is that tribal courts have not proven to be biased against non-Indians in civil cases. One scholar studied Navajo appellate decisions as a way to assess the fairness of the Navajo judicial system towards non-Indians.[142] She found ninety-five civil cases covering a variety of legal areas where Navajo and non-Navajo parties (oftentimes non-Indian companies) were on opposite

140. United States v. Morin, 338 F.3d 838, 844 (8th Cir. 2003).

141. Erdrich, *supra* note 10.

142. *See* Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047 (2005).

sides of litigation.[143] The non-Navajo party won 47.4% and lost 52.6% of these cases.[144] The win-loss balance was consistent across all types of disputes, even child custody disputes.[145] This win-loss ratio suggests that non-Navajo and Navajo litigants are equally able to predict their chances at success in litigation.[146]

One context where tribal courts might be especially prone to bias against non-Indians is in child placement and adoption proceedings under the Indian Child Welfare Act (ICWA). The Navajo Nation has declared that its children are its most precious resource, so it would be unsurprising "if this concern resulted in bias against non-Navajo parents. . . ."[147] However, "not one of the 534 Navajo appellate cases online arises under ICWA."[148] Of the custody decisions not implicating ICWA, only six were between Navajo and non-Navajo parents, and the non-Navajo parent won four times.[149] Of course, with such limited data and small sample sizes it is not possible to draw any definitive conclusions.

Even if this data suggests that Navajo Nation court proceedings are fair to non-Indians, the win-loss ratio of Navajo Nation appellate court decisions cannot be used to suggest that *all* tribal courts and juries will be fair towards non-Indians. First, the Navajo Nation allows non-Indians on juries, so it would be unfair to say that this is representative of what juries composed entirely of Indians would do (although simply because the Navajo Nation allows non-Indians on jurors does not mean that non-Indians are actually present on every jury). Second, the Navajo Nation is the largest reservation in the country, so it may be that its judical system is more sophisticated and well funded than others. Despite the limitations of this data, it shows that tribal courts *can* be fair towards non-Indians and that a litigant's (or defendant's) status as a non-Indian does not necessarily determine the outcome of any particular case.

The assumption that Indians will be biased against non-Indians is primarily an argument about race. Racial discrimination and jury selection have a long, fraught history together. In most cases, non-Indians will be represented on tribal court juries, but it is important to analyze why an all-

143. *Id*. at 1075.
144. *Id*. at 1047.
145. *Id*. at 1051.
146. Berger goes into a much deeper discussion about what the nearly 50-50 win-loss rate suggests. *See id.* at 1074–79.
147. *Id.* at 1088.
148. *Id.* at 1090.
149. *Id.*

Indian jury would be so objectionable. There are some who take offense at the suggestion that a jury composed entirely of Indians would be biased against non-Indians.[150] But, the type of criminal jurisdiction the VAWA permits is important. These are crimes of sexual assault and rape committed by non-Indian males against Indian females. How would one perceive the fairness of a trial for African-American male accused of raping a white female? What if all of the jurors were white?

In *McCleskey v. Kemp*, McCleskey, an African-American male, was sentenced to death for killing a white police officer during the course of an armed robbery.[151] McCleskey challenged his sentence under the Eighth and Fourteenth Amendments, and argued that his sentence was influenced by his race.[152] He cited a study showing that persons who murder white people are more likely to be sentenced to death than persons who murder black people and that black murderers are more likely to receive the death penalty than white murderers.[153] Although McCleskey ultimately lost, it was not because the study he cited was invalid or inaccurate, but because he could not prove that the decision-makers in his particular case acted with a discriminatory purpose.[154] This study speaks to a larger issue behind this controversy—we do not trust jurors to make decisions without considering race. Even if we trust that most individuals will not make decisions based on racial prejudice, we suspect that, in general, race may play some role in a jury's decision and taint the verdict. Jurors may not go into a jury room and decide that a defendant deserves a death sentence solely based on the defendant's race, but it is hard to imagine that race plays no role.[155]

---

150. *See* Erdrich, *supra* note 10 (stating the idea that "Native people can't be impartial jurists" is a "fulsome notion").

151. 481 U.S. 279, 283 (1987).

152. *Id.* at 286.

153. *Id.* at 291; *see also* David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983).

154. *Id.* at 292–93.

155. This discussion of racial discrimination and juries is woefully incomplete. Racial discrimination is not just an issue when it comes to jury venire and petit juries. Racial discrimination is also prevalent in striking jurors. For an overview of this issue, see WAYNE LAFAVE ET AL., CRIMINAL PROCEDURE 1068–98 (5th ed. 2009) (chapter 22, "Trial by Jury and Impartial Judge"). In the area of peremptory challenges, there is a lot of interesting scholarship on the relationship between race and jury selection. The seminal case on this issue is *Batson v. Kentucky*, 476 U.S. 79 (1986). Justice Rehnquist authored a particularly interesting dissent in that case. He wrote:

> In my view, there is simply nothing "unequal" about the state using its peremptory challenges to strike blacks from the jury involving black defendants, so long as such challenges are used to exclude whites in cases

The interesting aspect of the controversy surrounding tribal court jurisdiction under the VAWA is that the tables are turned. This time the ones claiming unfair treatment are not members of a racial minority, but of the racial majority. Non-Indians *can* receive fair trials in tribal courts, but a more accurate statement might be that non-Indians will receive trials that are just as fair, if not more so, as the trials that racial minorities receive in the American judicial system. If there are in fact cases where non-Indians are treated unfairly, and there may be some, it would only be fair to evaluate whether our judicial system as a whole grants enough protections to racial and ethnic minorities charged with crimes. The protections granted to non-Indian criminal defendants in tribal court are similar enough to the protections granted to criminal defendants tried in state and federal courts. If there is a problem with one, then there is a problem with all.

Impartiality can be a legitimate concern with tribal court jurisdiction over non-Indians, but it does not mean that such jurisdiction should not exist. There is a great need for justice in Indian country and tribal court jurisdiction over domestic violence crimes is an appropriate solution, even if it may be imperfect. The threat of this jurisdiction alone may also be enough to deter future sexual assaults—at least at the high level they are being committed now.

Conclusion

How protections for minority groups may be strengthened is a subject for another note. This note does not try to offer a policy solution for this problem. Instead, the goal of this note is to highlight the parallel between the alarm over tribal court jurisdiction in the VAWA with concerns that critical race scholars have been raising for decades about how race permeates our justice system.

The VAWA's expansion of tribal court jurisdiction provides tribal courts with a means to address the high levels of sexual violence committed in Indian country. While concerns about tribal court jurisdiction over non-Indians are not unfounded, it is important to consider that this jurisdiction is

---

> involving white defendants, Hispanics in cases involving Hispanic defendants, Asians in cases involving Asian defendants, and so on.

Batson, 476 U.S. at 137. The implication of this statement seems to be that juries should not be composed of people of the same race as the defendant in order to eliminate racial bias in favor of the defendant by members of his own minority group. For scholarship on *Batson*, race, and jury selection, see Jeffrey S. Brand, *The Supreme Court, Equal Protection and Jury Selection: Denying that Race Still Matters*, 1994 WIS. L. REV. 511.

needed in order to enforce sexual violence laws that otherwise go unenforced.

The text of the VAWA amends the ICRA to provide jurisdiction over non-Indians in a limited set of cases. Jurisdiction can only be asserted when the defendant has an existing relationship to the Indian victim or to the tribe. The VAWA adequately addresses gaps that previously existed in the ICRA by requiring that tribal courts draw jurors from sources that reflect a fair cross-section of the community. Because non-Indians make up a substantial portion of Indian country, they will be represented on tribal court juries. While this note has suggested that non-Indians will receive fair trials in tribal courts, the debate over this issue is part of a larger debate about the role of race in jury selections. It may be that there is no way to make our jury system more representative than it currently is, or it may be that *Duren* inadequately protects defendants who are part of the minority in a given community and this system needs remedying. However, if members of Congress are concerned that the VAWA does not adequately protect the rights of non-Indians, then Congress should try to strengthen the protections for all minorities who face non-representative juries.