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Introduction

At oral argument for *Dollar General v. Mississippi Band of Choctaw Indians*,[1] Chief Justice John Roberts twice asked the Mississippi Choctaw's counsel if it would violate due process for a non-Indian defendant to be tried by a tribal court jury that consisted solely of tribal members.[2] In response to this question, former Solicitor General Neal Katyal, representing the Tribe, clarified that the tribal court proceeding at issue was a bench trial and it was therefore unnecessary to consider jury selection.[3] Chief Justice Roberts replied: "I understand that. But it's kind of a yes-or-no question. Does it […] violate due process as a general matter for a nonmember to be subjected to a jury trial with the jury composed solely of members of the Tribe?"[4]

In light of the procedural requirements tribal courts must adopt to assert jurisdiction over non-Indians, the answer to the Chief Justice's question is quite likely, "no." So long as a tribe can meet the Supreme Court's test for a fair jury pool cross-section under *Duren v. Missouri*,[5] tribal courts should be situated the same as state or federal courts when asserting jurisdiction

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1. Dollar General Corp. v. Miss. Band of Choctaw Indians, 136 S. Ct. 2159 (2016) (per curiam) (upholding the Fifth Circuit's recognition of the tribal court's jurisdiction over a tort claim against Dollar General).

2. Transcript of Oral Argument at 42, *Dollar General*, 136 S. Ct. 2159 (2016) (No. 13-1496) (argued Dec. 7, 2015).

3. *Id*. The underlying case is a tort suit brought in tribal court against Dollar General and one of its store managers on behalf of a tribal member youth who participated in the tribe's Youth Opportunity Program, which places tribal members in unpaid positions at businesses located within the tribe's jurisdictional boundaries for educational purposes. The youth brought a sexual molestation claim against the manager and sued both the manager and Dollar General in tribal court for $2.5 million in damages. Petition for Writ of Certiorari at 2, *Dollar General*.

4. Transcript of Oral Argument, *supra* note 2.

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

over non-Indians. Therefore, the hypothetical all-tribal-member jury empaneled in a case involving a non-Indian defendant would likely satisfy the Court's requirements to the same extent as would an all-Massachusetts-resident, Red Sox-fanatic jury in a Massachusetts state court trial involving a New York defendant who supports the Yankees.[6]

Yet this question highlights the unique status of tribal courts as compared to state and federal courts. Indian tribes are neither foreign nations, nor are they the equivalent of states.[7] As a result, although tribal courts that now exercise jurisdiction over non-Indian defendants through the Violence Against Women Act 2013 Reauthorization[8] (VAWA) should theoretically provide fair jury trials as dictated by Supreme Court precedent, they will also be held to a different standard by federal courts reviewing such challenges.

In light of such expected scrutiny, this Article reconsiders the fairness of tribal court criminal jurisdiction over non-Indians.[9] Policymakers tasked with determining such fairness should consider at least two vantage points: not only the non-Indian defendant's right to a fair trial, but also a tribe's interest in being able to adequately police and govern its land. The first consideration has consistently been emphasized and protected by the Supreme Court. And for good reason: constitutional rights of criminal defendants are paramount and must be protected in any forum. However, the second consideration—a tribe's interest in protecting its land and people—is no less important. Assuming that tribal courts are found to be able to provide fair trials to non-Indians,[10] Congress should also consider a

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6. Justice Breyer made this comparison in oral argument, resulting in much laughter. Transcript of Oral Argument, *supra* note 2, at 43.

7. Katherine Florey, *Beyond Uniqueness: Reimagining Tribal Courts' Jurisdiction*, 101 CAL. L. REV. 1499, 1501-02 (2013).

8. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, sec. 904, § 204(b)(4)(B), 127 Stat. 54, 122 (codified at 25 U.S.C.A. § 1304(b)(1) (West 2014)).

9. Tribal courts also have limited civil jurisdiction over non-Indians. *See* Matthew L.M. Fletcher, *Contract and (Tribal) Jurisdiction*, 126 YALE L.J. FORUM, 1, 2 (2016), http://www.yalelawjournal.org/pdf/FletcherPDF_xevyxrdi.pdf ("The Court's working theory, memorialized in the *Montana* test, is that Indian nations do not have jurisdiction over nonmembers, except in two circumstances. One is where nonmember activity is potentially "catastrophic" to tribal government operations and reservation life. The other is where a nonmember consents, usually through a commercial transaction, to tribal jurisdiction." (footnotes omitted)); Montana v. United States, 450 U.S. 544, 564-66 (1981). Although criminal and civil jurisdiction should theoretically be consistent, in light of the already-established bifurcation, this article limits its focus to tribal court criminal jurisdiction.

10. Despite a policy rationale for arguing that tribal courts should be required to satisfy constitutional due process requirements for Indian defendants as well as for non-Indians,

tribe's interest in regaining broader criminal jurisdiction over the many non-Indians working and living within Indian country when determining the future scope of tribal court jurisdiction over non-Indians.

Not only will tribal courts satisfy the legal requirements for a fair jury trial when exercising criminal jurisdiction over non-Indians, but overarching fairness considerations demand that tribal courts be recognized to have criminal jurisdiction over all non-Indians whom a tribe considers to be members of a tribe's community. This jurisdictional definition is a natural extension of the logic employed in VAWA: tribal courts should have criminal jurisdiction over certain non-Indians who have demonstrated sufficient ties to a tribe so as to justify the tribal court's jurisdiction.

Part I of this Article provides an overview of tribal court systems as they have developed within Indian country. Part II presents a history of the Supreme Court's rhetoric regarding the fairness of tribal court trials to demonstrate the Court's focus on protecting non-Indian rights, often at the expense of tribal court jurisdiction. Part III sets forth the legal requirements for a fair jury pool composition under *Duren v. Missouri* and looks to how tribes have modified their jury selection procedures to meet this standard. Finally, Part IV considers Indian tribes' interest in adequately policing its land and argues that Congress should recognize tribal court criminal jurisdiction over all non-Indians whom a tribe deems to be part of its "community."

I. History of Tribal Court Systems

Tribal courts occupy a unique space in the American legal scheme.[11] Indian tribes predate the United States government, yet tribal governments are not recognized as foreign nations.[12] In addition, state laws do not apply on Indian land.[13] Instead, the Supreme Court has held that tribes retain inherent sovereignty, subject to congressional oversight.[14]

Consequently, the United States Constitution does not apply to tribal courts and tribal courts are not bound to provide all of the due process

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tribal courts are currently not required to provide the full Bill of Rights to Indian criminal defendants. Talton v. Mayes, 163 U.S. 376 (1896).

11. Florey, *supra* note 7, at 1501-02.

12. *Id.*

13. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

14. *Id.*

protections guaranteed to defendants in state and federal prosecutions.[15] Such a situation raises concerns as to whether tribal courts can fairly adjudicate claims against non-Indians. This part provides a basic overview of tribal court systems and the lands over which they govern to better explain the legal and physical contexts in which tribal courts operate.

A. An Overview of Indian Country

The composition of Indian country[16] today is relevant to any study on tribal court fairness in adjudicating claims against non-Indians. It is a surprising fact that non-Indians currently outnumber Indians within Indian country: of the 4.6 million people that currently live in Indian country, only 1.1 million identify as Indian.[17] This is due partly to the legacy of allotment, a period of time during which the federal government apportioned tribal land into parcels and subsequently transferred many of those parcels from Indians to non-Indians.[18] Because of the disorganized nature of this land transfer, some tribal jurisdictions (such as the Navajo Nation) contain almost all Indians, yet many others (such as the Port Madison Reservation) contain a vast majority of non-Indians.[19]

In addition, as a result of tribal governments' success in Indian gaming and other tribal economic development initiatives, many non-Indians work

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15. *Talton*, 163 U.S. at 383-85 (explaining that Congress's ability to regulate "the manner in which" local powers of tribal governments are exercised "does not render such local powers federal powers arising from and created by" the Constitution).

16. "Indian country" is a term of art that encompasses the land on which all Indian tribes reside. It 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 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).

17. Cynthia Castillo, *Tribal Courts, Non-Indians, and the Right to an Impartial Jury After the 2013 Reauthorization of VAWA*, 39 AM. INDIAN L. REV. 311, 325-26 (2014-2015).

18. 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) ("Because of allotment, many reservations today have a significant non-Indian population and a checkerboard land pattern with non-Indian fee property mixed in with Indian allotments and collective tribal property.").

19. Castillo, *supra* note 17, at 326 (citing Frickey, *supra* note 18, at 15).

or reside within Indian country. Indian tribes today collectively employ hundreds of thousands of American citizens who are not tribal members.[20] Although those employees may not necessarily reside on tribal land, their employment with tribal governmental entities provides strong links to the tribes.[21]

Finally, and largely the reason for enactment of the tribal VAWA provision, many non-Indians who reside or work in Indian country are intimately involved with Indians.[22] It is not uncommon for non-Indians who are married to Indians to become eligible for tribal governmental resources and benefits through their Indian spouses.[23]

In summary, Indian country today is quite often comprised of more non-Indians than Indians. Although some tribal jurisdictions remain predominantly closed off from non-Indian populations, the rise in Indian commerce—most notably, casino gaming—has led to increased intermingling between Indians and non-Indians.[24] It is within this backdrop that tribal courts operate.

B. Tribal Court Systems

Indian tribes have engaged in community dispute resolution practices since before the founding of the United States.[25] However, Congress has repeatedly intervened in tribal justice systems pursuant to its plenary authority over Indian affairs.[26] Many modern tribal courts evolved from courts first established in Indian country by the Bureau of Indian Affairs

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20. Matthew Fletcher & Leah Jurss, *Tribal Jurisdiction—A Historical Bargain*, 76 MD. L. REV. 593, 594 (2017) ("The 567 federally recognized Indian nations employ hundreds of thousands of American citizens who are not members of an Indian nation. Indian nations and nonmember business partners do billions of dollars of business every year. Thousands of nonmembers lease housing, grazing lands, mineral rights, and other properties from Indian nations. And many thousands enjoy the benefits of tribal government services, from health care to social services to public safety protections.").

21. *Id*.

22. *Id*. at 594-95.

23. *Id*. at 595.

24. *See* Paul Monies, *Indian Gaming Helps Drive Rural Oklahoma Economies, Report Finds*, NEWS OK (July 26, 2017), http://newsok.com/article/5557665.

25. *See* Matthew Fletcher, *Anishinaabe Law and* The Round House, 10 ALBANY GOV'T L. REV. 88 (2017) (explaining the Anishinaabe's traditional forms of law and order that predate United States legal systems).

26. Federal power to regulate Indian affairs has been determined to derive from the text and structure of the Constitution: namely, the Indian commerce clause. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.01 (Neil Jessup Newton et al. eds., 2012 ed.) [hereinafter COHEN'S HANDBOOK].

during the late nineteenth century as part of an effort to assimilate Indians into the Anglo-American legal system.[27] These "Courts of Indian Offenses," commonly known as "CFR courts" because they apply the Code of Federal Regulations, largely served to assimilate Indians into mainstream American society.[28] Today, fewer than twenty CFR courts remain in effect.[29] Instead, CFR courts have largely been replaced by tribal court systems.[30]

In 1934, Congress passed the Indian Reorganization Act (IRA),[31] allowing tribes to create and operate their own court systems and to write their own codes of laws to supplant the Code of Federal Regulations.[32] Congress also required tribes to obtain the Department of the Interior's approval for the tribes' laws before being able to replace the CFR.[33] Consequently, many tribes simply codified the CFR, or made only slight adaptations, into their own tribal codes so as to obtain the Department's approval.[34]

Indian tribes predate the United States Constitution and are recognized to possess inherent tribal sovereignty.[35] Because tribal governments are sovereign nations, the Constitution does not apply to tribal governmental affairs, and therefore tribal courts are not governed by constitutional due process requirements.[36] Instead, in 1968 Congress passed the Indian Civil Rights Act (ICRA) that imposed many (though not all) of the rights guaranteed in the Constitution onto tribal courts and governments.[37] As a

27. BUREAU OF JUSTICE ASSISTANCE, PATHWAYS TO JUSTICE: BUILDING AND SUSTAINING TRIBAL JUSTICE SYSTEMS IN CONTEMPORARY AMERICA 9 (2005), https://www.walkingoncommonground.org/files/Background%206%20Pathways_Report_Final.pdf [hereinafter PATHWAYS TO JUSTICE].

28. COHEN'S HANDBOOK, *supra* note 26, § 4.04.

29. 25 C.F.R. § 11.100 (2016).

30. *Id.*

31. Ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479).

32. PATHWAYS TO JUSTICE, *supra* note 27, at 10.

33. *Id.*

34. *Id.*

35. Talton v. Mayes, 163 U.S. 376, 383-84 (1896).

36. *Id.* at 384-85.

37. Indian Civil Rights Act, 25 U.S.C. § 1302 (2012). Congress passed the ICRA in 1968. Previously, the Bill of Rights was found not to apply to Indian tribes. *Talton*, 163 U.S. at 384-85; *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.4 (1991).

result of the United States' intervention, many of the almost 300[38] tribal courts currently in operation resemble state and federal courts in both their procedural and substantive law.[39]

However, although many tribal courts currently resemble their state and federal counterparts, tribal courts have extremely limited jurisdiction over non-Indians in both the civil and criminal contexts.[40] This limited jurisdiction causes serious law enforcement problems in light of the composition of Indian country, where only about one-quarter of people today identify as Indian.[41] Despite the presence of many non-Indians within Indian country, a tribal court most often will not have jurisdiction over crimes committed by those non-Indians.[42]

The 2013 Reauthorization of VAWA provided tribal courts with jurisdiction over non-Indians in the limited context of domestic violence relationships.[43] VAWA recognizes tribes' inherent power to exercise "special domestic violence criminal jurisdiction" over non-Indians who commit acts of domestic violence on Indian land against Indian women.[44] The VAWA tribal court provision was enacted specifically to combat the extraordinarily high levels of violence against Indian women and is seen as a victory for tribal governance and sovereignty.[45] Eight tribes participated

38. Matthew L.M. Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, 46 ARIZ. ST. L.J. 779, 790 n.63 (2015) ("A 2005 report on Indian courts noted that the Bureau of Justice Assistance had awarded grants to 294 Indian tribes for planning and enhancing their court systems.") (citing PATHWAYS TO JUSTICE, *supra* note 27, at 4).

39. OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, TRIBAL CRIME DATA COLLECTION ACTIVITIES, 2015 (Tech. Report NCJ 248785, July 2015), http://www.bjs.gov/content/pub/pdf/tcdca15.pdf; Some tribal courts also apply their own tribal law in addition to adapted federal and state law. COHEN'S HANDBOOK, *supra* note 26, § 4.05.

40. COHEN'S HANDBOOK, *supra* note 26, §§ 7.02, 9.04.

41. Castillo, *supra* note 17, at 325-26.

42. Tribes generally lack criminal jurisdiction over non-Indians but retain jurisdiction over "all Indians," including their own citizens as well as "nonmember Indians." Neither Congress nor the federal courts have carefully considered who is included in this category. Addie C. Rolnick, *Tribal Criminal Jurisdiction Beyond Citizenship and Blood*, 39 AM. INDIAN L. REV. 337, 340 (2014-2015).

43. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, sec. 904, § 204(b)(4)(B), 127 Stat. 54, 122 (codified at 25 U.S.C.A. § 1304(b)(1) (West 2014)).

44. VAWA recognizes and affirms "special domestic violence criminal jurisdiction" over non-Indians as part of the inherent jurisdiction of Indian tribes defined in the Indian Civil Rights Act. *Id.*

45. *See*, *e.g.*, Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202(a)(5), 124 Stat. 2261, 2262 ("It is estimated that 34% of Indian women will be raped in their lifetime (compared to the nationwide rate of 20%, including Indians.")); Brief of Amici Curiae National Indigenous Women's Resource Center and Additional Advocacy Organizations for

in VAWA's Pilot Program and many others are now in the process of implementing this jurisdiction.[46]

VAWA requires that tribal courts exercising jurisdiction over non-Indian defendants grant such defendants all of the due process protections that the defendant would receive in state or federal court,[47] including the requirement that the tribe draw jurors from a "fair cross section of the community" that does not systematically exclude any group, "including non-Indians."[48] Therefore, in order for tribal courts to exercise jurisdiction over non-Indian defendants, VAWA essentially requires that the tribal courts function as would state or federal courts.

II. The Supreme Court's Rhetoric on Tribal Court Fairness

The Supreme Court's historical rhetoric on the fairness of tribal court practices demonstrates the Court's strong concerns about the fairness of tribal court jurisdiction over non-Indian defendants. This part explores the

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Survivors of Domestic Violence and Assault in Support of Respondents at 2-3, Dollar General Corp. v. Miss. Band of Choctaw Indians, 136 S. Ct. 2159 (2016) (No. 13-1496), 2015 WL 6467637 ("The extraordinary magnitude of violence and sexual assault perpetrated against Native women and children today constitutes one of the greatest threats to the integrity and continued existence of Tribal Governments. Native women are more likely to be battered, raped, or sexually assaulted than any other population in the United States. Likewise, Native children suffer rates of trauma 2.5 times higher than the national average."). In addition, Sen. Al Franken (D-Min.) and Sen. Jon Testor (D.-Mont.) recently introduced a bill to further extend tribal court jurisdictional over non-Indians who commit violence against children in Indian country. Tribal Youth and Community Protection Act of 2016, S. 2785, 114th Cong. (2d Sess. 2016).

46. The tribes currently exercising VAWA 2013 jurisdiction are: Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation; Confederated Tribes of the Umatilla Indian Reservation; Eastern Band of Cherokee; Little Traverse Bay Bands of Odawa Indians; Pascua Yaqui Tribe; Seminole Nation of Oklahoma; Sisseton Wahpeton Oyate of the Lake Traverse Reservation; and Tulalip Tribes. *Tribal Implementation of VAWA Pilot Project*, NAT'L CONG. OF AM. INDIANS, http://www.ncai.org/tribal-vawa/pilot-project-itwg/pilot-project (last visited Feb. 14, 2017).

47. Violence Against Women Reauthorization Act of 2013, sec. 904, § 204(d)(4), 127 Stat. at 122. VAWA is carefully crafted to withstand constitutional due process challenges non-Indian defendants may bring. Although no such challenges have yet been raised, scholars agree that the statute should withstand due process challenges. *See*, *e.g.*, Shefali Singh, *Closing the Gap of Justice: Providing Protection for Native American Women Through the Special Domestic Violence Criminal Jurisdiction Provision of VAWA*, 28 COLUM. J. GENDER & L. 197, 220-27 (2014); Castillo, *supra* note 17, at 332.

48. Violence Against Women Reauthorization Act of 2013, sec. 904, § 204(d)(3), 127 Stat. at 122. This requirement derives from the constitutional standard for jury fairness as articulated in *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

Court's treatment of tribal courts, focusing in particular on the Court's rhetoric on the fairness of tribal court jury trials. The cases presented below comprise a bulk of federal Indian law and therefore demonstrate the extent to which such cases may turn on the due process and general fairness concerns as raised by the Chief Justice in argument for *Dollar General*. Understanding these cases, and the Court's concerns about tribal court trials, may inform the scrutiny to which tribal courts exercising jurisdiction over non-Indians are subjected.

The Supreme Court first articulated its mistrust of tribal court systems in the 1883 case *Ex parte Crow Dog*, where the Court determined that it was not fair to try Indians in federal court because of the inequality between tribal and federal courts.[49] Crow Dog, a member of the Brule Sioux, killed his tribe's chief, Spotted Tail.[50] As punishment for the murder, the tribe required Crow Dog to provide goods and payment to Spotted Tail's family for the remainder of Crow Dog's life.[51] Unhappy with this perceived lack of justice, the local federal court prosecuted Crow Dog for the murder.[52] Crow Dog was found guilty and the court imposed what it considered a more appropriate form of justice: the death penalty.[53]

The Supreme Court reversed on appeal, holding that the federal court did not have jurisdiction over crimes committed between two Indians on Indian land.[54] The Court further explained that, by attempting to exert jurisdiction over Indians in federal court, the United States was seeking to try Indians "not by their peers, nor by the customs of their people, nor the law of their land, but *by superiors of a different race*, according to the law of a social state of which they have an imperfect conception."[55] Such reasoning expresses the Court's view of how different from, and unequal to, tribal courts are to state and federal courts. This decision set the groundwork for

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49. *Ex parte* Crow Dog, 109 U.S. 556, 571 (1883). The language in *Crow Dog* is so offensive to Indians that the Court in subsequent references has shortened its citations, leaving out the most racist terminology. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210-11 (1978).

50. *Id.* at 557.

51. Anthony G. Gulig & Sidney L. Harring, "*An Indian Cannot Get A Morsel of Pork. . . ." A Retrospective on* Crow Dog, Lone Wolf, Blackbird*, Tribal Sovereignty, Indian Land, and Writing Indian Legal History*, 38 TULSA L. REV. 87, 89 (2002).

52. *Crow Dog*, 109 U.S. at 557.

53. Gulig & Harring, *supra* note 51, at 89.

54. *See Crow Dog*, 109 U.S. at 572.

55. *Id.* at 571 (emphasis added).

an argument that racial difference between Indians and non-Indians impacts the ability for the one to be tried fairly within the other's court systems.[56]

The Court inverted this rhetoric in *Oliphant*, a devastating 1978 decision that divested tribes of all criminal jurisdiction over non-Indians, through an explanation of why it is unfair for non-Indians to be tried in tribal court.[57] The defendants in *Oliphant* were two non-Indian residents of the Port Madison Reservation charged by the Suquamish tribe of, respectively, assaulting a tribal officer and engaging in a high-speed car chase.[58] The Supreme Court agreed to hear their habeas petition and found that the Suquamish lacked any jurisdiction to try the non-Indian defendants in tribal court.[59] Prefacing its decision, the Court noted one key difference in the due process provisions afforded in tribal court as compared to federal and state courts: "Non-Indians, for example, are excluded from Suquamish tribal court juries."[60] By including this distinction at the outset of its opinion, the Court framed the petition broadly as an issue of fairness for non-Indians in tribal courts. Instead of deciding the case narrowly, on the facts for that tribe's jury composition and due process concerns, the Court determined that no tribe may ever exercise criminal jurisdiction over non-Indian defendants.[61]

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56. Congress then reinforced the *Crow Dog* Court's rhetoric. Despite the Court's deprecation of tribal courts and Indian persons in the *Crow Dog* decision, the Court did actually uphold the tribal court decree. Congress then reacted swiftly to this perceived lack of justice by enacting the Major Crimes Act granting federal courts jurisdiction over all as-defined "major crimes" between Indians on Indian lands. The Major Crimes Act, 18 U.S.C. § 1153 (2012), undermined tribal criminal justice systems by extending for the first time federal jurisdiction to crimes committed by Indians against other Indians in Indian country, an extension justified by the belief that tribal justice systems were not capable of addressing serious crimes. *See* SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 136-39 (1994), Rolnick, *supra* note 42, at 354 n.55.

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

58. *Id.* at 194.

59. *Id.* at 195.

60. *Id.* The Court further explained in a footnote:

> The Indian Civil Rights Act of 1968 provides for "a trial by jury of not less than six persons," 25 U.S.C. § 1302(10), but the tribal court is not explicitly prohibited from excluding non-Indians from the jury even where a non-Indian is being tried. In 1977, the Suquamish Tribe amended its Law and Order Code to provide that only Suquamish tribal members shall serve as jurors in tribal court.

Id. at 212 n.4.

61. *Id.* at 195.

The Court later cited this reasoning in *Duro v. Reina*, a 1990 case that further limited tribes' criminal jurisdiction to solely members of a tribe.[62] The Court again highlighted the tribe's member-only jury pool as a bar against jurisdiction: "[s]ince, as a nonmember, Duro cannot vote in tribal elections, hold tribal office, or sit on a tribal jury, his relationship with the Tribe is the same as the non-Indian's in *Oliphant*."[63] Here the Court emphasized a distinction between members and nonmembers of the tribe instead of between Indians and non-Indians.[64] Congress corrected the *Duro* decision by enacting a law reinstating tribal court criminal jurisdiction over all Indians.[65] Yet the logic that tribal courts are insular, unfamiliar, and therefore unfair to outsider defendants, remained.

In *Strate v. A-1 Contractors*,[66] a civil case decided in 1997, the Court considered whether a tribal court was the appropriate forum for a tort suit brought by Indians against non-Indians for damages from a car crash that occurred on a state highway within the borders of the Fort Berthold reservation.[67] Near the end of the tribe's argument, Justice O'Connor asked:

> Well, how about if it goes to trial in the tribal court and the tribe chooses to use as the jury all the friends and relatives of the victim, and they say, yeah, she's really been injured, and we're going to give a heck of a verdict here, and they do, and suppose other errors that might amount to a due process violation in a Federal or State court obtain. There is no way to challenge that as a due process violation later in any State or Federal court, I assume.[68]

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62. Duro v. Reina, 495 U.S. 676, 679 (1990).

63. *Id.* at 677. Congress responded to *Duro*'s further narrowing by providing in statute that tribal courts do possess criminal jurisdiction over nonmember Indians (but maintaining the ban against jurisdiction over non-Indians). Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646.

64. The Supreme Court generally uses the member-nonmember distinction in civil cases and the Indian-non-Indian distinction in criminal cases. *See* Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1, 4-5 (1993).

65. Act of Oct. 28, 1991, 105 Stat. 646.

66. Strate v. A-1 Contractors, 520 U.S. 438 (1997).

67. A-1 Contractors v. Strate, Civ. No. A1-92-24, 1992 WL 696330, at *1 (D.N.D. Sept. 16, 1992).

68. Transcript of Oral Argument at 28, A-1 Contractors v. Strate, 520 U.S. 438 (1997) (No. 95-1872).

Counsel for the tribe disagreed with the Justice and explained that the Indian plaintiffs would have to proceed through state court in order to collect any judgment issued in tribal court.[69] The state court would then have full review over the tribal court proceeding and could challenge issues such as jury composition.[70] However, the question of why tribal courts would be so prejudiced was not addressed. The Court found that the tribal court did not have jurisdiction.[71]

The Supreme Court has also expressed generalized fears of tribal court proceedings outside of jury selection. Justice Souter's concurrence in *Nevada v. Hicks* exemplified the Court's reasoning:

> Tribal courts also differ from other American courts (and often from one another) in their structure, in the substantive law they apply, and in the independence of their judges. Although some modern tribal courts "mirror American courts" and "are guided by written codes, rules, procedures, and guidelines," tribal law is still frequently unwritten, being based instead "on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices," and is often "handed down orally or by example from one generation to another" . . . . The resulting law applicable in tribal courts is . . . unusually difficult for an outsider to sort out.[72]

Justice Souter's opinion represents the Court's mixture of attempted respect for tribal court variance yet simultaneous aversion to the as-described different, difficult system. In particular, the idea that a non-Indian would unknowingly be subjected to unfamiliar law and procedure is a theme within the Court's Indian law jurisprudence.[73]

Finally, and most recently prior to *Dollar General*, the Roberts Court in its 2008 *Plains Commerce* decision expressed concern with a tribal court judgment against a non-Indian bank in various claims resulting from the bank's foreclosure action.[74] In *Plains Commerce*, the plaintiffs brought several claims against the bank in tribal court, including tort, contract, and discrimination actions. The Supreme Court objected to the tribal court's

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69. *Id.*

70. *Id.*

71. *Strate*, 520 U.S. at 453.

72. Nevada v. Hicks, 533 U.S. 353, 384-85 (2001) (Souter, J., concurring) (citations omitted).

73. *See, e.g.*, Fletcher & Jurss, *supra* note 20, at 594 n.1.

74. Fletcher, *supra* note 38, at 838.

issuance of monetary damages and found that such damages rested improperly upon the discrimination claim:

> [t]he jury found against the Bank on three of the special interrogatories, including number 4, the discrimination claim. The Bank, the jurors found, "intentionally discriminate[d] against the Plaintiffs Ronnie and Lila Long." The jury then entered an award of $750,000… These facts establish that the jury could have based its damages award, in whole or in part, on the finding of discrimination.[75]

The Court did not decide *Plains Commerce* based on due process concerns for the non-Indian defendant. Instead, it held that the tribal court lacked civil jurisdiction over the claims because non-Indians held the land in question in fee and therefore, although the land was within the tribe's geographic boundaries, it was not tribal land.[76] Yet the Court's dicta is instructive as to the Court's general concerns with fairness in tribal court proceedings.

III. The Fair Cross-Section Jury Requirement in Indian Country

Despite the United States government's mistrust of tribal court proceedings presented in Part II above, tribal courts, and particularly those that exercise jurisdiction over non-Indians, generally operate in accordance with due process requirements. With regard to jury selection procedures, many tribes have included non-Indians in their jury pools long before the passage of VAWA.[77] This part presents the constitutional fair-cross section standard, considers several case studies to illuminate how a non-Indian's challenge to a tribal court jury pool would be resolved, and then presents how the Pascua Yaqui Tribe of southern Arizona, one of the pilot VAWA tribes, has adapted its jury selection procedures to meet VAWA and constitutional standards.

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75. Plains Comm. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 325 (2008) (internal citations omitted).

76. *Id.* at 320.

77. *See* Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 761 (2006); Castillo, *supra* note 17, at 328 ("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.").

A. The Fair Cross-Section Requirement

The Sixth Amendment provides criminal defendants with the right to trial "by an impartial jury of the State and district wherein the crime shall have been committed."[78] This right has been interpreted to require that jury pools resemble a "fair cross-section" of the community within which the court sits and is codified into federal law in the Federal Jury Selection and Service Act of 1968 (JSSA).[79]

Duren v. Missouri presents the governing test to determine whether a jury selection pool constitutes a fair cross-section of the community.[80] The three-part test is:

> (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.[81]

In *Duren*, the Court invalidated a jury selection process that produced a jury pool containing 15% women in a county where women made up 54% of the general population.[82] Because the disparity between the jury pool and the population of women in the community was so clear, the *Duren* Court did not provide many guidelines beyond the actual test for how subsequent plaintiffs might successfully challenge their own jury pool schemes.[83]

The VAWA jury requirements are modeled after the JSSA and *Duren* requirements. VAWA specifically requires that tribal courts exercising jurisdiction over non-Indians provide defendants with juries that satisfy *Duren*:

> In a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction, the participating tribe shall provide to the defendant . . .
>
> (3) the right to a trial by an impartial jury that is drawn from sources that—

78. U.S. CONST. amend. VI.
79. 28 U.S.C. §§ 1861-1869 (2012).
80. Duren v. Missouri, 439 U.S. 357 (1979).
81. *Id.* at 364.
82. *Id.* at 362-63.
83. Cynthia A. Williams, *Jury Source Representativeness and the Use of Voter Registration Lists*, 65 N.Y.U. L. REV. 590, 598 (1990).

> (A) reflect a fair cross section of the community; and
>
> (B) do not systematically exclude any distinctive group in the community, including non-Indians.[84]

From the plain language of the VAWA jury requirements, the statute is designed to provide non-Indian defendants with tribal court juries that represent a fair cross-section of the community. Therefore, a federal court evaluating a non-Indian's challenge to a tribal court jury pool will likely apply the *Duren* standard.

However, because of how obvious the underrepresentation was in *Duren*, the Court's reasoning in that case provides particularly little guidance for plaintiffs bringing fair cross-section challenges on behalf of distinctive groups who comprise a very small portion of the general population.[85]

The Supreme Court's most recent fair cross-section case involved one such minority group. In *Berghuis v. Smith*,[86] Smith, an African-American, was convicted in Michigan state court by an all-white jury.[87] Smith argued that African-Americans were underrepresented in his jury selection pool because African-Americans comprised only 6% of his county's jury pool despite representing 7.28% of the county's adult population.[88] The Court denied the challenge, finding that although the 18% comparative disparity between the group's population and representation in jury pools did constitute sufficient underrepresentation, Smith failed to prove that the state's jury selection process systematically excluded African-Americans under the third *Duren* prong.[89]

In addition, Indians almost invariably constitute a very small group within the jury selection community.[90] These cases demonstrate the difficulty in showing underrepresentation. Consequently, Indians who have brought fair cross-section challenges when prosecuted in state or federal courts have faced similar difficulties in showing systematic exclusion.[91] In some cases, Indians have not been able to show that Indians constitute a

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84. 25 U.S.C.A. § 1304(d) (West 2014).
85. Williams, *supra* note 83, at 598.
86. Berghuis v. Smith, 559 U.S. 314 (2010).
87. *Id.*
88. *Id.*
89. *Id.* at 331.
90. *See* Washburn, *supra* note 77, at 729.
91. *See, e.g.*, United States v. Bushyhead, 270 F.3d 905 (9th Cir. 2001); United States v. Etsitty, 130 F.3d 420 (9th Cir. 1997); United States v. Raszkiewicz, 169 F.3d 459 (7th Cir. 1999).

"distinctive community" under the first *Duren* prong.[92] Other times, the challenge has failed because the Indian plaintiff was unable to show that the underrepresentation was due to systematic exclusion by the court system in question.[93] Regardless of which prong the Indian plaintiff failed to satisfy, the *Duren* test has not proven to be very useful for Indian plaintiffs challenging federal and state court jury pool compositions.

Similarly, non-Indians will most likely comprise a small portion of a tribal community's population. Therefore, in theory, non-Indians should face related issues when attempting to challenge their tribal court jury pools as have Indians who challenge federal and state court jury pools.[94]

But there are several reasons why non-Indians bringing *Duren* challenges may be treated differently than Indians have been. First, ICRA requires that tribal courts provide defendants with many, but not all, of the substantive protections provided in the Bill of Rights.[95] Consequently, federal courts scrutinize tribal courts' practices much more so than they do other federal, or even state, court practices.

In addition, not all tribes permit non-Indians to become tribal members.[96] Because of this, a non-Indian defendant may have no ability to influence a tribe's laws. Yet under VAWA, the non-Indian defendant would be entitled to a jury that does not discriminate against non-Indians.[97] Therefore, the non-Indian would not be able to argue that his or her inability to be a tribal member bears any relation to the fairness of his or her jury pool. Consequently, this factor should not affect a *Duren* challenge.

However, based on past treatment of tribal courts as compared with state and federal courts, tribes should expect to be treated differently within a *Duren* analysis as well. In particular, non-Indians would certainly be able to show that they represent a "distinctive" group within the community.[98]

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92. *Raszkiewicz*, 169 F.3d at 467.

93. *Bushyhead*, 270 F.3d at 910; *Etsitty*, 130 F.3d at 425.

94. *See* Castillo, *supra* note 17, at 332.

95. Kevin Washburn, *Reconsidering the Commission's Treatment of Tribal Courts*, 17 FED. SENT'G REP. 209, 210 (2005), http://doi.org/10.1525/fsr.2005.17.3.209. *See* United States. v. Bryant, No. 15-420 (U.S. June 13, 2016) (noting that one of the key due process rights not provided in tribal court is the right to counsel for indigent defendants on trial for misdemeanors).

96. *See* Rolnick, *supra* note 42, at 425 (demonstrating that each tribe has its own membership requirements, some of which still include blood quantum).

97. *See* 25 U.S.C.A. § 1304(d) (West 2014).

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

VAWA specifically names non-Indians as persons who cannot be excluded from tribal court jury rolls, thus defining them as distinctive.[99]

Furthermore, a non-Indian who goes to trial in front of a jury of all tribal members appears to raise all of the concerns that have troubled Congress and the Supreme Court since the beginnings of federal Indian law policy. Regardless of whether the jury pool included non-Indians and thus satisfied *Duren*, a reviewing court may likely still find that such a jury did not adequately protect the non-Indian defendant's due process rights.

So long as tribes are considered to be sovereign governments operating with different concepts of law and justice, tribal courts will continue to face the scrutiny and mistrust that impedes their ability to regain jurisdiction over non-Indians. It is for this reason that tribes wishing to exercise jurisdiction over non-Indians likely should expand their own concepts of community to better include the non-Indians living and working within the tribes' territorial boundaries, so as to hedge against claims of unfairness.

As tribal courts begin to exercise VAWA jurisdiction and effectively demonstrate that tribal courts are "fair" forums for non-Indians, tribes can pave the way for expanded jurisdiction over non-Indians to better facilitate justice within Indian country.

B. The Pascua Yaqui Tribe's Implementation Process

Tribes that currently exercise VAWA jurisdiction have made the necessary changes to include non-Indians within the community in the tribes' jury selection processes.[100] Because of differences between tribal

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99. 25 U.S.C.A. § 1304(d).

100. Fulfilling the requirement that juries expanding tribal criminal jurisdiction under the Violence Against Women Reauthorization Act of 2013 must represent a "fair cross section of the community," tribal courts have altered their tribal codes to include non-Indians within jury pools. *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, sec. 904, § 204(b)(4)(B), 127 Stat. 54, 122 (codified at 25 U.S.C.A. § 1304(b)(1) (West 2014)); FORT PECK TRIBES COMPREHENSIVE CODE OF JUSTICE tit. 6, ch. 5 § 507(b)(1), (c)-(d) (requiring the juror list for special domestic violence criminal jurisdiction include fifty tribal members and fifty non-tribal members, randomly summoning twenty-one individuals and choosing six); SISSETON-WAHPETON OYATE CODES OF LAW ch. 23, § 23-10-03, -04, -05 (compiling a potential juror list that includes tribal members, residents within the tribe's jurisdictional boundaries, full time employees of the tribe, and individuals leasing tribal lands); PASCUA YAQUI TRIBAL CODE, 3 PYTC 2-1-160 (pulling potential jurors from tribal members, individuals living in tribal housing, and anyone working for the tribe); TULALIP TRIBAL CODES ch. 2.05, § 110 (creating a potential juror list from tribal members and employees of the tribe's casino and Quil Ceda Village, then referencing census data to ensure it reflects a fair cross-section); CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, CRIMINAL CODE AND PROCEDURES ch. 3, § 3.19 (using county voter

court systems, each tribe must figure out its own means of incorporating the VAWA jury requirements to its existing system. Some tribes exercising VAWA jurisdiction employ different jury selection procedures for VAWA and non-VAWA cases, limiting jury service in non-VAWA cases to tribal members.[101] Yet other tribes include non-Indians with ties to the tribal community, such as non-Indians who live or work in Indian country, in all jury selection pools.[102]

The Pascua Yaqui Tribe is an example of one tribe that had to change its jury selection practices in order to satisfy the VAWA requirements. The Yaqui was one of three tribes to first exercise enhanced VAWA jurisdiction. Yaqui courts have been working through jury selection issues since February 2014.[103] In addition, the Yaqui have been active in the Intertribal Technical-Assistance Working Group on Special Domestic Violence Criminal Jurisdiction (ITWG), a group that develops and shares

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registration lists to find and summon potential jurors from any resident of the Umatilla Indian Reservation, regardless of tribal membership); Fletcher & Jurss, *supra* note 20, at 615 n.117.

101. *See* 6 FORT PECK TRIBES COMPREHENSIVE CODE OF JUSTICE § 507(b)(1) (defining eligible juror in VAWA 2013 prosecution as any resident within the boundaries of the Fort Peck Reservation age of eighteen or over, regardless of race or tribal citizenship not otherwise disqualified under Court standards, and defining eligible juror in non-VAWA 2013 prosecution as a tribal member who is at least eighteen years old, "is of sound mind an discretion, has never been convicted of a felony, is not a member of the Tribal Council, or a judge, officer or employee of the court or an employee of the Reservation police or Reservation jail, and is not otherwise disqualified according to standards established by the Court"); Jordan Gross, *Let the Jury Fit the Crime: Increasing Native American Jury Pool Representation in Federal Judicial Districts Within Indian Country Criminal Jurisdiction*, 77 MONT. L. REV. 281, 302 (2016).

102. *See e.g.,* CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION CRIM. CODE § 3.19(A) (as amended by Resolution No. 14-018, Mar. 24, 2014) ("[A]ny resident within the boundaries of the Umatilla Indian Reservation of the age of 18 or over is eligible to be a juror regardless of race or tribal citizenship."); LAW AND ORDER CODE OF THE TULALIP TRIBE § 1.11.2 (stating that jurors "shall be chosen from the following classes of persons: 1) tribal members living on or near the Tulalip Indian Reservation; 2) residents of the Tulalip Indian Reservation; and 3) employees of the Tulalip Tribes or any of its enterprises, agencies, subdivisions, or instrumentalities who have been employed by the Tribes for at least one continuous year prior to being called as a juror"); Gross, *supra* note 101, at 302.

103. *See generally* ALFRED URBINA & MELISSA TATUM, CONSIDERATIONS IN IMPLEMENTING VAWA'S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION AND TLOA'S ENHANCED SENTENCING AUTHORITY: A LOOK AT THE EXPERIENCE OF THE PASCUA YAQUI TRIBE (Oct. 2014), http://www.ncai.org/tribal-vawa/getting-started/Practical_Guide_to_Implementing_VAWA_TLOA_letter_revision_3.pdf.

best practices in how tribes should implement the VAWA requirements.[104] In May 2017, the Yaqui obtained the first jury trial conviction of a non-Indian defendant pursuant to VAWA jurisdiction.[105]

The Pascua Yaqui reside on land outside of the city of Tucson, in southern Arizona. Approximately 500 of the 5000 people living within Yaqui jurisdictional boundaries identify as non-Indian.[106] The primary employers on Yaqui land are the tribal government and the two tribal government-run casinos: the Casino of the Sun and Casino del Sol.[107]

Prior to exercising VAWA jurisdiction, Yaqui courts obtained jurors from an electronic database containing the names of all persons over the age of eighteen enrolled in the tribe.[108] In order to meet the VAWA jury requirements, the Yaqui had to expand this database to contain all persons within their "community," including non-Indians.[109] The tribe consequently went through the process of determining what constitutes such a community, taking stock of the many non-Indians who work and live on Yaqui land.

The tribe contacted the Pascua Yaqui Casino Human Resources office and the Yaqui Government Human Resources office to obtain lists of all non-Yaqui employees working for the casinos and the Yaqui government.[110] In addition, the Yaqui court system asked the tribal housing office for a list of non-Yaqui tribal housing residents and the tribal enrollment office for a list of tribal members' non-Indian spouses.[111] The Yaqui court system added all of these persons to its jury selection pools.[112]

Through this process, the Yaqui determined that 610 of the approximately 1,600 casino employees were non-Indian, 189 of the almost

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104. *Tribal Implementation of VAWA: Resource Center For Implementing Tribal Provisions of the Violence Against Women Act*, NAT'L CONGRESS OF AM. INDIANS, http://www.ncai.org/tribal-vawa/pilot-project-itwg/about-itwg (last visited Oct. 18, 2016).

105. *First Non-Indian Jury Trial Conviction in Indian Country Prosecuted at Tucson, Arizona's Pascua Yaqui Tribal Court*, CISION PR NEWSWIRE (May 23, 2017), http://www.prnewswire.com/news-releases/first-non-indian-jury-trial-conviction-in-indian-country-prosecuted-at-tucson-arizonas-pascua-yaqui-tribal-court-300462521.html.

106. URBINA & TATUM, *supra* note 103, at 32.

107. *Fire Department*, PASCUA YAQUI TRIBE, http://www.pascuayaqui-nsn.gov/index.php/fire-department (last visited July 14, 2017).

108. Email from Alfred Urbina, Attorney General, Pascua Yaqui Tribe, to author (Sept. 29, 2016) (on file with author).

109. *See* URBINA & TATUM, *supra* note 103, at 7.

110. Email from Alfred Urbina, *supra* note 108.

111. *Id.*

112. *Id.*

900 tribal government employees were non-Indian, and nine non-Indians lived in tribal housing.[113] In addition, thirty non-Indian spouses were registered with the enrollment office.[114] The Yaqui were therefore able to add almost 900 non-Indians to its jury pools—a number that reflects the sizable presence of non-Indians employed by the Yaqui government and enterprises.

The Yaqui also considered how and if they could enforce jury service summonses on these non-Indians despite generally having no civil jurisdiction over nonmembers of the tribe.[115] Because all of the non-Indians added to the Yaqui jury pool have some tie to the tribe, either through employment, housing, or marriage, the Yaqui determined that they could possibly enforce jury service through contract and civil penalties based on the non-Indian's particular relationship with the tribe.[116] Such an arrangement would hedge against the potential issue of the tribe not having any enforcement mechanisms against non-members because of the limited scope of tribal civil jurisdiction over non-tribal members.[117]

But a tribe's lack of legal ability to enforce non-Indian jury service should not by itself constitute a breach of the *Duren* standard. So long as a tribal court summons a non-Indian and the non-Indian has the ability to accept such a summons, the tribal court has fulfilled its duty.[118] If non-Indians never appeared for a tribal court's jury duty, then the court's selection process may be found to be inadequate. Until such a situation arises, tribal courts should be protected under *Duren* so long as they are able to serve non-Indians with summonses despite having no civil or criminal remedies available in the event that the non-Indian fails to respond.

In summary, tribal courts exercising jurisdiction under VAWA should, in theory, be able to provide non-Indian defendants with constitutionally fair jury trials. Congress has imposed the requisite due process protections on tribal court proceedings, and tribes are taking care to implement these protections.

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113. *Id.*

114. *Id.*

115. *See* Fletcher, *supra* note 9 ("The Court's working theory, memorialized in the Montana test, is that Indian nations do not have jurisdiction over nonmembers, except in two circumstances. One is where nonmember activity is potentially "catastrophic" to tribal government operations and reservation life. The other is where a nonmember consents, usually through a commercial transaction, to tribal jurisdiction."); Montana v. United States, 450 U.S. 544, 564-65 (1981).

116. Email from Alfred Urbina, *supra* note 108.

117. *See* Fletcher, *supra* note 9.

118. Castillo, *supra* note 17, at 332.

However, because the jurisdiction granted by VAWA is nevertheless insufficient to address current problems with law enforcement in Indian country, Congress should consider a further expansion of tribal court jurisdiction over non-Indians under a "community recognition standard" as articulated in this next part.

IV. The Fairness of Indian Tribes' Right to Govern

In light of tribal courts regaining some, albeit quite limited, jurisdiction over non-Indians through VAWA, it is appropriate to once again step back and consider the fairness implications of tribal court jurisdiction over non-Indians more broadly.[119] A tribal court is one of the few jurisdictions that does not possess geographic, or territorial, jurisdiction over every person who enters the tribe's geographic boundaries.[120] Therefore, unlike when an American commits a crime in Canada and the American is subject to Canadian law despite the fact that the American is not a Canadian citizen, non-Indians may commit crimes in Indian country and use the defense of not being a member of the Indian tribe to bar the tribal court's jurisdiction.[121] Such an arrangement is arguably unfair on its face to the tribal governments attempting to regulate their lands.

There is a fundamental tension between a tribe's right to have territorial jurisdiction over its lands and the unique relationship between Indian tribal governments and the United States. Because tribes will likely never be recognized by the United States as separate sovereign nations, there is

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119. The idea that tribes should retain jurisdiction over tribal lands is not a new one. Scholars have called for Congress and/or the Supreme Court to recognize an expansion of tribal court jurisdiction for years. *See*, *e.g.*, Alison Burton, *What About the Children? Extending Tribal Criminal Jurisdiction to Crimes Against Children*, 52 HARVARD CIVIL RIGHTS – CIVIL LIBERTIES L. REV. 193 (2017); Amanda M.K. Pacheco, *Broken Traditions: Overcoming the Jurisdictional Maze to Protect Native American Women from Sexual Violence*, 11 J. L. & SOC. CHALLENGES 1, 3 (2009); Amy Radon, *Tribal Jurisdiction and Domestic Violence: The Need for Non-Indian Accountability on the Reservation*, 37 U. MICH. J.L. REFORM 1275, 1277-78 (2004); Frickey, *supra*, note 18, at 1.

120. *See* Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) ("[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."); David Wolitz, *Criminal Jurisdiction and the Nation-State: Toward Bounded Pluralism*, 91 OREGON L. REV. 725, 730 (2012) ("The doctrine of territoriality—according to which criminal jurisdiction is determined by the territorial location of the crime—seems to answer most questions about which criminal justice system has jurisdiction over which crimes."); *see* Rolnick, *supra* note 42, at 338.

121. *See* Rolnick, *supra* note 42.

perhaps a need for an "intermediate" form of territorial and membership-based sovereignty. Under such a model, tribal governments could better control Indian country without violating the due process rights of non-Indians and other non-tribal members.

Critical race theorist and Indian law scholar Addie Rolnick has created one such model that she calls a "community recognition standard."[122] Under this standard, tribes should have criminal jurisdiction over "anyone who is recognized by the tribe as a member of the community."[123] This definition allows tribes to maintain whatever requirements they may have for tribal membership, some of which include blood quantum, while also assimilating non-Indians whom they feel are part of their greater community into tribal court proceedings as jury members.[124] The community recognition standard is a hybrid between the geographic and membership-based conceptions of jurisdiction that have defined past federal Indian law jurisprudence.[125] Such a hybrid model more accurately reflects the unique status of Indian tribes within American law than does either a purely geographic or purely membership-based conception of jurisdictional power.

Rolnick's model presents a logical outgrowth of VAWA jurisdiction. By enacting VAWA, Congress recognized the need for tribal courts to adjudicate claims against non-Indians, but only in those specific instances where the non-Indian defendant has demonstrated close ties to the tribe or to tribal members.[126] Expanding this logic, there are many more instances when tribal courts can—and should—exercise jurisdiction over non-Indians who have close ties to the tribe's community. For example, the Tribal Youth and Community Protection Act, a bill presented to Congress in 2016, would expand tribal court jurisdiction over non-Indians who commit acts of

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122. *Id.* at 345.
123. *Id.*
124. *Id.* at 423-24.
125. *See* Dussias, *supra* note 64.
126. 25 U.S.C.A. § 1304(b)(4)(b) (West 2014).

> A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant only if the defendant—
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> (i) resides in the Indian country of the participating tribe;
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> (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.

Id.

domestic violence against children.[127] There could foreseeably be many more instances where a non-Indian displays sufficient ties to a tribal community to be properly held in tribal court despite not having tribal membership.

The community recognition standard allows a tribe, as authorized by a required future act of Congress, to determine whether or not to exercise jurisdiction over non-Indians. This is a fair distribution of power: Congress and the Supreme Court have already set the requirements tribal courts must meet in order to exercise jurisdiction.[128] It should then be the tribes who are granted the option of determining whether they can meet those standards, just as is the case with the VAWA jurisdiction.

In addition, the community recognition standard accurately reflects the composition of most of Indian country today.[129] It seems particularly unfair that tribal courts are not sufficiently able to adjudicate crimes committed within Indian country just because a majority of persons physically residing in Indian country do not identify as Indians. Because Congress' attempt to confer criminal jurisdiction to state and federal governments has generally shown to be ineffective in combating crime, tribal courts are arguably the best-situated forums to adjudicate these claims.[130]

Therefore, when the Court invariably hears its first fair cross-section challenge brought by a non-Indian convicted in tribal court, it should conduct a two-part fairness analysis: First, it should ensure that the defendant was provided a fair jury under the *Duren* standard. And second, particularly because it is so difficult to prove these fair cross-section claims when the population in question represents a small group within the jurisdiction, the Court should refrain from applying its historical analysis as to tribal court fairness.

It is clear that the status quo, where tribal courts retain extremely little criminal jurisdiction over non-Indians, has not been effective in combating

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127. Tribal Youth and Community Protection Act of 2016, S. 2785, 114th Cong. (2d Sess. 2016). The VAWA only allows for jurisdiction against non-Indians who commit acts of domestic violence against other adults.

128. *See* Indian Civil Rights Act, 25 U.S.C. § 1302 (2012); *see supra* Parts I and II.

129. *See supra* Part I.

130. Rolnick, *supra* note 42, at 349-50 ("Within Indian country, the federal government exercises jurisdiction over crimes between Indians and non-Indians and certain enumerated major crimes involving only Indians. In some areas, states exercise Indian country criminal jurisdiction in place of the federal government pursuant to Public Law 280 or a similar law.") (citing the Major Crimes Act, 18 U.S.C. § 1153 (2012); Public Law 280, Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended in scattered sections of 18 U.S.C. and 25 U.S.C.)).

crime in Indian country.[131] One reason for why the status quo is inadequate is that criminal law is intended to be local in nature.[132] Yet, in Indian country, the local court is almost always the tribal court and the tribal court invariably will not have jurisdiction if the perpetrator of the crime is not Indian.

The current solution is for the federal government, or occasionally for state governments, to prosecute those crimes that a tribal government cannot.[133] But even putting aside practical considerations such as the federal government's lack of funding for Indian country prosecutions or lack of interest in prosecuting crimes that often take place in rural and remote areas, having the federal government handle routine Indian country crimes simply does not make sense.[134] Federal courthouses, prosecutors, and law enforcement officers are rarely located near the scene of the crime.[135] This geographic distance makes going to trial burdensome for all parties involved and over time can result in a perversion of justice.[136] Consequently, most Indian law scholars and policymakers agree that the current model is insufficient for addressing crime within Indian country.

Perhaps the most obvious alternative to the status quo would be for tribes to regain full criminal jurisdiction over all persons within a tribe's geographic boundaries. Not only would this solution clarify criminal jurisdiction in Indian country, it would also recognize the sovereignty of tribal governments. Tribes would then have the same criminal jurisdiction over tribal lands as do state governments over state geographic boundaries.

It is important to note that no Indian law scholars advocate outright for such territorial jurisdiction—likely because such an idea is untenable in light of current federal Indian law and policy.[137] Even the small, carefully crafted amount of jurisdiction granted to tribes under VAWA has caused

131. *See* STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME: A BJS STATISTICAL PROFILE, 1992-2002, at 5 (2004), https://www.bjs.gov/content/pub/pdf/aic02.pdf; Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202(a)(5), 124 Stat. 2261, 2262.

132. Washburn, *supra* note 77, at 713.

133. *Id.* at 712. On some reservations in so-called Public Law 280 states, state governments are tasked with Indian country law enforcement. *See generally* Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535 (1975); Washburn, *supra* note 77, at 712 n.13.

134. Washburn, *supra* note 77, at 713.

135. *Id.* at 712.

136. *Id.* at 712-14.

137. *See supra* Part II.

some concerns within the legal community.[138] Instead, persuasive scholarship has largely focused on highlighting flaws in the current system and offering some potential solution in the abstract.[139]

Therefore, the community recognition standard is currently the most realistic, yet impressively aspirational, standard offered to replace the status quo. This standard acknowledges the complicated history between Indian tribes and the United States, as well as the delicacy involved in Indian law advocacy, and limits tribal criminal jurisdiction to only those non-Indians whom the tribe believes have demonstrated adequate ties to the tribe. At the same time, the community recognition standard also places some power back into the hands of tribal governments by allowing tribes to define their communities, and thus the extent of their jurisdiction, within boundaries set by Congress and the Supreme Court.

In addition, this standard builds logically upon VAWA. VAWA created the framework for considering ties between a tribe and certain non-Indians by granting tribal criminal jurisdiction over non-Indian perpetrators of intimate domestic violence against tribal members. This format can certainly be expanded to eventually reach all non-Indians with whom the tribe has a relationship.

The community recognition standard presents tribal policymakers with a guideline for how to advocate for continued expansion of tribal criminal jurisdiction through successive legislative grants instead of through court-made law. It is a guideline for where tribal criminal jurisdiction should be headed so long as tribes can demonstrate their abilities to provide non-Indians with fair trials.

It may be difficult for tribes to show that they can fairly adjudicate claims against non-Indians. As seen in Part II, the Supreme Court has long articulated concerns about the differences between tribal court practices and state and federal court practices. However, the community recognition standard acknowledges that some non-Indians have demonstrated sufficient ties to the tribal community to effectively be put on notice as to the tribal court's jurisdiction.

Provided that tribal courts afford all defendants, including non-Indians, with fair trials as mandated by the United States Constitution, it is

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138. *See e.g.*, Thomas F. Gede, *Criminal Jurisdiction of Indian Tribes: Should Non-Indians Be Subject to Tribal Criminal Authority Under VAWA?*, ENGAGE, July 2012, at 40, http://www.fed-soc.org/library/doclib/20120806_GedeEngage13.2.pdf.

139. *See e.g.*, Katharine C. Oakley, *Defining Indian Status for the Purpose of Federal Criminal Jurisdiction*, 35 AM. INDIAN L. REV. 177 (2010-2011); Washburn, *supra* note 77; Dussias, *supra* note 64.

additionally fair to restore a tribal court's criminal jurisdiction over all persons within that tribe's community: Indians and non-Indians alike. With time, perhaps this model will come to describe the state of criminal jurisdiction in Indian country.

V. Conclusion

As demonstrated in Part II above, the Supreme Court has long discussed the fairness concern of subjecting non-Indians to the sometimes-unfamiliar practices and procedures of tribal court systems. The Court has subsequently chosen to privilege non-Indian defendants' rights, often at the expense of the tribal government's ability to regulate its land and its people.

Although Indian tribes face considerable obstacles before they can convince Congress and the Supreme Court of their fitness to adjudicate claims against non-Indians in tribal court, the changing composition of Indian country may help alter the course of tribal court jurisdiction in the public mind. So far, Supreme Court rhetoric has reflected American society's wariness of tribal justice systems. But as more non-Indians live and work within Indian country, and as tribes gain recognition in modern society, fears of tribal court unfairness may begin to lessen. Such societal change may influence federal court review of tribal court practices.[140]

Therefore, in light of the competing fairness concern for tribes to be able to adequately police their land, Congress should recognize tribal courts' jurisdiction over all non-Indians within a tribe's community, however the particular tribe chooses to define this term, so as to better reflect the changing populations in Indian country. Such a jurisdictional grant should likely survive judicial review, despite current precedent.

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140. *See e.g.*, Brian Leiter, *Legal Realism and Legal Doctrine*, 163 U. PA. L. REV. 1975, 1979 (2015) ("'Judges are human,' wrote [Felix] Cohen, 'but they are a peculiar breed of humans, selected to a type and held to service under a potent system of government controls. . . . A truly realistic theory of judicial decisions must conceive every decision as something more than an expression of individual personality, as . . . a product of social determinants.'") (quoting Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 843 (1935)).