

Fair Cross Section and Tribal Jury Composition: VAWA 2022 Tribal Criminal Jurisdiction Series



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The [Violence Against Women Reauthorization Act of 2013](#) (VAWA 2013) amended the [Indian Civil Rights Act](#) (ICRA) to ensure that non-Indian criminal defendants in Tribal courts have the right to a trial by an impartial jury that is drawn from sources that

1. “reflect a fair cross section of the community” and
2. “do not systematically exclude any distinctive group in the community, including non-Indians.”¹

This requirement applies when a non-Indian who is criminally prosecuted in Tribal court faces possible imprisonment.

The implementation of these jury provisions has been a topic of discussion among the [Inter-Tribal Working Group on Special Tribal Criminal Jurisdiction \(ITWG\)](#) due to the complex legal and logistical issues they raise. The ITWG has collaborated extensively with the [Center for Jury Studies](#) to interpret this provision accurately, develop effective strategies for its implementation, and ensure that their jury processes comply with ICRA as amended by VAWA 2013. This collaboration aims to uphold the integrity of the judicial process and protect the rights of defendants.

This paper explores the origins and implications of the fair cross-section requirement, drawing on relevant Federal jurisprudence, particularly the landmark U.S. Supreme Court case [Duren v. Missouri](#). It also addresses some of the practical challenges tribes face in defining their communities and assembling representative jury pools. By examining these legal frameworks and practical considerations, this report provides guidance to Tribal governments about how they can effectively implement the jury provisions of VAWA 2013 while maintaining fairness and upholding community values.

I. Understanding Fair Cross Section

The jury pool language in VAWA 2013 is similar to the Sixth Amendment of the U.S. Constitution, which guarantees the right to trial by an impartial jury in criminal prosecutions.² The U.S. Supreme Court has interpreted this to mean that juries must be drawn from a

¹ 25 U.S.C. § 1304(d)(3).

² The Sixth Amendment to the U.S. Constitution states: “In all criminal prosecutions, **the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed**, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.”

representative cross-section of the community.³ Although the VAWA jury provisions are distinct from the Sixth Amendment, it is likely that a court interpreting the VAWA jury provisions would look to Sixth Amendment jurisprudence for guidance. For this reason, this section analyzes how the Federal courts have interpreted the analogous section of the U.S. Constitution, which should inform how Tribes interpret the VAWA statute’s jury provisions.⁴

In *Duren v. Missouri*, the U.S. Supreme Court established a test for determining whether a jury selection process violates the fair cross-section requirement.⁵ The test requires first that the defendant establish a *prima facie* fair-cross section violation and, if that occurs, that the jurisdiction fails to establish a compelling justification for the systematic exclusion. This test ensures that jury pools are not systematically biased or unrepresentative of the community’s demographics, with the goal of upholding the integrity of the judicial process and protecting defendants’ rights to a fair trial.

a. Establishing a Prima Facie Fair Cross Section Violation

Duren creates a three-part framework for establishing a *prima facie*, or apparent, fair cross section violation. First, the defendant must prove that the group alleged to be excluded from the jury pool is a “distinctive” group in the community.⁶ A distinctive group for fair cross section purposes generally refers to groups that see themselves as distinct from other groups, are seen by others as a distinctive group, and hold values that are not necessarily held by other groups. In most cases, distinctive groups are defined by race, ethnicity, or gender.⁷ The VAWA 2013 jury provision explicitly identifies “non-Indians” as a distinctive group that cannot be excluded from the jury pool in criminal trials with non-Indian defendants.

Second, the defendant must prove that the group’s representation in the jury pool is not fair and reasonable given the group’s representation in the community.⁸ For this prong of *Duren*, Federal and State courts have employed a variety of statistical tests to assess the degree of underrepresentation in the jury pool as compared to their population in the community. The two most common statistical measures are absolute disparity and comparative disparity.

Absolute disparity and comparative disparity are two statistical methods used to measure whether a jury pool meets the fair cross-section requirement. Absolute disparity is calculated by subtracting the percentage of a distinctive group in the jury pool from its percentage in the

³ *Taylor v. Louisiana*, 419 U.S. 522 (1975).

⁴ For a more comprehensive analysis, please see Center for Jury Studies, “Jury Manager’s Toolbox: A Primer on Fair Cross Section Jurisprudence,” (2010), https://www.ncsc-jurystudies.org/data/assets/pdf_file/0026/7478/a-primer-on-fair-cross-section.pdf.

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

⁶ *Duren*, at 364.

⁷ For a discussion of distinctive groups, See, *United States v. O’Lear*, No. 22-3835, 6th Federal Circuit Court of Appeals (2024).

⁸ *Duren*, at 364–66.

community. For example, if a minority group makes up 20% of the community but only 10% of the jury pool, the absolute disparity is 10%. Comparative disparity, however, assesses the extent of underrepresentation relative to the group's community percentage. It is calculated by dividing the absolute disparity by the group's percentage in the community, expressed as a percentage. Using the same example, the comparative disparity would be 50% (10% absolute disparity divided by 20%). These methods help evaluate whether jury pools are sufficiently representative of the community's demographics.⁹

In *Berghuis v. Smith*, the U.S. Supreme Court expressly declined to articulate a numerical threshold for absolute and comparative disparity.¹⁰ Values of 10% to 12% absolute disparity have been found by many courts as sufficient to establish a *prima facie* violation of the fair cross section requirement. The threshold level for comparative disparity is generally considered to be 40% to 50%.¹¹

The third criteria of the *Duren* test is that underrepresentation of the distinctive group results from systematic exclusion.¹² Systematic exclusion is not necessarily intentional; it must only be inherent in the procedures employed by the court to select juries, including the source of names used to create the master jury list; the automation used to randomly select names; and the qualification criteria for jury service. A crucial step for Tribes exercising criminal jurisdiction over non-Indians is to identify an accurate source of names and address records for non-Indians that can be merged with the list of Tribal members to create a master jury list.

b. Burden on the Jurisdiction if a *Prima Facie* Case Is Established

In interpreting the Sixth Amendment jury provisions, the Supreme Court in *Duren* made clear that “the demonstration of a *prima facie* fair-cross-section violation by the defendant is not the end of the inquiry into whether a constitutional violation has occurred.”¹³ Once a *prima facie* violation has been established, the burden shifts to the State to justify “this infringement by showing attainment of a fair cross section to be incompatible with a significant state interest.”¹⁴

One significant interest in criminal cases is the community’s interest in having crimes within the community solved by the community.¹⁵ If too many non-Indians are in the main jury pool, the members of the Tribal community may well lose confidence that they are involved in participating in the criminal justice system of their own laws.

⁹ For a discussion of comparative disparity, See, *United States v. Johnson*, No. 22-6048, 6th Federal Circuit Court of Appeals (2024).

¹⁰ *Berghuis v. Smith*, 559 U.S. 314 (2010).

¹¹ Center for Jury Studies, “Jury Manager’s Toolbox: A Primer on Fair Cross Section Jurisprudence,” (2010), https://www.ncsc-jurystudies.org/data/assets/pdf_file/0026/7478/a-primer-on-fair-cross-section.pdf.

¹² *Duren*, at 366–67.

¹³ *Duren*, at 367.

¹⁴ *Duren*, at 368.

¹⁵ See *American Indians, Crime, and the Law*, Kevin K. Washburn, 104 Michigan Law Review 4 (2006).

As a practical matter, the *Duren* test presents a high hurdle for criminal defendants to bring fair cross section challenges in State and Federal courts, and they are rarely successful when they arise. The degree of underrepresentation of a distinctive group must be substantial to satisfy the second prong of *Duren* and the most common factors leading to underrepresentation (underinclusive master jury lists, undeliverable summonses, and nonresponse and failure to appear rates) have generally been ruled nonsystematic exclusion. There are no known cases in which non-Indian defendants in Tribal courts have formally raised a fair cross section challenge, or even a serious threat of a challenge. Consequently, it is unclear how a Federal court might view the jury plans developed by tribes who are exercising criminal jurisdiction over non-Indians, particularly with respect to the manner in which they defined their respective communities and identified source lists to include non-Indians in the jury pool.

II. Defining the Community

Applying the VAWA 2013 jury provision in Tribal courts requires defining the “community” against which the representation of a distinctive group in the jury pool can be compared. In State and Federal courts, the community is defined as the jury-eligible population residing within the boundaries of the geographic area served by the court. The most common source of prospective juror names and addresses in State and Federal courts are the lists of registered voters, licensed drivers, and State identification card holders who reside within the geographic area served by the court, which typically include 90% or more of the adult population.

For many Tribal courts, however, communities are not wholly or even primarily confined within geographic boundaries. They often include enrolled members of the Tribe regardless of where they reside. For some tribes, Indian country consists of a patchwork of communally held properties and individual parcels of land distributed across multiple counties or States in which large numbers of non-Indians reside with little or no relationship to the Tribal community.

For Tribes exercising criminal jurisdiction over non-Indians, the challenge of implementing the jury provision of VAWA 2013 involves defining the pool of prospective jurors in terms of both Tribal members and non-Indians who have a sufficiently meaningful relationship to the Tribe (e.g., marriage, employment, residency, or other legally cognizable relationship) to be included as part of the Tribe’s “community.” The most common source of non-Indians for jury pools among the Tribes who are exercising criminal jurisdiction over non-Indians are residents or lessees of Tribal property (sixteen Tribes) or Tribal employees (eleven Tribes). Other sources listed in Tribal codes include non-Indian spouses of Tribal members ([Pasqua Yaqui Tribe](#) and [Standing Rock Sioux Tribes](#)); taxpayers ([Seminole Nation of Oklahoma](#)); voters ([Muscogee Creek Nation](#)); and persons who volunteer for jury service (Choctaw Nation and [Seminole Nation of Oklahoma](#)). Although some Tribal codes limit eligibility for jury service to Tribal

members living within specific geographic areas (e.g., [Sault Ste. Marie Tribe of Chippewa Tribe](#)), not all do so with respect to non-Indians.

III. Identifying Source Lists for the Jury Pool

For some Tribes, including non-Indians in the jury pool for the first time presents a logistical challenge because a list of non-Indian Tribal residents may be difficult to obtain. The Fort Peck Tribes were able to obtain a list of potential jurors through the 15th Judicial District of Montana, which luckily comprises 98% of the reservation. However, for some Tribes, including non-Indian employees or Tribal housing residents may be a more efficient course of action given the availability of that information. Including non-Indian employees may require Tribes to rewrite provisions of their corporation’s employee handbooks or revisit Tribal employee leave policies.

Tribal courts whose jurisdiction extends across multiple counties also face the challenge of specifying reasonable geographic boundaries for the purpose of summoning non-Indian jurors. The logistical difficulty of securing source lists from State courts or government agencies increases with every additional State or county entity whose cooperation is necessary. Practical concerns about the burden imposed on prospective jurors who would need to travel long distances to the Tribal courthouse may require Tribes to include non-Indians from the closest adjacent townships rather than from the entire county. Finally, in States where parcels of Tribal land are widely dispersed across multiple counties, the non-Indian population may greatly exceed the number of enrolled Tribal members. Randomly selecting non-Indians from State and county source lists could ultimately erode Tribal confidence in the legitimacy of trials involving non-Indian defendants by overrepresenting non-Indians, many of whom would have little or no formal connection to the Tribe in the jury pool.

IV. Other Jury Considerations

a. Jury Size and Unanimity

Other than the composition of the jury pool, VAWA 2013 did not explicitly describe how Tribal courts must conduct jury trials. VAWA 2013 did, however, include the proviso that Tribes exercising criminal jurisdiction over non-Indians must guarantee “all other rights whose protection is necessary under the Constitution of the United States...”¹⁶ Minimum jury size and unanimous verdicts are two rights that could fall within this catchall provision.

In 1978, the U.S. Supreme Court held in [Ballew v. Georgia](#) that six is the minimum number of jurors necessary to convict a defendant in a criminal case.¹⁷ One year later it held in [Burch v.](#)

¹⁶ The Indian Civil Rights Act, 25 USC 1304(d)(4).

¹⁷ [Ballew v. Georgia](#), 435 US 223 (1978).

Louisiana that six-person juries must be unanimous to convict.¹⁸ In 2020, the court extended the unanimity requirement to twelve-person juries in *Ramos v. Louisiana*.¹⁹ The ICRA states that Tribes may not “deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.”²⁰ ICRA is silent, however, about jury unanimity.

Jury procedures for Tribes exercising criminal jurisdiction over non-Indians whose codes have been reviewed are consistent with the requirements identified by the U.S. Supreme Court. With the exception of the Pascua Yaqui Tribe, which empanels seven-person juries, and the Little Traverse Bay Band of Odawa Indians in Michigan, which empanels twelve-person juries for cases in which the potential sentence exceeds one year, all Tribes use six-person juries for criminal trials of non-Indian defendants. Tribes exercising jurisdiction over non-Indians also require that the verdicts must be unanimous to convict.

b. Equal Protection Concerns

Early in the implementation process for VAWA 2013, some discussion occurred about whether Tribes needed to include non-Indians in the jury pool for all criminal cases, or only those involving non-Indian defendants. Some Tribes included non-Indians in their jury pools prior to the passage of VAWA 2013. For those who redesigned their jury systems to implement VAWA’s Tribal jurisdiction provisions, some Tribes included non-Indians in the jury pool for all jury trials. Other Tribes pursued a bifurcated approach in which non-Indians are included in the jury pool only for trials with non-Indian defendants. These Tribes have expressed the importance of ensuring that jurors understand and reflect community values and that a Tribal member on the reservation is ultimately accountable to a jury of fellow Tribal members.

The ITWG discussed at length whether such a bifurcated approach would violate the equal protection guarantee of the ICRA, and ultimately concluded that there were no equal protection concerns with a Tribe maintaining two separate jury pools. The U.S. Department of Justice (DOJ) appeared to agree with this conclusion when it approved a VAWA Pilot Project application from a Tribe that proposed to maintain two separate jury pools.²¹ In its approval letter to the Assiniboine and Sioux Tribes of the Fort Peck Reservation DOJ stated:

[Our] review, conducted in close coordination with the Department of the Interior and after formal consultation with affected Indian tribes, has led us to determine that Fort Peck's criminal justice system has adequate safeguards in place to fully protect defendants’ rights under the Indian Civil Rights Act of 1968, as amended

¹⁸ *Burch v. Louisiana*, 441 US 130 (1979).

¹⁹ *Ramos v. Louisiana*, 590 US 83 (2020).

²⁰ The Indian Civil Rights Act, 25 U.S.C. § 1302(a)(10).

²¹ Assiniboine and Sioux Tribes of the Fort Peck Reservation VAWA Pilot Project Application, <http://www.justice.gov/sites/default/files/tribal/pages/attachments/2015/03/13/fortpeckapp322015.pdf>.

by VAWA 2013. Indeed, we are confident that your tribal court's application of the federal statutory rights described in VAWA 2013 will be comparable to state courts' application of the corresponding federal constitutional rights in similar cases.²²

DOJ's approval suggests that they did not view the bifurcated approach to be an obvious equal protection violation. In addition, 25 U.S.C. §1304(d) explicitly states that the requirement for the non-exclusion of non-Indians is in those cases in which the Tribe is exercising criminal jurisdiction over non-Indians. To date there have been no formal legal challenges to bifurcated jury pools and several Tribes have adopted this approach.

c. Concerns about Juror Compliance with Summons

Tribes who are thinking about exercising criminal jurisdiction over non-Indians have routinely asked how they can ensure non-Indians comply with a jury summons. They have expressed concern about their limited authority over non-Indians. In practice, this has not been a problem. Tribes who have called non-Indians for jury service have anecdotally reported that non-Indians report for jury duty at higher rates than their Tribal citizens. In one early jury trial involving a non-Indian defendant at Fort Peck, the entire jury was composed of non-Indians. In educational programs and one-on-one technical assistance, the Center for Jury Studies has shared techniques for addressing nonresponse and failure-to-appear rates, especially timely and consistent follow-up to ensure that both Indian and non-Indian jurors understand the importance of compliance with jury summons. Education and public outreach to community members about jury service should also be pursued, especially by Tribes that do not have a long history with jury trials.

Conclusion

Compliance with the fair cross-section requirement under VAWA 2013 is essential for Tribal courts exercising criminal jurisdiction over non-Indians. By understanding the principles established by Federal jurisprudence, particularly the *Duren* test, Tribes can navigate the complexities of defining their communities and assembling inclusive jury pools. Achieving compliance with VAWA 2013's amendments to ICRA not only protects defendants' rights but also reinforces the legitimacy of Tribal courts and enhances justice within Tribal communities.

²² Letter from Acting Associate Attorney General Stuart Delery to the Assiniboine and Sioux Tribes, dated March 6, 2015 and <http://www.justice.gov/sites/default/files/tribal/pages/attachments/2015/03/13/fort-peck.pdf>.

Resources

- [Center for Jury Studies](#)
 - [Primer on Fair Cross Section](#)
 - [Safe Harbors from Fair-Cross-Section Challenges? The Practical Limitations of Measuring Representation in the Jury Pool](#)
 - [Best Practices for Jury Summons Enforcement](#)
 - [Characteristics of an Effective Master Jury List](#)
 - [Systematic Negligence In Jury Operations: Why The Definition of Systematic Exclusion In Fair Cross Section Claims Must Be Expanded](#)
 - [Assessing and Achieving Jury Pool Representativeness, Judges Journal, Spring, 2016](#)
- [Webinar: Part I - Developing an Effective and Defensible Jury Plan for Tribal Courts](#)
- [Webinar: Part I Update \(Jan. 2018\) - Developing an Effective and Defensible Jury Plan for Tribal Courts](#)
- [Webinar: Part II - Jury Selection Plans](#)

Additional resources about the jury requirements in the Indian Civil Rights Act can be found at www.tribalvawa.org/jury-requirements.