Note

A Jury of Someone Else's Peers: The Severe Underrepresentation of Native Americans from the Western Division of South Dakota's Jury-Selection Process

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Abstract

Native American defendants hailed into federal court in the Western Division of the United States District Court for South Dakota routinely face a venire of potential jurors that fails to include a single Native American. As such, many of them decline to exercise their constitutional right to a jury trial. This unrepresentative venire is a direct result of a flawed jury-selection process that is in violation of the Sixth Amendment's fair cross-section requirement. Currently, the Western Division's jury-selection process mandates the use of the federal voter-registration list as the only source of names for prospective jurors. As a result of major obstacles to voter registration for Native Americans residing on the Pine Ridge Reservation, Native Americans are severely underrepresented on the master jury wheel. Names are pulled from the master jury wheel to determine who receives juror qualification questionnaires, and ultimately who will be placed on the qualified jury wheel for placement on venires. This underrepresentation is a direct result of the Western Division's jury-selection process, which, as this note will discuss, is unconstitutional under *Duren v. Missouri*.

This issue was previously raised by Stephen Demik, a Deputy Federal Public Defender who worked in the Western Division of South Dakota. Time and again, his Native American clients—knowing that their jury would almost certainly not include any of their peers—declined to take their cases to trial, declined to put the prosecution to its burden, and declined to be judged by a jury of their peers. Eventually, Demik filed a motion to dismiss an indictment of one of his Native American clients based on a Sixth Amendment fair cross-section violation. Unfortunately,

this motion never received a ruling.

To the knowledge of the author, there is currently no article or note that addresses the flaws of the Western Division's jury-selection process and the detrimental effects that process has on Native American defendants. Nor to the author's knowledge is there an article or note that seeks to do the same for any other division of a federal court district that encompasses a similarly large Native American population. This problem is not unique to the Western Division, and it is certain to affect Native Americans in other divisions of federal courts districts across the country with similar jury-selection processes. This note seeks to fill this gap and shed light on an unjust jury selection process that affects an already marginalized population.

I. INTRODUCTION

While working as a Deputy Federal Public Defender in South Dakota, Stephen Demik found himself faced with a difficult challenge: many of his Native American[1] clients were declining to exercise their

* Law Student at University of Texas at Austin. The author would firstly like to thank Stephen Demik, without whom the idea for this paper never would have been born. His consultation and feedback throughout the process was critical, and his dedication to fighting for the rights of his clients—in South Dakota and beyond—is truly inspiring. Next the author would like to thank her brother, Dominique Fenton, who was similarly indispensable to the nascence and writing of this paper. Without him, the author might never have been introduced to the strength and beauty of the Oglala Lakota people living on the Pine Ridge Reservation. The author would also like to thank Professors Cary Franklin and Jennifer Laurin for their encouragement and consultation throughout the entire process. It's a privilege to have access to professors willing to help their students run with ambitious ideas like writing three papers in one semester. Additional thanks to Angelica Baker, the author's most cherished editor, and Anthony Medina, with whom it was such pleasure to brainstorm and whose incredible attention to detail caught even the most minor of errors in the footnotes. And lastly, but certainly not least, the author would like to thank her father, Granville Fenton, for teaching her the Native American history she wasn't learning in the California public schools of the 1990s. Among other things, she'll never forget how the opossum lost its tail.

[1] In this note the author uses the term "Native American" as opposed to "Indian" but it should be noted that, while "Native American" has perhaps been regarded as a more sensitive phrase, Native Americans remain split on which term is preferable. *See* Brendan Koerner, *American Indian vs. Native American*, SLATE (Sep. 24, 2004), https://slate.com/news-and-politics/2004/09/american-indian-vs-native-american.html [https://perma.cc/WCJ8-QWXH].

> A 1995 Department of Labor survey found that close to 50 percent of American Indians were perfectly happy with [the "American Indian"] label, while 37 percent preferred to be known as Native Americans. Those who prefer the former often do so because "Native American" sounds like a phrase concocted by government regulators—note, for example, that one of the community's most radical civil rights groups is the American Indian Movement. Those who prefer Native American, on the other hand, often think that "Indian" conjures up too many vicious stereotypes from Western serials.

Id. When the term "Indian" is used in this note, it is because the Federal Government continues to use it within the criminal jurisdictional framework and the Supreme Court has held it to be political,

rights to a jury trial because they knew that Native Americans would be drastically underrepresented in their jury pools.[2] This challenge is only one of many obstacles for Deputy Federal Public Defenders, "not the least of which is the fact that nationwide, as of 2012, 93% of prosecutions result in convictions."[3] When Demik faced what he calls "the inevitable question" of "how many Native Americans" would be on his client's jury, he could only respond "with a sigh and resignation": "[p]robably none."[4] This was especially frustrating to him when so many criminal defendants were Oglala Lakota Native Americans living on the Pine Ridge Reservation located in the southwest portion of that state, with many facing severe consequences for their alleged crimes.[5] In Demik's experience, "[w]ith a plea offer on the table and the prospect of facing an all-white jury, many Native American defendants . . . were reluctant to take their case to a jury trial because of that underrepresentation."[6]

In this paper, I explore the circumstances that gave rise to these unrepresentative juries in the Western Division of the United States District Court for South Dakota and offer some possible solutions.[7] I begin in Part II by briefly laying out the Supreme Court's interpretation of the Sixth Amendment, which established the criminal defendant's right to an impartial jury drawn from a representative cross-section of the community.[8] I also explain the Supreme Court's three-pronged test, emerging from *Duren v. Missouri*,[9] for determining whether a defendant's right to a jury drawn from a representative cross-section of the community is being violated.[10]

I then establish in Part III that the Western Division of South Dakota's jury-selection process is in violation of the Sixth Amendment's fair cross-section requirement. I begin by briefly explaining the criminal-jurisdictional landscape for Native American defendants and introduce the reader to the Pine Ridge Reservation, which comprises a substantial portion of the Western Division.[11] I then explain the jury-selection process in the Western Division and go on to apply the *Duren* test to its pro-

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not racial. *See, e.g.*, United States v. Antelope, 430 U.S. 641, 645 (1977) (explaining the classification of 'Indians' as a political group).

2 E-mail from Stephen Demik, Deputy Federal Public Defender, District of South Dakota, to Camille Fenton, Fellow, Office of the Federal Public Defender for the Central District of California (May 7, 2017, 18:22 EST) (on file with author).

3 E-mail from Stephen Demik, *supra* note 2 (citing OFFICES OF THE UNITED STATES ATTORNEYS, UNITED STATES ATTORNEYS' ANN. STAT. REP. FISCAL YEAR 2012 8 (2013), *available at* https://www.justice.gov/sites/default/files/usao/legacy/2013/10/28/12statrpt.pdf [https://perma.cc/9HL9-MPJX]).

4 *Id.*

5 *Id.*

6 *Id.*

7 *See infra* Parts II–IV.

8 *See infra* Part II.A.

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

10 *See infra* Part II.B.

11 *See infra* Parts III.A–B.

cess to show that it is in violation of the Sixth Amendment's fair cross-section requirement.[12] The crux of my argument lies in the third prong of the test, which requires me to make a *prima facie* showing that Native Americans are being systematically excluded from the jury-selection process by virtue of a flaw inherent in the process.[13] I argue that, due to the significant barriers and obstacles to voter registration faced by Native Americans living on the Pine Ridge Reservation, the Western Division's use of a voter-registration list as its single jury-source list results in a master jury wheel that does not represent a fair cross-section of the community.[14] The problems stemming from this unrepresentative single-source list of potential jurors are compounded by the Western Division's inadequate follow-up procedures after it has sent out juror qualification questionnaires to these potential jurors.[15]

After I make this *prima facie* showing that the jury-selection process utilized by the Western Division results in the exclusion of Native Americans from the Western Division's venires, I conclude in Part IV by offering a two-tiered set of possible solutions.[16] The first tier involves fixes to the jury-selection process itself.[17] I propose that the Western Division supplement the voter registration list with other jury-source lists.[18] I also propose that the Western Division improve its follow-up procedures such that Native Americans receiving the juror-qualification questionnaire have a better opportunity to respond and make it onto the qualified jury wheel.[19] The second tier of solutions depends upon the implementation of these procedural fixes, as these additional solutions can only be effective if Native Americans are summoned for jury service.[20] In an effort to make jury service less burdensome for the Native American residents of Pine Ridge, and even incentivize their participation, I suggest an increase in juror compensation in conjunction with the implementation of an education campaign and other grassroots efforts.[21] Working together, these two tiers of solutions would increase the representation of Native Americans in the Western Division's jury-selection process.

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[12] *See infra* Parts III.C–D.
[13] *Duren*, 439 U.S. at 364.
[14] *See infra* Part III.D.
[15] *See infra* Part III.D.iii.
[16] *See infra* Part IV.
[17] *See infra* Part IV.A–B.
[18] *See infra* Part IV.A.
[19] *See infra* Part IV.B.
[20] *See infra* Part IV.C.
[21] *Id.*

II. THE INTERPRETATION OF THE SIXTH AMENDMENT BY THE SUPREME COURT PROVIDES CRIMINAL DEFENDANTS WITH THE RIGHT TO AN IMPARTIAL JURY DRAWN FROM A REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY.

A. The Sixth Amendment Right to an Impartial Jury and the Establishment of the Fair Cross-Section Requirement.

The right to a trial by a "jury of one's peers" is a phrase likely to be familiar to the average American.[22] However, the concept does not appear explicitly in the United States Constitution.[23] It is an idea derived from the Magna Carta,[24] that has become fully formed through Supreme Court case law interpreting the Sixth Amendment.[25] The Sixth Amendment provides at base that all criminal defendants in federal or state court have the right to an "impartial jury of the State and district wherein the crime shall have been committed[.]"[26] The Supreme Court wrote further in *Taylor v. Louisiana* that an "essential component" of that right is "the selection of a petit jury from a representative cross section of the community."[27] This comports with the purpose of the jury being to ensure that the determination of a defendant's rights reflects the voice of the defendant's peers and equals, and the fact that a jury's determination cannot reflect that voice if significant swaths of the community are left out of the jury pool.[28] Accordingly, all criminal defendants in federal or state court have a constitutional right to be tried by a jury selected from a fair

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[22] *See, e.g.*, Jordan Gross, *Let the Jury Fit the Crime: Increasing Native American Jury Pool Representation in Federal Districts with Indian Country Criminal Jurisdiction*, 77 MONT. L. REV. 281, 298 (2016) ("A 'jury of one's peers' is a familiar phrase associated with the American legal system.")

[23] *Id.*

[24] *Id.*; *see also* MAGNA CARTA, ch. 30 (1215), *available at* https://www.bl.uk/collection-items/magna-carta-1215 [https://perma.cc/VV9U-JYJW]. Chapter 30 of the 1215 Magna Carta provides:

> No free man shall be seized or imprisoned, or stripped of his rights of possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

Id.

[25] Gross, *supra* note 22, at 298.

[26] U.S. CONST. amend. VI.

[27] Taylor v. Louisiana, 419 U.S. 522, 528 (1975).

[28] *See* Strauder v. West Virginia, 100 U.S. 303, 308 (1879) ("The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.").

cross-section of the community.[29]

The issue in *Taylor* was the constitutionality of then-recently repealed provisions of the Louisiana Constitution and the Louisiana Code of Criminal Procedure, both of which "provided that a woman should not be selected for jury service unless she had previously filed a written declaration of her desire to be subject to jury service."[30] The Supreme Court held that the presence of a fair cross-section of the community on venires, panels, and lists from which petit juries are drawn is essential to the fulfillment of the Sixth Amendment's guarantee of an impartial jury in criminal prosecutions.[31] The Court found the Amendment's guarantee violated by the systematic exclusion of women, which in *Taylor*'s judicial district "amounted to 53% of the citizens eligible for jury service."[32] While the Louisiana jury-selection process did not disqualify women from jury service, in operation the process resulted in very few women—"grossly disproportionate to the number of eligible women in the community"—being called for jury service.[33]

Just a few years later, the Supreme Court took its holding in *Taylor* a step further when, in *Duren v. Missouri*, it found that "systematic exclusion of women [from jury venires]" resulted from the state's automatic exemption from jury service of any woman requesting not to serve, and that this exclusion was a violation of the "Constitution's fair cross-section requirement."[34] The Court based its holding on its finding that the opportunity for women to claim the exemption at multiple stages in the process, combined with the presumption that women claimed the exemption merely by not responding to a summons, resulted in "systematic[] underrepresent[ation] within the meaning of *Taylor*."[35] That is, the underrepresentation of women was a direct result of the particular jury-selection process utilized.[36]

B. Duren v. Missouri Establishes the Elements of a Fair Cross-Section Challenge.

In addition to extending the Supreme Court's holding in *Taylor*, *Duren* was doubly significant in that it also laid out the three-pronged

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[29] *E.g.*, WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING, & ORRIN S. KERR, CRIMINAL PROCEDURE § 15.4(d) (5th ed. 2004).

[30] *Taylor*, 419 U.S. at 523; *see also* LA. CONST. art. VII, § 41 (repealed 1975); LA. CODE. CRIM. PROC. art. 402 (repealed 1975).

[31] *Taylor*, 419 U.S. at 538.

[32] *Id.* at 531.

[33] *Id.* at 525.

[34] *Duren*, 439 U.S. at 359–60.

[35] *Id.* at 367.

[36] *See id.* at 366–67 (explaining how the jury selection process ultimately resulted in the exclusion of women from the venire).

test that must be met to succeed on a fair cross-section challenge.[37] *Duren* provided that:

> In order to establish a *prima facie* violation of the fair cross-section requirement, a defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.[38]

In the context of a fair cross-section challenge, case law has further developed the contours of some elements of these prongs. Group distinctiveness generally requires "(1) the presence of some quality or attribute which 'defines and limits' the group; (2) a cohesiveness of 'attitudes or ideas or experience' which distinguishes the group from the general social milieu; and (3) a 'community of interest' which may not be represented by other segments of society."[39] And systematic exclusion does not require intent.[40] Rather, a finding that the exclusion is "inherent in the particular jury-selection process utilized" is sufficient to show systematic exclusion.[41]

A *prima facie* case is established by satisfying the three prongs of the test articulated in *Duren*. But establishing a *prima facie* case "is not the end of the inquiry into whether a Sixth Amendment violation has occurred."[42] In *Taylor*, the Supreme Court explained a corollary that, "so long as it may be fairly said that the jury lists or panels are representative of the community," the "States remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions."[43] But when the lists and panels may not be fairly described as representative, the state faces a more onerous burden because"[t]he right to a proper jury cannot be overcome on merely rational grounds."[44] In that case, the state is required to establish that "a *significant* state interest be manifestly and primarily advanced by those aspects of the jury-selection process, such as exemption criteria, that result in the disproportionate exclusion of a distinctive group."[45] Though a potentially important part of the analysis,

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[37] *Id.* at 364.

[38] *Id.*

[39] United States v. Test, 550 F.2d 577, 591 (10th Cir. 1976) (internal citations omitted); *see also* Gross, *supra* note 22, at 299–300 (citing and paraphrasing *id.*).

[40] Gross, *supra* note 22, at 299 (citing Nina W. Chernoff, *Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing It with Equal Protection*, 64 HASTINGS L.J. 141, 157–58 (2012) (citing *Duren*, 439 U.S. at 366 and also citing *id.* at 371 (Rehnquist, J., dissenting) ("[U]nder Sixth Amendment analysis intent is irrelevant[.]")).

[41] Duren v. Missouri, 439 U.S. 357, 366 (1979).

[42] *Id.* at 367.

[43] *Id.* (quoting *Taylor*, 419 U.S. at 538).

[44] *Id.* (quoting *Taylor*, 419 U.S. at 534).

[45] *Id.* at 367–68 (emphasis added).

a discussion of whether such a significant state interest might exist is beyond the scope of this note.

The complainant in *Duren* was able to meet all three prongs and succeed on his fair cross-section challenge.[46] In concluding he met the third prong, the Supreme Court found the underrepresentation of women in the final pool of prospective jurors in every weekly venire for a period of nearly a year to be convincing evidence that the underrepresentation was due to Missouri's exemption criteria, and sufficiently indicative of systematic exclusion.[47] It should be noted that the Court found systematic exclusion even though, upon receiving the initial questionnaire, women had the *choice* of claiming ineligibility or exemption from jury service.[48]

In the Eight Circuit, which includes the Western Division, the challenger's burden to show systematic exclusion has been augmented beyond that required by the Supreme Court. As just discussed, the issue in *Duren* was not whether it was easy or difficult for women to choose to serve on juries.[49] The finding of systematic exclusion in *Duren* was not contingent on that the presence of any barriers that prevented women from appearing in the final venire stage of the jury-selection process.[50] All the petitioner in Duren had to show on this point was that allowing women to regularly claim an exemption amounted to an unrepresentative venire.[51] The Supreme Court found that the statutory exemptions created a flaw in the process sufficient to establish systematic exclusion.[52] But since *Duren*, the Eight Circuit has augmented the challenger's burden associated with this third prong to a significant extent.[53] The Eighth Circuit does not recognize systematic exclusion when a distinctive group effectively removes itself from the jury-selection process such that its members become underrepresented in venires and panels.[54] Instead, it requires challengers to show that the systematic exclusion resulted from affirma-

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[46] *Id.* at 364–67.

[47] *Id.* at 366.

[48] *Id.* at 364–67.

[49] *See id.* at 358 (explaining that the issue was whether the fair-cross-section requirement can be satisfied if women are systematically excluded from venires, despite being sufficiently numerous and distinct from men).

[50] *Id.*

[51] *Id.* at 366–67.

[52] *See id.* at 357 (holding that "[t]he exemption on request of women from jury service under Missouri law, resulting in an average of less than 15% women on jury venires in the forum country, violates the 'fair-cross-section' requirement of the Sixth Amendment as made applicable to the states by the Fourteenth").

[53] *See, e.g.*, United States v. Greatwalker, 356 F.3d 908, 911 (8th Cir. 2004) ("Greatwalker has not attempted to prove Native Americans, in particular, face obstacles to registering to vote in presidential elections. Thus, like the defendant in *Morin*, Greatwalker has failed to show Native Americans are systematically excluded from jury pools in the District of North Dakota."); United States v. Morin, 338 F.3d 838, 844 (8th Cir. 2003) ("Absent proof that Native Americans, in particular, face obstacles to voter registration in presidential elections, '[e]thnic and racial disparities between the general population and jury pools do not by themselves invalidate the use of voter registration lists and cannot establish the 'systematic exclusion' of allegedly under-represented groups.'" (quoting United States v. Sanchez, 156 F.3d 875, 879 (8th Cir. 1998))).

[54] *See, e.g.*, *Greatwalker*, 356 F.3d at 911; *Morin*, 338 F.3d at 844.

tive "obstacles" in the jury-selection process.[55]

This augmented burden to show systematic exclusion is particularly evident when challenging the exclusive use of voter-registration lists in the jury-selection process.[56] Due to the augmented burden, courts in the Eighth Circuit are refusing to find systematic exclusion in jury-selection processes that use lists of voluntary voter-registrants as the sole-source list unless the challenger shows that the distinctive group faces substantial obstacles to voter registration.[57] This is inconsistent with *Duren*, where the Supreme Court found that exemptions for women were sufficient to cause systematic exclusion, despite the ability for women to choose not to claim the exemption and instead participate in the jury-selection process.[58] The Court in *Duren* did not find that obstacles existed such that women were unable to choose to participate in that process.[59] The source of potential jurors is a core part of jury selection,[60] and much like the statutory exemptions for women in the Missouri jury-selection process, the exclusion of those not on the voluntary voter-registration list is a part of the Western Division's jury-selection process. If the source list utilized is resulting in underrepresentation, it represents a flaw in the jury-selection process, sufficient to render the entire process unconstitutional under the Sixth Amendment's fair cross-section requirement.[61] Under *Duren*, it should not matter whether the distinctive group faces substantial obstacles to voter registration.[62] The fact that the use of a voluntary voter-registration list inherently results in underrepresentation should suffice to prove systematic exclusion.

For the sake of argument, however, this note will also address this more burdensome application of the *Duren* test that requires a showing of affirmative obstacles. The note will nonetheless prove that Native Americans face certain affirmative obstacles and thus are being systematically excluded from the Western Division of South Dakota's venires, even by that more burdensome standard, in violation of the Sixth Amendment's fair cross-section requirement.[63]

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[55] *See, e.g.*, *Greatwalker*, 356 F.3d at 911; *Morin*, 338 F.3d at 844.

[56] *See Greatwalker*, 356 F.3d at 911 (failing to establish that Native Americans were systematically excluded because they did not face obstacles to registering to vote); *Morin*, 338 F.3d at 844 (stating the need for proof of obstacles faced by Native Americans in registering to vote to find a Sixth Amendment violation).

[57] *Greatwalker*, 356 F.3d at 911; *Morin*, 338 F.3d at 844.

[58] Duren v. Missouri, 439 U.S. 357, 370 (1979).

[59] *See id.* (explaining that reasonable exemptions, such as those based on hardship, should be narrowly tailored and should not result in the systematic exclusion of any representative group).

[60] *See id.* at 363 (stressing that "juries must be drawn from a source fairly representative of the community" (internal citations omitted)).

[61] *See id.* at 367 (holding that systematic exclusion is a result of the system by which juries are selected).

[62] *See id.* at 367 (also explaining that State interests should not get in the way of the Sixth Amendment's fair-cross section requirement).

[63] *See* United States v. Greatwalker, 356 F.3d 908, 911 (8th Cir. 2004) (finding that the *Duren* claim failed because Native Americans faced no obstacles in voter registration); United States v. Morin, 338 F.3d 838, 844 (8th Cir. 2003) (finding that the *Duren* claim failed because there were no specific obstacles keeping Native Americans from registering to vote).

III. THE WESTERN DIVISION OF SOUTH DAKOTA'S JURY-SELECTION PROCESS IS IN VIOLATION OF THE SIXTH AMENDMENT'S FAIR CROSS-SECTION REQUIREMENT

A. The Criminal Jurisdictional Landscape for Native American Defendants

In order to understand why and how the jury-selection process in the Western Division of South Dakota negatively impacts Native American defendants, it is important to review how federal criminal jurisdiction works for Native Americans. Unfortunately, tribes no longer have exclusive jurisdiction in Indian country and instead face what has been described as a "patchwork" system between tribes, states, and the federal government that turns on factors like the tribal membership of those involved in the criminal incident, such as the perpetrator and victim.[64] The use of tribal membership to allocate jurisdiction has further been described as "[p]erhaps the most idiosyncratic (and dubious) distinction [of criminal jurisdiction in Indian country][.]"[65]

In addition to tribal membership of those involved, location and type of the crime is also important to allocating jurisdiction. If the crime does not occur in Indian country, the state has exclusive jurisdiction.[66] Otherwise, federal law provides to states jurisdiction over offenses committed on some tribal land under limited circumstances, such as when both the perpetrator and victim are non-Indian.[67] In addition, the federal government has jurisdiction over a host of violent felonies committed by a Native American in Indian country under the Major Crimes Act, 18 U.S.C. § 1153.[68] The Major Crimes Act provides that Native Americans

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[64] *E.g.*, Gross, *supra* note 22, at 284–85.

[65] *E.g.*, *id.* at 285.

[66] *E.g.*, Timothy J. Droske, *Correcting Native American Sentencing Disparity Post-Booker*, 91 MARQ. L. REV. 723, 737 (2008).

[67] *Id.* at 737–38 (noting that state courts will have jurisdiction over offenses committed on tribal land if the perpetrator is a non-Indian who commits either a crime against a non-Indian or a "victimless" crime, or if the tribal land is subject to [a certain law]); Gross, *supra* note 22, at 290 ("Public Law 280 [is] a federal statute that transferred criminal jurisdiction over some crimes in some Indian country to states.").

[68] The Major Crimes Act, 18 U.S.C. § 1153(a) (2012); *see also* Gross, *supra* note 22, at 287–88. Gross notes that:

> The Major Crimes Act initially covered seven crimes—murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny. By successive amendments, Congress increased the number of enumerated crimes from seven to thirteen, adding carnal knowledge, assault with intent to commit rape, incest, assault with a dangerous weapon, assault resulting in serious bodily injury, and robbery.

Id.

who commit an enumerated offense in Indian country "shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States."[69] So even if a court finds that the defendant is an "Indian," and that the offense occurred in Indian country, a Native American may be prosecuted federally for any of the crimes that fall under the Major Crimes Act, regardless of whether the victim was Native American.[70]

In absence of applicable Congressional statutes, tribes retain exclusive criminal jurisdiction in Indian country.[71] This jurisdiction covers crimes committed on tribal land by tribal members against non-tribal members as long as the crimes are not covered by the Major Crimes Act.[72] And since the Major Crimes Act only covers a subset of felonies, this means that all misdemeanors committed on tribal land by tribal members against non-tribal members therefore fall under the exclusive jurisdiction of the tribe.[73]

As an additional point, tribes share concurrent jurisdiction with the federal government over Native American defendants who commit crimes covered by the Major Crimes Act.[74] Because Native American tribes are separate sovereigns from the United States, the Supreme Court has held that dual prosecutions for the same offense under these circumstances do not violate the double jeopardy clause of the United States Constitution.[75]

The Pine Ridge Reservation, like other reservations, is subject to the Major Crimes Act.[76] This means that a Native American charged with an enumerated "major" crime committed on the reservation may be prosecuted in federal court[77] within the District of South Dakota's Western Division.[78]

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[69] 18 U.S.C. § 1153(a).

[70] Droske, *supra* note 66, at 733, 735 (citing United States v. Bruce, 394 F.3d 1215, 1221 (9th Cir. 2005) and United States v. Van Chase, 137 F.3d 579, 582 (8th Cir. 1998), and further noting "that jurisdiction under the Major Crimes Act exists if any part of the crime occurred in Indian country").

[71] *E.g.*, *id.* at 735 (citing WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 170 (4th ed. 2004) (citing *Ex Parte* Crow Dog, 109 U.S. 556 (1883))).

[72] *E.g.*, *id.* at 736 (citing CANBY, *supra* note 71, at 170).

[73] *E.g.*, *id.* (citing Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 ARIZ. ST. L.J. 403, 410–11 (2004)).

[74] *E.g.*, *id.* at 737 (citing CANBY, *supra* note 71, at 171–72).

[75] United States v. Wheeler, 435 U.S. 313, 329–30 (1970).

[76] *See, e.g.*, *Native Americans in South Dakota: An Erosion of Confidence in the Justice System*, S.D. Advisory Comm. to the U.S. Comm'n on Civil Rights (March 2000), https://www.usccr.gov/pubs/sac/sd0300/ch1.htm [https://perma.cc/46AL-82RM] ("The Federal Government has primary responsibility for the investigation and prosecution of serious crimes that occur in Indian Country. Serious crimes are enumerated under the Major Crimes Act and include, among other, murder, manslaughter, rape, burglary, robbery, and kidnapping—offenses constituting the greatest threat to public safety.").

[77] *See id.* (explaining that for crimes committed under the purview of the Major Crimes Act, "the FBI carries out the investigation and the South Dakota U.S. Attorney's Office is responsible for prosecuting defendants").

[78] U.S. DISTRICT COURT DISTRICT OF S.D., PLAN FOR THE RANDOM SELECTION OF GRAND AND PETIT JURORS 3 (2018) [hereinafter JURY PLAN] (providing that the Western Division of South Da-

B. The Pine Ridge Reservation.

Located in southwest South Dakota,[79] the Pine Ridge Indian Reservation today is the fifth largest reservation by acreage in the United States[80] and second by population as of the 2010 Census.[81] Home to the Oglala branch of the Sioux Tribe, the reservation encompasses more than 2.8 million acres, which is larger than the combined acreage of Delaware and Rhode Island.[82] The Pine Ridge Reservation includes part of the Badlands National Park and has been described as grasslands with rolling hills.[83] The population of Pine Ridge is perhaps "one of the most difficult statistics to confirm."[84] The 2010 United States Census Report found the resident population to be 18,834.[85] But in a 2005 workforce study conducted by Colorado State University and reportedly accepted by the Federal Department of Housing and Urban development for funding purposes, the estimated resident population was 28,787.[86]

An introduction to Pine Ridge would be incomplete without addressing the harsh realities of life on the reservation. For example, Oglala Lakota County, one of the counties comprising the Pine Ridge Reservation,[87] had a per capita annual income of $7,772 in 2010.[88] This made Oglala Lakota County, formerly known as Shannon County,[89] the third

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kota consists of the counties of Oglala Lakota and Jackson), *available at* http://www.sdd.uscourts.gov/sites/sdd/files/Approved%20Jury%20Plan%202018.pdf [https://perma.cc/L292-NEAJ].

[79] George D. Watson Jr., *The Oglala Sioux Tribal Court: From Termination to Self-Determination*, 3 GREAT PLAINS RES. 61, 62 (1993).

[80] Amber Pariona, *Biggest Indian Reservations In The United States*, WORLD ATLAS (June 5, 2018), https://www.worldatlas.com/articles/biggest-indian-reservations-in-the-united-states.html [https://perma.cc/3J6Z-FV5C].

[81] TINA NORRIS, PAULA L. VINES & ELIZABETH M. HOEFFEL, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010 1, 14 (2012), *available at* https://www.census.gov/history/pdf/c2010br-10.pdf [https://perma.cc/B4UF-S2EU].

[82] *The Reservation*, RED CLOUD INDIAN SCHOOL, https://www.redcloudschool.org/reservation [https://perma.cc/HK5Q-2YPB] (last visited Dec. 1, 2018).

[83] Watson, *supra* note 79, at 62 (citing generally BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES (1980)).

[84] RED CLOUD INDIAN SCHOOL, *supra* note 82.

[85] SOUTH DAKOTA DEP'T OF TRIBAL RELATIONS, OGLALA SIOUX TRIBE STATISTICAL PROFILE 1 (2011) (citing BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE , DEMOGRAPHIC PROFILE DATA DP-1 (2010)), *available at* http://www.sdtribalrelations.com/docs/oststatprofile2011.pdf [https://perma.cc/M5SF-TLVJ].

[86] RED CLOUD INDIAN SCHOOL, *supra* note 82 (citing generally KATHLEEN PICKERING, PINE RIDGE WORKFORCE STUDY (2005)).

[87] OGLALA SIOUX TRIBE STATISTICAL PROFILE, *supra* note 82, at 1 (noting counties of Shannon and Jackson); Charlie Ban, *Shannon County, S.D. To Be Renamed Oglala Lakota County* (Nov. 17. 2014), https://www.naco.org/articles/shannon-county-sd-be-renamed-oglala-lakota-county [https://perma.cc/5TQP-S9RV].

[88] *Per Capita Income in the Past 12 Months (In 2010 Inflation-Adjusted Dollars)*, U.S. CENSUS BUREAU, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_5YR_B19301&prodType=table (last visited Jan. 8, 2019).

[89] Ban, *supra* note 87.

poorest county in America.[90] An educational institution located on the reservation reports that eighty percent of residents on the reservation are unemployed and forty-nine percent live below the federal poverty line.[91] That institution also reports that thirteen percent of residents lack complete plumbing facilities, over nine percent lack complete kitchen facilities, and over twenty-two percent of residents lack phone service.[92] Additionally, it reports that "[l]ife expectancy on the Pine Ridge Reservation is the lowest in the United States—twenty years lower than communities just 400 miles away—and on par with India, Sudan, and Iraq."[93] Finally, extreme poverty, historical trauma, and racial discrimination exacerbate youth depression and anxiety, resulting in waves of teens attempting suicide.[94]

C. The Jury-Selection Process in the Western Division of South Dakota.

As it stands, the juries in the Western Division are organized according to the District of South Dakota's jury selection plan, adopted in 2008 and recently revised in 2018.[95] The District of South Dakota's jury selection plan mandates the use of only one source of names for prospec-

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[90] Ryan Lengerich, *Nation's Top Three Poorest Counties in Western South Dakota* (Jan. 22, 2012), https://rapidcityjournal.com/news/nation-s-top-three-poorest-counties-in-western-south-dakota/article_2d5bb0bc-44bf-11e1-bbc9-0019bb2963f4.html [https://perma.cc/ASC3-R2W5].

[91] RED CLOUD INDIAN SCHOOL, *supra* note 82.

[92] *Id.*

[93] *Id.*

[94] *See* Dominique Alan Fenton, *Racism at Core of Native Teen Suicides in Pine Ridge*, COLORLINES (Apr. 2, 2015), https://www.colorlines.com/articles/racism-core-native-teen-suicides-pine-ridge [https://perma.cc/6LAA-QYV7] (connecting the conditions of life on the reservation and the high rate of teen suicide); *see also* RED CLOUD INDIAN SCHOOL, *supra* note 82 (reporting that "[t]hirty-one percent [of youth have] seriously considered attempting suicide [and] fifteen percent attempted suicide in the last twelve months"). A 2016 study by the Centers for Disease control found the following:

> In 2014, the last year for which the researchers compiled data, non-Hispanic Native women between the ages of 15 and 24 committed suicide at a rate of 15.6 deaths per 100,000, or three times the rate of non-Hispanic white women of the same age. Young Native men had a rate of 38.2 deaths per 100,000 people. Among young people, the suicides often come in clusters, as happened . . . in 2015 [ ] on South Dakota's Pine Ridge Reservation. Some . . . blamed technology, social media and bullying. Others looked to the boarding schools that removed a generation of children and created a cycle of abuse . . . . [Some] think of suicide—along with alcoholism and drug abuse—as a symptom of intergenerational trauma, the inherited grief among indigenous communities resulting from colonization.

Abe Streep, *What the Arlee Warriors Were Playing For*, N.Y. TIMES MAG. (Apr. 4, 2018), https://www.nytimes.com/2018/04/04/magazine/arlee-warriors-montana-basketball-flathead-indian-reservation.html [https://perma.cc/7QDK-93MT] ("In 2016, the Centers for Disease Control released a study examining suicide rates among Americans by race and ethnicity.").

[95] JURY PLAN, *supra* note 78, at 3 (providing that the Western Division of South Dakota consists of the counties of Oglala Lakota and Jackson counties).

tive jurors—a list of registered voters provided by the office of the South Dakota Secretary of State.[96] The plan justifies the use of this single-source list by announcing without data or facts that the "voter registration lists represent a fair cross section of the community[.]"[97]

The names of all registered voters are used to populate the district's master jury wheel.[98] From time to time, the clerk is to draw names at random from the master jury wheel and mail a juror-qualification questionnaire to each person whose name was drawn.[99] After the person fills out the questionnaire and mails it back, that person will be placed on the qualified jury wheel if not found disqualified, exempt, or excused from service.[100] Each division in the district has its own qualified jury wheel.[101]

D. Application of the Duren test to the Western Division of South Dakota

1. Distinctive Group

As described above, the first step in succeeding on a fair cross-section challenge is establishing that the group alleged to be excluded from the venires is a "distinctive" group in the community.[102] While the Eighth Circuit has not directly addressed the issue, the Tenth Circuit had found that "[t]here is no question that Indians constitute a distinctive group in the community[.]"[103] The Eighth Circuit seemed to have implicitly recognized that Native Americans constitute a distinctive group, without explicitly holding so, in *United States v. Greatwalker*.[104]

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[96] *Id.* at 3.

[97] *Id.*

[98] *Id.* at 4.

[99] *Id.* at 9.

[100] JURY PLAN, *supra* note 78, at 9.

[101] *Id.*

[102] Duren v. Missouri, 439 U.S. 357, 357 (1979).

[103] United States v. Yazzie, 660 F.2d 422, 426 (10th Cir. 1981).

[104] *See* United States v. Greatwalker, 356 F.3d 908, 911 (8th Cir. 2004) (rejecting Greatwalker's claim that the jury selection process improperly excluded Native Americans from the jury in violation of the Sixth Amendment's fair cross-section requirement, and holding that he failed to show Native Americans are systematically excluded from jury pools in the District of North Carolina, but making no mention of the preceding distinctive-group prong).

2. *Representation Not Fair and Reasonable*

The second step is to ask whether "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."[105] As phrased by Dr. Rich Braunstein, the second prong of the *Duren* test essentially requires a "significant difference between the distinctive group's presence in the jury pool and their presence in the community they live in."[106]

Much like the distinctiveness of Native Americans as a group, the lack of a fair and reasonable relation between Native American presences in the jury and the community in the Western Division is likely to be recognized. Of the measures courts use to evaluate this relation, the two most frequently used are absolute disparity and comparative disparities.[107] In a 2016 report filed to support a fair cross-section challenge, Braunstein compared the percentage of Native Americans in the Western Division populace as a whole with the percentage of Native Americans in the jury pool as constituted under the Jury Plan, and found an absolute disparity of 17.89% and a comparative disparity of 75%.[108] As will be discussed below, past judicial reliance of these measures indicates that it is likely that the values in the Western Division would satisfy this prong.

Braunstein utilized these two common measures to calculate disparities in cases involving cross-section claims.[109] The first approach is absolute disparity analysis.[110] Absolute disparity analysis measures "the difference between the percentage of a population sub-group eligible for jury duty and the percentage of that group who actually appear in the venire."[111] An absolute disparity of 17.89% signifies the "percentage gap between qualified jury pool representation and the actual Native [American] population[.]"[112] The second approach to calculating disparities is the comparative disparity analysis.[113] This analysis takes into account the proportion of the adult Native American population present in the Western Division to control for the effect population proportion has on the ab-

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[105] *Duren*, 439 U.S. at 364.

[106] Representation of the Native American Community, *infra* note 108.

[107] Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claim Must Be Expanded*, 59 DRAKE L. REV. 761, 767 (2011).

[108] Representation of the Native American Community in the US District Court of South Dakota's Western Division Jury Management System at 8–9, United States v. Poor Bear, No. 13-CR-50156 (D. S.D. Sept. 23, 2016) [hereinafter Representation of the Native American Community].

[109] *Id.* at 8.

[110] *Id.*

[111] *Id.* (citing Ramseur v. Beyer, 938 F.2d 1215, 1231 (3rd Cir. 1992)); *see also* United States v. Yanez, 136 F.3d 1329, 1329 n.4 (5th Cir. 1998) (defining absolute disparity as "the difference between the proportion of the distinctive groups in the population from which the jurors are drawn and the proportion of the groups on the jury list").

[112] Representation of the Native American Community, *Supra* note 108, at 8.

[113] *Id.* at 9.

solute disparity.[114] A comparative disparity of 75% means "that Native Americans are 75 percent less likely, when compared to the overall jury-eligible population, to be on the qualified jury service list for the Western Division."[115]

While there are perhaps no dispositive threshold values of what runs afoul of the fair and reasonable prong, courts have found disparity values lower than those in the Western Division sufficient for such a finding. For example, absolute disparity values have been found sufficient at as low as ten percent.[116] Here, absolute disparity is 17.89%.[117] Among courts that have applied comparative disparity, most required values of fifty percent or higher.[118] Here, comparative disparity is 75%.[119] These values are likely to demonstrate that Native Americans are being substantially underrepresented in the Western Division's venires, and thus that the level of representation is "not fair and reasonable in relation to the number of such persons in the community."[120]

3. *Systematic Exclusion*

The final step, represented by the third prong of the *Duren* test, requires the defendant to make a showing that the underrepresentation of the distinctive group is "due to the systematic exclusion of the group in the jury-selection process."[121] As highlighted above, this systematic exclusion does not have to be intentional.[122] It suffices that it is an inherent result of the employed jury-selection process.[123]

Systematic exclusion is inherent in the Western Division's jury-selection process and is the result of two problems. First, the Division's use of only *one* source for prospective jurors in and of itself is problematic.[124] Systematic exclusion is evident at the very first stage of the jury-

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[114] *Id.*

[115] *Id.*

[116] Hannaford-Agor, *supra* note 107, at 767 (citing for example United States v. Rioux, 930 F. Supp. 1558, 1570 (D. Conn. 1995), which further remarked that "some courts have found disparities of between 10% and 16% sufficient to establish underrepresentation")).

[117] Representation of the Native American Community, *supra* note 108, at 8.

[118] Hannaford-Agor, *supra* note 107, at 768–69.

[119] Representation of the Native American Community, *supra* note 108, at 9.

[120] *See* Duren v. Missouri, 439 U.S. 357, 364 (1979) (laying out the test required for a prima facie violation of the cross-section requirement).

[121] *Id.*

[122] *See id.* at 366 (holding the unintentional exclusion of women through the exemption system constituted systematic exclusion).

[123] *Id.*

[124] *See* Representation of the Native American Community, *supra* note 108, at 1–2; *accord* AMERICAN JURY PROJECT & AMERICAN BAR ASS'N, PRINCIPLES FOR JURIES AND JURY TRIALS 10 (2016) [hereinafter PRINCIPLES FOR JURIES] (suggesting the use of at least two sources lists), *available at* https://www.americanbar.org/content/dam/aba/administrative/american_jury/principles.pdf. [https://perma.cc/R49A-CYSZ]; Representation of the Native American Community, *supra* note 108, at 5–6.

selection process.[125] By populating the master jury wheel exclusively with names from the voter-registration list, too few Native Americans are included in the master jury wheel.[126] This results in too few Native Americans receiving the juror-qualification questionnaire, which then results in too few Native Americans making it onto the qualified jury wheel.[127] The end product is a venire that underrepresents Native American jurors.[128] As will be touched on below, using additional source lists may help remedy the likelihood of underrepresentation.

Second, and as Braunstein touches upon, the fact that the source list includes only registered voters creates both general issues with representativeness and significant obstacles to voter registration for Native Americans in the Western Division.[129] Though not required by Supreme Court precedent, the Eighth Circuit requires a showing of these affirmative obstacles as part of a fair cross-section challenge.[130]

i. The Use of Only One Jury-Source List by the Western Division Increases the Likelihood that the Master Jury Wheel Does Not Represent a Fair Cross-Section of the Community.

In regard to the first problem of one juror-source list, while the Eighth Circuit has upheld the sole use of voter-registration lists,[131] the American Bar Association recommends jury-source lists be compiled from two or more lists to "assure representativeness and inclusiveness."[132] As of a 2011 review of jurisdictions, forty-three states and the District of Columbia allow the use of more than one list, while thirty-one states require at least two and eleven states require at least three.[133] States appear to commonly use "registered voter, licensed driver, and state income or property tax lists."[134] Some jurisdictions appear to alternatively or additionally use unemployment-compensation lists and public-welfare-benefit lists.[135]

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[125] *See* Representation of the Native American Community, *supra* note 108, at 1–2 ("The development of a representative jury pool in the Western Division is complicated by . . . the lack of validity of voter registration records as source data for the actual Native community population.").

[126] *Id.* at 4.

[127] *See id.* (illustrating how racial disparities in voter registration result in racial disparities in jury selection).

[128] *Id.* at 10–11.

[129] Representation of the Native American Community, *supra* note 108, at 3–4.

[130] *See, e.g.*, United States v. Greatwalker, 356 F.3d 908, 911 (8th Cir. 2004); United States v. Morin, 338 F.3d 838, 844 (8th Cir. 2003).

[131] *See Sanchez*, 156 F.3d at 879 ("We have consistently upheld the use of voter registration lists to select jury pools." (internal citations omitted)).

[132] PRINCIPLES FOR JURIES, *supra* note 139, at 10.

[133] Hannaford-Agor, *supra* note 107, at 780.

[134] *Id.* at 780.

[135] *Id.* at 781.

ii. The Fact that the Source List Includes Only Registered Voters Creates Both General Issues with Representativeness and Significant Obstacles to Voter Registration for Native Americans in the Western Division.

a. The Use of Voter-Registration Lists as the Sole Jury-Source List is Generally Problematic Given the Limited Representativeness of Voter-Registration Lists.

Both Congressional law and judicial precedent indicate voter-registration lists may need to be supplemented. The Jury Selection and Service Act of 1968 (JSSA),[136] in enforcing the right to a fair cross-section under the Sixth Amendment, mandates that federal jury-selection plans "shall prescribe *some other source or sources of names in addition to voter lists* where necessary to foster" fair cross-section policies.[137] The JSSA makes clear that voter lists must be supplemented when there is evidence that, standing alone, they are not representative.[138] *Duren* supports this requirement by stating that a fair cross-section evaluation "involves a comparison of the makeup of jury venires or other sources from which jurors are drawn with the makeup of the *community, not of voter registration lists*."[139] The California Supreme Court, among others, recognizes that courts have control over which source lists are used in compiling the master jury wheel to ensure representativeness and inclusion sufficient to satisfy the requirements of the Sixth Amendment.[140]

Administrative materials also provide some indication of whether voter-registration lists are adequate to ensure a fair cross-section. In 1979, and as subsequently revised, a manual on management of jury systems was published to support a Department of Justice (DOJ) grant program called the "Incentive Program in Juror Usage and Management."[141]

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[136] Jury Selection and Service Act (JSSA), 28 U.S.C. §§ 1861–1878 (1968).

[137] 28 U.S.C. § 1863(b)(2) (emphasis added).

[138] Jeffrey Abramson, *Two Ideals of Jury Deliberation*, U. CHI. LEGAL F. 125, 156 (1998) ("Congress mandated an affirmative or positive requirement that the master jury wheel actually be representative of the community."); *see also* Robin E. Schulberg, *Juries, Fair Cross-Section Claims, and the Legacy of Griggs v. Duke Power Co.*, 53 LOY. L. REV. 1, 20 (2007) (explaining that "[the JSSA] also recognized that voter registration lists would have to be supplemented if they resulted in underrepresentation of a distinct group in jury pools[.]").

[139] *Duren*, 439 U.S. at 365 n.23 (first emphasis in original, second emphasis added).

[140] People v. Wheeler, 583 P.2d 748, 758 (Cal. 1978) ("It therefore becomes the responsibility of our courts to insure that [the Sixth Amendment guarantee] not be reduced to a hollow form of words[.]").

[141] G. THOMAS MUNSTERMAN, JURY SYSTEM MANAGEMENT, at ix (1996) (citing CENTER FOR JURY STUDIES, METHODOLOGY MANUAL FOR JURY SYSTEMS (Center for Jury Studies rev. ed.

That program provided money "to assist [some state courts] in the improvement of their jury systems."[142] The DOJ used this jury-management manual to "provide[] the methodology by which these courts examined their jury operations."[143] The DOJ's program used certain standards for evaluating state court jury systems' success in jury-system management.[144] It set the "inclusiveness" standard for the jury-source lists at eight-five percent or more of the eligible-juror population"[145]

Statistics from South Dakota evidence the representational problems associated with using voter-registration lists as the sole jury-source list in that state. As recently as 2014, only 64.2% of voting age citizens in South Dakota were registered to vote.[146] This single-source list falls more than twenty percent below the accepted DOJ standard of eighty-five percent.[147] Selecting jurors from a pool that excludes perhaps over a third (35.8%) of the jury-eligible population should almost certainly fail to provide a Sixth Amendment right to a fair cross-section of the community given that the exclusions are unlikely to be proportional among distinctive groups.[148]

Federal and state courts must supplement voter-registration lists with other lists where necessary to ensure representative of juries. As of 2011, thirty-three of ninety-four federal district courts use supplemental lists instead of solely using voter registration lists.[149] By failing to supplement voter-registration lists where necessary with a more inclusive source list, federal and state courts fail to meet that responsibility.

1981), *available at* https://ncsc.contentdm.oclc.org/digital/api/collection/juries/id/94/download), *available at* http://www.ncsc-jurystudies.org/~/media/Microsites/Files/CJS/What%20We%20Do/Jury%20System%20Management.ashx [https://perma.cc/MX9B-TZFV].

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.* at 5.

[146] U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2014 tbl.4c (2015)) (while data on voter registration by race was available, no data was found on Native American voter registration specifically), *available at* http://census.gov/data/tables/time-series/demo/voting-and-registration/p20-577.html [https://perma.cc/82AS-CPKC] .

[147] *See* MUNSTERMAN, *supra* note 141, at 4–5 (stating that the acceptable standard is eighty-five percent).

[148] *See* Duren v. Missouri, 439 U.S. 364–66 (1979) (reasoning that a "gross discrepancy" in the percentage of a distinctive group in the community and the percentage of that group in venires shows that the group is not fairly represented).

[149] Hannaford-Agor, *supra* note 107, at 781.

b. The Use of the Voter-Registration List as the Sole Jury-Source List is Especially Problematic in the Western Division as a Result of the Geographic, Socioeconomic, and Historic Obstacles to Voter Registration faced by Native Americans in South Dakota.

Native Americans have historically faced and continue to face hurdles at all stages of the voting process, including voter registration.[150] In South Dakota specifically, geographic and socioeconomic issues have created the most significant barriers to voter registration for Native Americans. Geography impedes Native Americans from voter registration more frequently as they live in rural areas like South Dakota at a substantially higher rate than the general population.[151] Residing in rural areas may make registration in person difficult due to geographic distance, and though states must provide for voter registration by mail,[152] registration forms are sometimes rejected for failing to provide a proper street address, even when the registrant lives in a rural area that lacks such an address.[153]

These geographic burdens are especially onerous considering the socioeconomic struggles of Native Americans in South Dakota.[154] National statistics from 2014 show that voter registration has a direct correlation with income—the lower the family income, the lower the voter-registration percentage.[155] South Dakota's reservations are marked by poverty; they contain five of the twenty-five most impoverished counties in the United States.[156] In *Berghuis v. Smith*, the last Supreme Court

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[150] *Securing Indian Voting Rights*, 129 HARV. L. REV. 1731, 1732 (2016).

[151] *Id.* at 1739 n.72 (citing generally U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, 2010 CENSUS AMERICAN INDIAN AND ALASKA NATIVE SUMMARY FILE: URBAN AND RURAL (2010), which remarked that "[o]n the 2010 Census, 36% of people identifying as 'American Indian or Alaska Native alone' lived in rural areas—almost twice the percentage of the population at large (19%)").

[152] *Id.* at 1737 (citing 52 U.S.C.A. § 20505 (West 2015)).

[153] *Id.* (quoting Adam Cohen, *Editorial Observer; Indians Face Obstacles Between the Reservation and the Ballot Box*, N.Y. TIMES (June 21 2004), http://www.nytimes.com/2004/06/21/opinion/editorial-observer-indians-face-obstacles-between-reservation-ballot-box.html) [https://perma.cc/5G3Y-LWK6]).

[154] *Id.* at 1739; *see also* Kristopher A. Reed, Note, *Back to the Future: How the Holding of Shelby County v. Holder Has Been a Reality for South Dakota Native Americans Since 1975*, 62 S.D. L. REV. 143, 155 (2017); *see generally* Steven J. Rosenstone, *Economic Adversity and Voter Turnout*, 26 AM. J. POL. SCI. 25 (1982) (exploring the effect poverty has on Native American voting patterns).

[155] U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2014 tbl.7 (providing that family incomes less than $10,000 had the lowest voter registration percentage (43.1%) while those over $150,000 had the highest (75.7%). The trend followed income – i.e., percentage of registered voters climbed with income and, conversely, lowered with lower income.), *available at* https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-577.html [https://perma.cc/82EM-GKU8].

[156] *Id.* Shannon County, renamed Oglala Lakota County as of May 2015, (Pine Ridge Reservation) is ranked first with 52.2% of the county living in poverty; Todd County (Rosebud Reservation) is second at 47.4%; Ziebach County (Cheyenne River Reservation) is sixth at 44.6%; Buffalo County (Crow Creek Reservation) is twelfth at 40.7%; and Corson County (Standing Rock Reservation) is

opinion addressing cross-section challenges, the Court left unanswered the question of whether socioeconomic factors could be used to support a fair cross-section claim.[157] These facts and statistics should be taken into consideration.[158]

A history of voting restrictions based on racial discrimination and hostility towards Native Americans further contributes to the lower registration rates of Native Americans in South Dakota. As stated in the complaint in the case filed by Thomas Poor Bear, barriers to voting for Native Americans in South Dakota extend all the way back to the creation of the state in 1889.[159] The complaint notes that, back then, "the right to vote was largely restricted to free white men, and it was illegal to create precincts on [Native American] reservations."[160] The complaint also states that even when Native Americans were given full rights of citizenship through the Indian Citizenship Act in 1924, South Dakota continued to ban Native Americans from voting until the 1940s.[161] The complaint further remarks that "Native Americans in 'unorganized counties' were forbidden from voting until the mid-1970s"[162] and that the part of Jackson County located within Pine Ridge Reservation, where Wanblee is located, was part of an "unorganized county" until 1983.[163] Even the former United States Attorney for the District of South Dakota confirms the historic concerns with Native American enfranchisement in South Dakota.[164] These historic voting obstacles have had lasting effects on the levels of voter registration in these communities.

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twenty-third at 38.6%. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, SMALL AREA INCOME AND POVERTY ESTIMATES (2014), *available at* https://www.census.gov/data/datasets/2014/demo/saipe/2014-state-and-county.html) [https://perma.cc/2VVB-3ADS].

[157] *See* Berghuis v. Smith, 559 U.S. 314, 332–33 (2010) (holding that a prima facie showing of systematic exclusion requires more than merely pointing to socioeconomic factors, but not addressing whether those factor can be considered as part of a challenge).

[158] *See, e.g.*, Hannaford-Agor, *supra* note 107, at 790 ("Although the socioeconomic factors that contribute to minority underrepresentation in the jury pool do not systematically exclude distinctive groups, the failure of courts to mitigate the underrepresentation through effective jury system practices is itself a form of systematic exclusion.").

[159] Complaint for Injunctive and Declaratory Relief 11, Poor Bear v. The County of Jackson, 2014 WL 4702282 (No. 14-5059) (D. S.D. Sept. 18, 2014) [hereinafter Poor Bear Complaint].

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] John Hult, *U.S. Attorney Scolds County on Voting Law*, ARGUS LEADER (Jan. 3, 2015, 8:11 PM), http://argusleader.com/story/news/2015/01/02/us-attorney-scolds-county-voting-law/21214459/ [https://perma.cc/4NS8-9VXG] ("'Let's be clear, South Dakota does not have a proud history when it comes to providing Native Americans an equal right to vote,' [United States Attorney Brendan] Johnson said.").

c. The Use of the Voter-Registration List as the Sole Jury-Source List is Especially Problematic as a Result of the Obstacles to In-Person Voter Registration Faced by Native Americans on the Pine Ridge Reservation.

Native Americans living on the Pine Ridge Reservation also face obstacles to in-person voter registration represented by difficulties in travel and transport. These obstacles are illustrated by the situation in the sparsely populated and impoverished Jackson County.

As background, and as noted in the complaint filed by Thomas Poor Bear, the southern half of Jackson County is located within the Pine Ridge Reservation.[165] The population is 3,031, fifty-two percent of which is Native American.[166] The voting age population is 2,034,[167] of which about forty-four percent are Native American.[168] The county has a population density of 1.6 inhabitants per square mile.[169] The per capita income for the county is $16,939.[170] About 32.1% of families and 44.8% of the population fall below the poverty line, including 52.4% of those under age eighteen and 26.9% of those age sixty-five or older.[171]

The situation in Jackson County is evidenced by a case that began in 2014, when Thomas Poor Bear, a member of the Oglala Sioux Tribe and resident of Wanblee, Jackson County, filed suit against the County after his request for a satellite voting office in Wanblee was denied.[172] Poor Bear alleged a violation of Section Two of the Voting Rights Act of 1965 and the Fourteenth Amendment to the United States Constitution.[173] According to the complaint, in-person voter registration and in-person absentee voting were only available in the county seat of Kadoka.[174] Un-

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[165] Poor Bear Complaint, *supra* note 159, at 6.

[166] *Id.* at 6 (citing generally BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES (2010)).

[167] Poor Bear Complaint, *supra* note 159, at 6. (citing generally BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES (2010)).

[168] *Id.* (citing generally BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES (2010)).

[169] American FactFinder, *Population, Housing Units, Area, and Density: 2010 – County—Census Tract 2010 Census Summary File 1*, U.S. CENSUS BUREAU, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_SF1_GCTPH1.CY07&prodType=table (last visited Jan. 9, 2019).

[170] American FactFinder, *Per Capita Income in the Past 12 Months (in 2017 Inflation-Adjusted Dollars) Universe: Total Population*, U.S. CENSUS BUREAU, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_17_5YR_B19301&prodType=table (last visited Jan. 9, 2019).

[171] American FactFinder, *Selected Economic Characteristics 2013-2017 American Community Survey 5-Year Estimates*, U.S. CENSUS BUREAU, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_5YR_DP03&prodType=table (last visited Jan. 9, 2019).

[172] Poor Bear Complaint, *supra* note 159, at 1.

[173] *Id.*

[174] *Id.* at 7.

like Wanblee, Kadoka is not on the Pine Ridge Reservation.[175] The compliant stated that approximately ninety-four percent of the population of Kadoka was white, and 5.2% of the population was Native American.[176] In Wanblee, 1.6% of the population was white, and approximately 95% was Native American.[177] The voting age population was similarly disparate; in Kadoka, 84% of the voting age population was white and 12% was Native American, whereas in Wanblee, 92% of the voting age population was Native American and 3.5% was white.[178]

Travel and transportation obstacles were key barriers cited in the 2014 case. Limiting in-person voter registration to Kadoka meant that Native American residents of Wanblee who sought to register in person could be required to travel about sixty miles round-trip—approximately twice as far as the largely white residents of Kadoka.[179] The impact of the long travel distance was alleged to be exacerbated by a lack of reliable public transportation in Jackson County, as well as a lack of access to private transportation for a substantial portion of the Native American population[180] For example, the complaint stated that there was a clear disparity in vehicle availability between Native American and whites in Jackson County; approximately seventy-eight percent of occupied housing units in which at least one Native American resided had a vehicle available,[181] while all occupied housing units in which whites resided had a vehicle available.[182]

Socioeconomic disadvantages for Native Americans within Jackson County exacerbated these travel and transportation barriers. The complaint filed in Poor Bear reports that within the year prior to filing suit:

> The poverty line and unemployment rates for Native Americans in Jackson County are much higher than for the white residents. . . . [I]n Jackson County, 52.9% of Native Americans live below the poverty level, 44.2% are unemployed and 75.1% have received Food Stamps/SNAP benefits. By contrast, in Jackson County 11.5% of whites live[d] below the poverty level, 1.4% [were] unemployed, and 1.5% [have] received Food Stamps/SNAP benefits."[183]

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[175] *Id.*

[176] *Id.* at 6. (citing U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *American Community Survey 5-Year Estimates* tbl.DP05 (2008-2012)).

[177] *Id.* (citing U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *American Community Survey 5-Year Estimates* tbl.DP05 (2008-2012)).

[178] *Id.* (citing U.S. BUREAU OF THE CENSUS, U.S. DEPT'T OF COMMERCE, tbl.P10 (2010)).

[179] *Id.* at 7.

[180] *Id.*

[181] *Id.* (citing U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES tbl.DP04 (2006-2010)).

[182] *Id.* (citing U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, U.S. CENSUS, AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES, tbl.DP03 (2006-2010)).

[183] *Id.* at 8. (citing U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES tbl.DP03 (2006-2010) (looking at White Alone)).

Overcoming excessive distance and lack of access to reliable transportation is one thing. Add to that the costs associated with traveling those distances, and registering to vote becomes nearly impossible for Native Americans.

While the immediate issue raised in the suit was perhaps temporarily fixed, the fundamental concern underlying the case likely remains. With regard to the immediate issue, after Poor Bear filed suit, Jackson County finally agreed to open an in-person voting center in Wanblee in advance of the 2014 elections.[184] The Jackson County Commission adopted a budget resolution promising to spend Help America Vote Act (HAVA) funding on this new Wanblee Center until 2023.[185] While this resolution was a step forward, the question remains what will happen in 2023 when the memorandum of agreement ends. There also remains the task of finding a solution for the rest for the Pine Ridge Reservation, which is equally rural and impoverished. This temporary voting center in Wanblee is merely a partial fix to a systematic problem affecting the entire reservation, which encompasses other counties.[186]

d. The Western Division's Failure to Follow Up with Undelivered Mailings or With Summonsed Jurors Who Fail to Appear Further Contributes to the Absence of Native Americans from the Qualified Jury Wheel.

Braunstein notes in his report regarding Native American representation in the Western Division that the Western Division's failure to "engage in supplemental efforts to reduce the disparate response rates of Native Americans called for jury service" is an "additional problem" that exacerbates the exclusion of Native Americans from the qualified jury wheel.[187] His report notes that the current jury-selection process in the Western Division fails to follow up with jurors residing at addresses

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[184] Andrea J. Cook, *Jackson County Agrees To Open Satellite Voting Office*, RAPID CITY J. (Oct. 17, 2014), https://rapidcityjournal.com/news/local/jackson-county-agrees-to-open-satellite-voting-office/article_1ee5d44e-3d0d-59f8-b813-fc651ff32c48.html [http://perma.cc/XPF3-NCBN] (noting the settlement in place for the 2014 elections).

[185] Bob Mercer, *Jackson County Will Open Voting Site in Wanblee*, RAPID CITY J. (Nov. 17, 2015) http://rapidcityjournal.com/news/local/jackson-county-will-open-voting-site-in-wanblee/article_bfe2b3a3-3c82-527b-a733-d3cf349cd751.html [https://perma.cc/7399-WTBV].

[186] *See, e.g.*, Poor Bear Complaint, *supra* note 159, at 3–4 (explaining that the Pine Ridge Reservation encompasses all of Shannon County, the southern half of Jackson County, and the northwest portion of Bennett County).

[187] Representation of the Native American Community, *supra* note 108, at 12.

yielding undelivered mailings or who receive delivery of the summons but still fail to appear.[188] The absence of a required follow-up in the Western Division's jury-selection process contributes to its failure to comply with the fair cross-section requirement because Native Americans are more likely not to respond; according to Braunstein's report, for example, the areas within that division with the lowest response rates are those with a predominantly Native American population.[189]

Braunstein further observes in his report that, while the Western Division sends a second mailing for non-responses from potential jurors at their listed addresses other than when the first mailing is returned undelivered, the jury-selection process "does nothing specific to engage Native Americans who live under traditionally hard-to-reach circumstances."[190] For comparison, the definition of hard-to-reach (or hard-to-count) individuals used by the Department of Commerce in administration of the census includes "ethnic and racial minorities who do not own their homes, do not maintain permanent addresses where they live, who move regularly, as well as those who live in remote or inaccessible areas," which according to Braunstein captures "precisely the characteristics of many Native Americans in the Western Division."[191]

In order to better understand the effects of the Western Division's treatment of non-response records, Braunstein analyzed the response rates by geographic areas within the Division.[192] The geographic areas included in the analysis were based on the ZIP code data present in the 2013 master jury wheel.[193] Braunstein focused his analysis on the ZIP codes that had five or more individuals contacted.[194] Of the forty-six ZIP codes with five or more individuals contacted, thirty-two had non-response rates of fifteen percent or more.[195] The analysis focused on this group, which represented 21.4%, or thirty-two of 149, ZIP codes in the Western Division.[196] The question sought to be answered was whether these "thirty-two ZIP codes with generally lower response rates than other ZIP codes in the Western Division Jury Wheel had a higher percentage of Native Americans."[197]

Braunstein's results show a "trend of lower response rates from ZIP codes with higher Native American population percentages."[198] The highest non-response rates include eight "densely Native American are-

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[188] *See id.* at 13–17.
[189] *Id.* at 15.
[190] *Id.* at 12.
[191] *Id.* at 12, n.11 (citing generally the U.S. Census Bureau and the U.S. Department of Commerce).
[192] *Id.* at 12–13.
[193] *Id.* at 13.
[194] *Id.* at 12–13.
[195] *Id.* at 13.
[196] *Id.*
[197] *Id.*
[198] *Id.* at 15.

as"—namely, the communities of Pine Ridge, Martin, Kyle, Allen, Tuthill, Wounded Knee, Porcupine, and Oglala.[199] Meanwhile, the ZIP codes with the lowest non-response rates had the lowest Native American population percentages.[200] Braunstein concluded from this data that Native American population density is negatively related to response rates in the Western Division.[201] According to Braunstein, "this finding is a direct result of the hard-to-reach or hard-to-count nature of the Native American community in the Western Division."[202] When the Division fails to follow up on undelivered and non-responsive addresses, Braunstein's findings show that Native American underrepresentation increases.[203] Braunstein further notes that "[b]ecause of the hard-to-reach character of much of the Native American community, it is especially important to develop and maintain a competent follow up procedure rather than simply moving on to the next address/individual on the master jury wheel." [204] The Western Division, according to Braunstein, is "augmenting the poor representation of Native Americans in its jury-selection process by maintaining current practices."[205]

The flaw identified by Braunstein regarding Native Americans who receive delivery of the summons but still fail to respond should not be brushed aside by attributing it to Native Americans *choosing* not to engage in the system. Much like how choice was of no consequence with the women in *Duren*, it should be of no consequence whether the Native Americans are deciding not to respond to juror-qualification questionnaires.[206] A jury-selection process in which juror-qualification questionnaires can go unanswered with no follow-up procedures is a system that is at risk of yielding an unrepresentative venire, particularly where certain distinctive groups are significantly more likely to not answer the questionnaires.

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[199] *Id.*
[200] *Id.*
[201] *Id.*
[202] *Id.* at 17.
[203] *Id.*
[204] *Id.*
[205] *Id.*
[206] *See* Duren v. Missouri, 439 U.S. 367 (1979) (explaining that giving women the choice to opt out of jury service resulted in the systematic exclusion of women from the venire).

e. For the Foregoing Reasons, the Underrepresentation of Native Americans From the Western Division's Master and Qualified Jury Wheels is Due to the Systematic Exclusion of the Group in the Jury-Selection Process.

As Braunstein notes, the Western Division's use of the voter registration list as the only jury source list, particularly given the significant barriers to voter registration for Native Americans, has created a jury-selection process that results in an unrepresentative venire, in violation of the fair cross-section requirement.[207] As discussed above in this part, registering to vote is prohibitively burdensome for Native Americans in the Western Division due to generally problematic use of single-source lists and obstacles stemming from geography, socioeconomic issues, historic disenfranchisement, difficulties with travel and transport to in-person voting centers, and the lack of follow-up with jurors residing at addresses yielding undelivered mailings or who otherwise fail to appear. As Braunstein notes, the lack of follow-up ensures that systematic exclusion is an inherent result of the employed jury-selection process.[208]

Braunstein concludes in his report that using voter registration data as the sole source for jury pools "increases concern for the validity of the Western Division's random selection" of a fair cross-section of the community.[209] His report also crucially concludes that "voter registration is generally an unreliable measure and unlikely to produce accurate representations for Native Americans in South Dakota."[210] This report and its conclusion highlights the problem with relying solely on voter registration lists in compiling the jury pool for the Western Division of South Dakota.

It is important to note that the systematic exclusion demonstrated above should satisfy even Eighth Circuit precedent that would otherwise reject a fair cross-section challenge for the defendant's failure to meet the third prong by showing affirmative obstacles. The obstacles discussed above—in the form of statistics *and* facts—clearly show the systematic exclusion necessary to satisfy even that precedent.[211] It is im-

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[207] Representation of the Native American Community, *supra* note 108, at 19–20.

[208] *Id.* at 13–17.

[209] Representation of the Native American Community, *supra* note 108, at 4.

[210] *Id.* at 5.

[211] *See* United States v. Rodriguez, 581 F.3d 775, 790 (8th Cir. 2009) (concluding that, even when the first two *Duren* elements were met, there was a lack of proof minorities faced obstacles to voting in North Dakota, and the defendant's *Duren* challenge failed under the third element); *see* United States v. Greatwalker, 356 F.3d 908, 911 (8th Cir. 2004) (finding it insufficient that "the mere fact that the jury panel included no Native Americans creates a *prima facie* case that the process is flawed"); *see* United States v. Morin, 338 F.3d 838, 844 (8th Cir. 2003) (quoting United States v. Sanchez, 156 F.3d 875, 879 (8th Cir. 1998) (finding that, "[a]bsent proof that Native Americans, in particular, face obstacles to voter registration in presidential elections, '[e]thnic and racial disparities

portant to underscore that the statistics discussed above do not stand alone;[212] The statistics in Braustein's report are supported by the facts offered by Thomas Poor Bear in his suit against Jackson County.[213]

IV. THE WESTERN DIVISION MUST REMEDY ITS JURY-SELECTION PROCESS TO ENSURE A FAIR CROSS-SECTION OF THE COMMUNITY BY INCLUDING MORE NATIVE AMERICANS IN THE MASTER AND QUALIFIED JURY WHEELS.

In light of the systematic exclusion discussed above, the federal court in the Western Division must develop and implement a remedied jury-selection process to ensure a fair and reasonable cross-section inclusive of that community. The JSSA specifically requires federal courts to "devise and place into operation a written plan for random selection of grand and petit jurors that shall be designed to achieve" certain objectives and policies, including that jurors be "selected at random from a fair cross section of the community in the district or division wherein the court convenes."[214] More fundamentally, in failing to guarantee the right to a fair and reasonable cross-section of the community, the Western Division is also in violation of the Sixth Amendment's requirement that juries be sufficiently representative.[215]

Due to the particular circumstances, a two-tiered approach to increasing the representativeness of Western Division venires is appropriate. The first tier of the approach, upon which the success of the second tier depends, needs to address the flaws in the jury-selection process. The Western Division should address these flaws by (1) supplementing the voter-registration list with additional lists and (2) improving its follow-up procedures with jurors residing at addresses not yielding undelivered mail. Once the first tier of the approach is complete, the second tier should be implemented to focus on reducing the burdens and obstacles associated with jury service in the Western Division and increasing public awareness in the communities around the importance of jury service. While these initiatives would greatly benefit from the Western Division's

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between the general population and jury pools do not by themselves invalidate the use of voter registration lists and cannot establish the 'systematic exclusion' of allegedly underrepresented groups'")).

[212] *See Sanchez*, 156 F.3d at 879 (rejecting the defendant's fair cross-section challenge, the court concluded that, "when jury pools are selected from voter registration lists, statistics alone cannot prove a Sixth Amendment violation").

[213] *See generally* Poor Bear Complaint, *supra* note 159; Representation of the Native American Community, *supra* note 108.

[214] Jury Selection and Service Act (JSSA), 28 U.S.C. § 1861, 1863(a) (1994)).

[215] See, e.g., People v. Wheeler, 583 P.2d 748, 758 (Cal. 1978) ("It therefore becomes the responsibility of our courts to insure that [the Sixth Amendment guarantee] not be reduced to a hollow form of words[.]").

involvement and direction, they also might successfully be spearheaded by grassroots organizations and non-profits, as will be discussed. The burdens and obstacles associated with jury service can be lessened and participation incentivized by increasing juror compensation;[216] public awareness can be increased through an education campaign, and other grassroots efforts can assist with these efforts.

A. The Western Division Should Supplement the Voter-Registration List with Lists that Specifically Include Native Americans.

The Western Division should supplement the voter-registration list with other lists that specifically include Native Americans. The continued use of voter-registration records as the only source filling the master jury wheel will perpetuate unrepresentative juries. Braunstein's research and the facts set forth in Poor Bear's complaint demonstrate that voting registration does not sufficiently capture the Native American population in South Dakota.[217] As such, supplemental data must be included in the Western Division's jury-selection process to more reliably sample the Native American population.

The supplemental lists selected should specifically include Native Americans. According to a 1995 study in the Eastern District of Pennsylvania, it is "clear that minority representation does not always improve" from the use of a supplemental list, particularly where that list would also cause the same kind of underrepresentation.[218] The study remarked that "[d]espite the apparent increase in coverage of the combined source lists [that newly included prospective jurors from lists of licensed drivers], the resulting improvements in representation were, at best, 'mixed.'"[219] As such, the Western Division must be mindful in selecting supplemental lists to ensure they both increase the total number of prospective jurors *and* fairly represent distinctive groups.[220] Using supple-

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[216] *Accord* Lois Heaney, *Jury Pool Composition Issues: Who is Missing and Why?*, 42 NJP LITIG. CONSULTING/WEST, no. 3, 2015, at 2 *available at* http://www.njp.com/wp-content/uploads/article/article35.pdf [https://perma.cc/6LXX-9GH9].

[217] *See* Poor Bear Complaint, *supra* note 159, at 4–7; Representation of the Native American Community, *supra* note 108, at 19.

[218] John P. Bueker, Note, *Jury Source Lists: Does Supplementation Really Work?*, 82 Cornell L. Rev. 390, 414 (1997). In 1995, the Eastern District of Pennsylvania joined several other federal districts in a two-year project to determine whether using multiple lists improved minority representation in the jury-selection process. The two groups examined during the pilot project were African Americans and Hispanics. The overall conclusion was that if the primary source list—the voter registration lists—are supplemented with driver's license lists, the underrepresentation of minorities actually increases. *Id.*

[219] *Id.*

[220] *See id.* at 414–15 (discussing the implications for African Americans and Hispanics, and quoting David Kairys et al., *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 CAL. L.

mental source lists most likely to include more Native Americans is "critical."[221]

The Western Division should consider nontraditional lists as part of its supplementation effort. Similar to supplementing with the DMV list of licensed drivers in the Eastern District of Pennsylvania, supplemental with that list in the Western Division is unlikely to substantially increase the Native American representation, particularly considering the above-mentioned socioeconomic factors that make it less likely for Native Americans in the Western Division to be on that list. Instead, the Western Division should supplement the voter-registration list with one or two lists that include mostly, if not exclusively, Native American names. Some nontraditional lists that state courts have used to increase minority representation have included welfare and unemployment compensation recipients,[222] utility records,[223] and Alaska's Permanent Fund Dividend list.[224] The Western Division might consider tribal identification or enrollment records, tribal voter registration, Oglala Sioux Lakota Housing or United States Department of Housing and Urban Development lists, county-administration lists, or government-benefits lists.

A possible concern with countering the effects of one unrepresentative list with another list that alone would also be unrepresentative is that the combined list may skew representation in the other direction. But Native Americans are currently so severely underrepresented that the harm from a risk of skewing is minimal by comparison.

B. The Western Division Should Improve its Follow-Up Procedures with Jurors Residing at Addresses Yielding Undelivered Mail or Who Otherwise Fail to Respond to Juror-Qualification Questionnaires.

A second problem that needs to be addressed is the nonresponse of some Native Americans who are sent the juror qualification questionnaire. Any potential gains made in improving the representativeness by supplementing with additional lists will be unrealized if the Native Americans newly added to the list of prospective jurors do not respond to the juror-qualification questionnaire.

It is critical that any methods used in the follow-up procedures to

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REV. 776 (1977)).

[221] *Id.* at 415 ("Thus, the choice of supplemental source lists is critical.")

[222] Ronald Randall et al., *Racial Representativeness of Juries: An Analysis of Source List and Administrative Effects on the Jury Pool,* 29 JUST. SYS. J. 71, 75 (2008) (noting that New York has supplemented its source list substantially by combining lists of voters, drivers, income tax payers, and welfare and unemployment compensation recipients).

[223] Heaney, *supra* note 216, at 1.

[224] *Id.* (explaining that Alaska has broadened the reach of its source list by including its Permanent Fund list. The Alaska Permanent Fund was created by oil revenues and pays dividends to Alaska residents).

increase response and participation of Native Americans be nonpunitive. Admittedly, some of the more effective follow-up procedures involve fines and sanctions.[225] But considering the low socioeconomic status and preexisting level of criminalization of Native Americans in the Western Division,[226] punitive methods of increasing participation in the jury selection process are likely to be excessively detrimental to an already vulnerable population. As such, the Western Division should focus on nonpunitive ways of increasing response and improving participation.

One nonpunitive way the Western Division could increase response and improve participation is to more diligently seek complete answers to the juror-qualification questionnaire. The Western Division should first give the prospective jurors more time to complete the questionnaire. Giving respondents more time to respond to the questionnaire should result in more representativeness. Studies cited by commentators have shown that, in part due to their increased mobility, minorities and low-income individuals tend to take longer to respond to jury questionnaires.[227] As one commentator notes, the slower response of these distinctive groups causes "juries chosen at the beginning of a new master wheel tend to be more unrepresentative than those chosen at the end of the wheel."[228] As the commentator further notes and as should be applicable in the Western Division, it may be best to "wait until the third mailing has been completed and the respondents have been qualified before selecting jurors from the qualified jury wheel."[229] This extended waiting period should allow for more Native Americans to respond to the questionnaire, further increasing the likelihood that the juries chosen from a given qualified wheel are representative.

Next, the Western Division should attempt several times to return or redeliver the jury questionnaire to increase the likelihood of receiving complete answers.[230] The JSSA already operates to give the jury clerk the authority to return a jury questionnaire to the prospective juror when the questionnaire is returned and answers to questions are omitted or are ambiguous.[231] Allowing potential jurors to amend or complete their ques-

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[225] *See, e.g.*, Hong Tran, *Jury Diversity: Policy, Legislative and Legal Arguments to Address the Lack of Diversity in Juries*, DEFENSE, 6, 8 (2013), *available at* https://www.wacdl.org/files/jury-diversity-article [https://perma.cc/76G3-BEQ3] ("The biggest predictor of nonresponse rates was jurors' expectations of what would happen if they failed to appear. People who believe nothing would happen were less likely to appear for jury service than those who believed they would be punished if they failed to appear.").

[226] *See* Poor Bear Complaint, *supra* note 159, at 5 (detailing the economic hardship of Native Americans); E-mail from Stephen Demik, *supra* note 2 (stating that many criminal defendants in the Western Division were Native Americans living on the Oglala Lakota Reservation).

[227] Bueker, *supra* note 218, at 425.

[228] *Id.*

[229] *Id.* at 426.

[230] *Accord id.* at 426 (suggesting courts return questionnaires several times in an attempt to receive complete answers).

[231] 28 U.S.C. § 1864(a) ("In any case in which it appears that there is an omission, ambiguity, or error in a form, the clerk or jury commission shall return the form with instructions to the person to make such additions or corrections as may be necessary[.]").

tionnaire instead of immediately disqualifying them will increase the number of these potential jurors who make it on to the qualified jury wheel.

Along these same lines, the Western Division should also set a minimum number of individuals who must be on the qualified jury wheel before it selects a jury from it. As one commentator notes, "[t]he [JSSA] places a minimum on the number of individuals on the master jury wheel, but fails to set a minimum for the qualified pool."[232] The commentator further notes that "[s]ome districts like the District of South Carolina have set minimums on the size of the qualified pool in their jury plans,"[233] though some "have failed to enforce these minimums when the representativeness of juries has been challenged on the ground that the qualified pool did not contain the minimum number of individuals required[,]"[234] To improve the representativeness of the qualified jury wheel, the Western Division must be sure to strictly abide by the minimum it sets.[235] The minimum should be a significant portion of the population sufficient to effectively cover many Native Americans.

C. Juror Compensation Should Be Increased and an Education Campaign and Other Grassroots Organizing Should be Undertaken to Further Increase Participation of Native Americans.

To most effectively increase the presence of Native Americans on venires in the Western Division, improvements in the jury-selection process need to be supplemented with efforts to reduce the obstacles to serving. Continuing to steer clear of punitive methods, these efforts should focus on incentives, public awareness, and barrier reduction. Increasing juror compensation, implementing an education campaign, and soliciting the help of grassroots and nonprofit organizations to address other difficulties associated with jury service, like the absence of reliable public transportation, could work well together to improve the representativeness of venires in the Western Division.

It is important to note, however, that the impact of these combined efforts inevitably depends on the aforementioned improvement to the Western Division's jury-selection process. All of these suggestions can only have an impact on Native American participation if Native Ameri-

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[232] Bueker, *supra* note 218, at 426 (citing United States v. Carmichael, 685 F.2d 903, 911 (4th Cir. 1982), *cert. denied*, 459 U.S. 1202 (1983) ("[T]he Act . . . contains no minimum pool size requirement.")); *see also* 28 U.S.C. § 1863(b)(4) ("The plan shall fix a minimum number of names to be placed initially on the master jury wheel[.]")).

[233] Bueker, *supra* note 218, at 426.

[234] *Id.* at 427, n.192.

[235] *See id.* (suggesting that for these measures to be effective, the minimums must be "strictly enforced").

to serve."[245]

As part of its effort to increase the representativeness of its juries, the Western Division should consider increasing its pay to make jury service less burdensome for Native Americans living on the Pine Ridge Reservation. Considering that by one estimate eighty percent of its residents are unemployed and forty-nine percent are living below the poverty line,[246] a substantial increase in pay would not only lessen the difficulties associated with jury service, but actually significantly incentivize it. More substantial compensation for jury service would reduce the barriers to jury service for many potential jurors.

A concern regarding increasing juror pay is that the federal court system would prevent a division-specific increase. Federal jurors across the country are paid the same rate per day of service.[247] Short of a major amendment to the system, it may prove to be impossible to increase the federal pay rate in one specific federal district or division. If bureaucratic barriers prevent the Western Division from raising its pay, grassroots or nonprofit organizations may be the answer, as discussed in the third proposal below.

2. *Education Campaigns*

Increasing public awareness about the importance of jury service through education campaigns and community outreach programs on the Pine Ridge Reservation could have a substantial impact on participation rates. Education campaigns focusing on the significance of jury service have become more prevalent in recent years. In 2016, the Kentucky state court system launched a campaign to encourage people to fulfill their obligation to participate in jury service.[248] Kentucky's Administrative Office of the Courts (AOC), on behalf of the Kentucky Court of Justice, received a grant from the Louisville Bar Foundation to fund this juror-awareness campaign.[249] According to the general counsel for the AOC, the aim of the campaign "is to draw the public's attention to the importance of participating in the jury process."[250] In addition to increasing juror participation, "the campaign is designed to improve the public's

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[245] *Id.*

[246] RED CLOUD INDIAN SCHOOL, *supra* note 82.

[247] *Juror Pay*, U.S. COURTS, http://www.uscourts.gov/services-forms/jury-service/juror-pay (last visited Jan. 9, 2019) [https://perma.cc/G2P3-PM74]]

[248] Rick Howlett, *New Campaign Aims to Encourage You to Serve Jury Duty*, 89.3 WFPL NEWS (Oct. 26, 2016), http://wfpl.org/new-campaign-aims-encourage-serve-jury-duty/ [https://perma.cc/4PYJ-L26S].

[249] Press Release, Administrative Office of the Courts, Kentucky Louisville Buses Now Rolling with Messages Encouraging Jury Service (Oct. 7, 2016), *available at* https://courts.ky.gov/Documents/Newsroom/NR_Juror%20Awareness%20Campaign%202016.pdf [https://perma.cc/S428-NYAD].

[250] *Id.* (quoting Marc Theriault, General Counsel for the Administrative Office of the Courts).

perception of jury service, increase jury diversity, and reduce fear of the legal process through education and access to information."[251] The campaign increases public awareness through bus advertisements that highlight the importance of jury service,[252] in conjunction with videos and social media to educate the public on the importance of jury service and the juror's role in the legal process.[253]

When the courts fail to take the initiative, nonprofit organizations like The Juror Project have been of assistance. The Juror Project states that it was formed to "increase the diversity of jury panels while changing and challenging people's perspective of jury duty"[254] and that it "engages [communities] through informative meetings and group discussions."[255] It says that its presentations at high schools, colleges, churches, neighborhood associations, and other community gatherings discuss "the importance of jury service, the discriminatory practices of some prosecutors, as well as what individuals can do to actually get on a jury."[256]

Increasing public awareness about the importance of jury service through education campaigns and community outreach programs on the Pine Ridge Reservation could have a substantial impact on participation rates. Effective programs would not only explain the importance of jury service generally, but also underscore how critical Native American jury service is in the federal system and patchwork of criminal jurisdiction on Indian reservations. Additionally, these programs could highlight any increased pay to further incentivize participation in jury service.

3. *Other Grassroots and Non-Profit Initiatives*

The major contribution that grassroots and non-profit organizations might make is the coordinated creation of a juror fund, somewhat akin to the bail funds that have developed in cities across the country,[257] to help incentivize juror participation if the Western Division cannot raise juror pay directly. Such a juror fund would serve to supplement the federal pay

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[251] *Id.*

[252] *Id.* (noting advertisements that read "(1) Jury Service: Justice for all starts with you. When called, please serve, (2) Jury Service: A fair trial starts with you. When called, please serve, (3) Jury Service: A jury of your peers starts with you. When called, please serve").

[253] *Id.*

[254] *About Us*, THE JUROR PROJECT, http://www.thejurorproject.org/new-page/ [https://perma.cc/LCZ2-QHJ5].

[255] *Id.*

[256] *Id.*

[257] See, e.g., BROOKLYN COMMUNITY BAIL FUND, https://brooklynbailfund.org/ (last visited Jan. 9, 2019) [https://perma.cc/4ZCH-XKZJ]; THE BRONX FREEDOM FUND, http://www.thebronxfreedomfund.org/ (last visited Jan. 9, 2019) [https://perma.cc/DYA3-C4TG]; PHILADELPHIA BAIL FUND, https://www.phillybailfund.org/ (last visited Jan. 9, 2019) [https://perma.cc/YRL8-TJHK]; CONNECTICUT BAIL FUND, http://www.ctbailfund.org/home/ (last visited Jan. 9, 2019) [https://perma.cc/YRL8-TJHK]; THE BAIL PROJECT, https://bailproject.org/ (last visited Jan. 9, 2019) [https://perma.cc/AAR8-2U2T].

level for residents of the Pine Ridge Reservation. The provision of this supplemental pay could be justified as accommodating jurors facing particularly difficult travel circumstances. A juror fund with state or federal involvement may be barred from distributing this supplemental pay solely to residents of the Pine Ridge Reservation participating in federal jury service, but it may be able to limit distribution to the Western Division. It could give the money to the court, specifically earmarked for this purpose, and the court could then be in charge of distributing the money to the jurors that qualify.

V. CONCLUSION

When juries are egregiously unrepresentative of communities, the public loses trust in the justice system. When Native American defendants refuse to exercise their constitutional right to a jury trial purely because the pool from which their jury will be selected is completely unrepresentative of their community, they have lost trust in the justice system, and justifiably so. The Western Division of the District Court of South Dakota's jury selection process is denying Native American defendants their Sixth Amendment right to an impartial jury drawn from a representative cross-section of the community. This violation needs to be addressed through concerted efforts to increase the presence of Native Americans throughout the Western Division's jury selection process. Implementing fixes to the process is critical, but in order to most effectively secure the participation of Native Americans from the Pine Ridge Reservation, reform efforts should not end there. The Western Division, with the help of grassroots and nonprofit organizations, should go a step further to reduce the burdens associated with jury service for Native Americans. Increased Native American participation on the Western Division's juries would do a great deal to restore that Native American community's faith in the Western Division's judicial process.