PEOPLE V. HUBBARD: INTERPRETING THE FAIR CROSS-SECTION REQUIREMENT OF THE SIXTH AMENDMENT

INTRODUCTION

In *People v. Hubbard*,[1] the Michigan Court of Appeals addressed the fair cross-section requirement of the Sixth Amendment.[2] The Sixth Amendment[3] guarantees each criminal defendant the right to a trial by an impartial jury.[4] The Sixth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment.[5] The Supreme Court has held that to satisfy the Sixth Amendment right to a jury trial, a jury must be drawn from a representative cross-section

1. 552 N.W.2d 493 (Mich. Ct. App. 1996).
2. *See id.*
3. The Sixth Amendment states in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . .

U.S. CONST. amend. VI.

4. *See generally* Joseph J. Sklansky, *Right to Jury Trial*, 84 GEO. L.J. 1139 (1996) (discussing the various issues arising from the Sixth Amendment right to jury trial).

5. *See* Duncan v. Louisiana, 391 U.S. 145, 149 (1968). In *Duncan*, the Supreme Court concluded that a criminal defendant's interest in a trial by jury is "fundamental to the American scheme of justice." *Id.* The Court held that "the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which . . . would come within the Sixth Amendment's guarantee." *Id.* (citation omitted). Thus, criminal defendants challenging state jury procedures must apply a standard nearly identical to the federal standard. Consequently, after *Duncan*, courts have applied the fair cross-section requirement to criminal defendants in both federal and state courts. *See* James H. Druff, Comment, *The Cross-Section Requirement and Jury Impartiality*, 73 CAL. L. REV. 1555, 1560-61 (1985).

of the community.[6] The requirement of a representative jury is intended to create a jury that reflects a community's diverse societal values.[7] The Court has also held that underrepresentation of a particular group is cognizable only when the group is a "distinctive" portion of the population.[8]

The *Hubbard* court held that the process used to allocate prospective jurors in Kalamazoo County, Michigan at the time of the trial violated the defendant's Sixth Amendment guarantee to an impartial jury drawn from a fair cross-section of the community.[9] The court found that the circuit court jury that tried and convicted the defendant resulted from a venire that unconstitutionally underrepresented the African-American community in Kalamazoo County.[10] The record in the case established a "complete absence of African-Americans in the defendant's jury array."[11]

Part I of this Recent Development traces the history of the Sixth Amendment and the fair cross-section doctrine. Part II analyzes the defective jury selection process used in *Hubbard* and how the court reached its conclusion. Part III will discuss the future implications of the holding and reasoning of the *Hubbard* Court.

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6. *See* Taylor v. Louisiana, 419 U.S. 522, 528 (1975) (recognizing that a jury selected from a representative cross section of a community is "an essential component of the Sixth Amendment right to a jury trial"). Instead of requiring an impartial jury to represent the different viewpoints, perspectives, and experiences of a certain community, an impartial jury should represent a cross-section of the community. *See id.* at 538 (stating that jury pools "from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to [reasonably represent the community]").

7. *See* People v. Wheeler, 583 P.2d 748, 754-56 (Cal. 1978) (noting that the best means of achieving an impartial jury is to promote a jury composed of various types of people with different views whose respective biases, "to the extent they are antagonistic, will tend to cancel each other out").

8. *See* Duren v. Missouri, 439 U.S. 357, 364 (1979). Distinctiveness has become the main focus of the Sixth Amendment test for cognizability. Courts apply different definitions to the term "distinctive" for both Sixth and Fourteenth Amendment claims. *See infra* notes 27-28 and accompanying text. "Discrete and insular minorities" will more easily be recognized as distinctive groups. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

9. *See Hubbard*, 552 N.W.2d at 504.

10. *See id.* at 497.

11. *Id.* at 498. The defendant raised the Sixth Amendment issue "on the ground that the juror allocation process employed by Kalamazoo County excluded African-American jurors from the venire." *Id.*

I. THE SIXTH AMENDMENT

The Sixth Amendment of the United States Constitution guarantees that a criminal defendant has the right to a speedy and public trial by an impartial jury.[12] The Supreme Court has interpreted the Sixth Amendment's impartiality requirement to mean that a jury must represent a fair cross-section of the community.[13] The notion of an impartial jury is symbolized by a group composed of people representing the various values, viewpoints, and experiences of a particular community.[14] The jury trial guaranteed by the Sixth Amendment is designed to protect an individual's rights and liberties from state infringement.[15] To satisfy the representative requirement of

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12. *See* U.S. CONST. amend. VI.

13. *See, e.g.*, Lockhart v. McCree, 476 U.S. 162, 173-74 (1986) (holding that "[t]he limited scope of the fair-cross-section requirement is a direct and inevitable consequence of the practical impossibility of providing each criminal defendant with a truly 'representative' petit jury"); Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (noting that the fair cross-section requirement is "fundamental to the American system of justice"); Peters v. Kiff, 407 U.S. 493, 503-04 (1972) (Marshall, J., writing for a plurality) (stating that removing any specific group of individuals from a jury takes away from the jury certain immeasurable characteristics of human nature and experience beneficial during the jury's deliberation); Apodaca v. Oregon, 406 U.S. 404, 410-11 (1972) (White, J., writing for a plurality) (recognizing that a jury should consist of a group of people constituting a cross-section of the community "who have the duty and the opportunity to deliberate" without external influence); Williams v. Florida, 399 U.S. 78, 100 (1970) (declaring that the number of jury members should be large enough to facilitate group deliberation, shielded from external influence, and that the jury selection process should allow a "fair possibility" of obtaining a petit jury that is representative of a cross-section of the community); Glasser v. United States, 315 U.S. 60, 86 (1942) (stating that "the proper functioning of the jury system, and ... our democracy itself," requires juries to be representative of the community as a whole, and not necessarily any specific group of people); Smith v. Texas, 311 U.S. 128, 130 (1940) (recognizing that "[i]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community").

14. *See supra* notes 6-7 and accompanying text. *See also* Toni M. Massaro, *Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures,* 64 N.C. L. REV. 501, 545-47 (1986) (stating that one duty of the jury is to incorporate views and experiences representative of the community into the decision process).

15. *See* THE FEDERALIST NO. 83, at 614 (Alexander Hamilton) (John C. Hamilton ed., 1869). Alexander Hamilton expressed that:

> The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury: Or if there is any difference between them, it consists in this; the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government.

the Sixth Amendment, however, juries must be randomly selected from the community.[16]

The Sixth Amendment fair cross-section requirement is based on fundamental democratic concepts.[17] The fair cross-section requirement does not entitle a defendant to a jury that mirrors the community and reflects the numerous distinctive groups present in the population.[18] Rather, the Sixth Amendment guarantees a defendant the opportunity for a representative jury by requiring that jury wheels, pools of names, panels, or venires[19] from which trial

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Id. See also Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968) (characterizing the right to jury trial as a fundamental right and protection against oppression by the Government).

16. A jury selected from a fair cross-section of the community is more likely to accomplish the jury's role of functioning as a check on the criminal justice system. *See Taylor*, 419 U.S. at 530 (stating that the fair cross-section doctrine guards against abuse of power by judges or prosecutors). *See also* H.R. REP. NO. 90-1076, at 8 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1792, 1797 (stating that the role of the jury is both to understand the case and to mirror "the community's sense of justice in deciding" the case, and that biased juries which misrepresent the views of society are a consequence of "significant departures from the cross sectional goal"); S. REP. NO. 90-891, at 9 (1967) (maintaining that "[a] jury chosen from a representative community sample is a fundamental of our system of justice"). For more discussion and background on the Act's debate, see 114 CONG. REC. 3992-93 (1968) (remarks of Rep. Rogers); 118 CONG. REC. 6938-39 (1972) (remarks of Rep. Poff); 114 CONG. REC. 3999 (1968) (remarks of Rep. Machen); 114 CONG. REC. 6608-09 (1968) (remarks of Sen. Tydings).

This Recent Development discusses a state court case, and therefore does not address the Federal Jury Selection and Service Act, which provides that a master juror wheel must be randomly selected from representative members of the community. *See* 28 U.S.C. §§ 1861-64 (1994). The fair cross-section requirement, however, applies to both state and federal jury selections. *See supra* note 5.

17. *See Taylor*, 419 U.S. at 530 (noting that the idea of jury representativeness under the Sixth Amendment is based on fundamental democratic concepts, especially the theory that the jury's function in the administration of the law is "critical to public confidence in the fairness of the criminal justice system").

18. *See id.* at 538.

19. Jury pools and jury master lists are the sources from which a jurisdiction identifies potential jurors. The sources are typically voter registration lists, driver registration records, or other records such as taxpayer lists. The jury wheel refers to those individuals, present on the master list, who are qualified to be jurors. Potential jurors are then summoned for jury service from the jury wheel. The jury panel or venire is the group of people summoned for jury service for a certain trial. The jury (also known as the petit jury) is comprised of those individuals on the jury panel or venire who are not peremptorily struck. *See* Darryl K. Brown, *The Means and Ends of Representative Juries*, 1 VA. J. SOC. POL'Y & L. 445, 473 n.2 (1994) (reviewing HIROSHI FUKARAI ET AL., RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE (1993)). The Supreme Court has held that the fair cross-section

courts draw juries must not systematically exclude distinctive groups in the community.[20] If a jury wheel, pool, panel, or venire systematically excludes distinctive[21] groups, then the resulting jury fails to constitute a fair cross-section of the community.[22]

Despite the fact that the Sixth Amendment guarantees a criminal defendant the right to an impartial jury, there are inherent flaws in the jury selection process.[23] Randomly selected jury panels do not always completely and accurately represent the community. Randomly selected panels often underrepresent both racial and ethnic minorities, as well as other minorities.[24] Thus, the two goals of juror master lists, inclusion of all eligible citizens and representation of all portions of the community, are difficult to accomplish.[25]

In an attempt to balance the ideals of the Sixth Amendment with the realities of random selections the Supreme Court has stated that a defendant must prove three elements to establish a prima facie

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requirement applies to every stage of the jury selection process. *See* Duren v. Missouri, 439 U S. 357, 363-64 (quoting *Taylor*, 419 U.S. at 538).

20. *See Duren*, 439 U.S. at 363-64 (quoting *Taylor*, 419 U.S. at 538). *See also* United States v. Jackman, 46 F.3d 1240, 1244 (2d Cir. 1995) (noting that "the Sixth Amendment guarantees the *opportunity* for a representative jury venire, not a representative venire itself") (citing Roman v. Abrams, 822 F.2d 214, 229 (2d Cir. 1987)); Peters v. Kiff, 407 U.S. 493, 502-03 (1972) (Marshall, J., writing for a plurality) (recognizing that a major function of the fair cross-section requirement is to engender public confidence and create legitimacy in the justice system, and noting that unrepresentative juries "create the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well"). Note that the focus of Sixth Amendment claims is aimed at the process of selecting juries and not the results of that procedure. *See* United States v. Osorio, 801 F. Supp. 966, 975 (D. Conn. 1992) (citing Batson v. Kentucky, 476 U.S. 79, 96 (1986)).

21. *See infra* notes 27-28.

22. Under a Sixth Amendment challenge to a jury, proof of discriminatory intent is not required. *See Duren*, 439 U.S. at 368 n.26 (stating that "in Sixth Amendment fair-cross-section cases, systematic disproportion itself demonstrates an infringement of the defendant's interest in a jury chosen from a fair community cross section"). Additionally, an individual does not have to be a member of the excluded group to bring a Sixth Amendment challenge. *See Taylor*, 419 U.S. at 526.

23. *See* HIROSHI FUKARAI ET AL., RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE 3 (1993).

24. *See id.*

25. *See id.* at 46 (citing AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO JUROR USE AND MANAGEMENT, STANDARD 2 (1983)).

violation of the Sixth Amendment fair cross-section requirement.[26] First, the defendant must show that "the group alleged to be excluded is a 'distinctive'[27] group in the community."[28] Second, the defendant must show that "the representation of [the distinctive] group in venires from which trial courts select juries is not fair and reasonable in relation to the number of such persons in the community."[29] Finally, the defendant must show that the "underrepresentation is due to systematic exclusion of the group in the jury-selection process."[30]

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26. *See Duren*, 439 U.S. at 364. The *Duren* test makes it easier for a defendant to bring a Sixth Amendment claim than an equal protection claim under the Fourteenth Amendment. Under *Duren*: (1) a defendant does not need to prove discriminatory intent; (2) a defendant has standing even if the defendant is not a member of the allegedly excluded group; and (3) the standards for determining what qualifies as a "distinctive group" are more relaxed than those required for the Fourteenth Amendment. *See id.*

27. To show distinctiveness, the Supreme Court has required proof of some attribute that defines the group. Race, gender, economic status, and religious affiliation are examples of distinctive groups. *See* Hernadez v. Texas, 347 U.S. 475, 478 (1954) (explaining the requirements of distinctiveness for the first time); *see also Taylor*, 419 U.S. at 531 (discussing women as a distinct group); Thiel v. Southern Pac. Co., 328 U.S. 217, 222-24 (1946) (stating that economic status may define a distinctive group); United States v. Biaggi, 909 F.2d 662, 676-79 (2d Cir. 1990) (finding that both African-Americans and Hispanics are distinctive groups for purposes of the *Duren* test); United States v. Gelb, 881 F.2d 1155, 1161 (2d Cir. 1989) (holding that Jews are a distinctive group because they constitute a significant portion of the population); United States v. LaChance, 788 F.2d 856, 864-65 (2d Cir. 1986) (discussing that African-Americans are a distinctive group); United States v. Jenkins, 496 F.2d 57, 65 (2d Cir. 1974) (same); United States v. Osorio, 801 F. Supp. 966, 977 (D. Conn. 1992) (concluding that "[t]here is little question . . . that both blacks and Hispanics are 'distinctive' groups in the community for purposes of [Sixth Amendment] analysis).

28. *Duren*, 439 U.S. at 364. *See also* United States v. Ashley, 54 F.3d 311, 313 (7th Cir. 1995) (finding that African-Americans clearly meet the "distinctive member of the community" requirement of the *Duren* test); United States v. Jackman, 46 F.3d 1240, 1246 (2d Cir. 1995) (employing language similar to *Osorio* and stating that "[t]here is little question that both Blacks and Hispanics are 'distinctive' groups in the community for purposes of [the *Duren*] test"); Ramseur v. Beyer, 983 F.2d 1215, 1230 (3d Cir. 1992) (holding that "African-Americans are unquestionably a constitutionally cognizable group," meaning that they can be "singled out for discriminatory treatment").

29. *Duren*, 439 U.S. at 364. *See also* United States v. Osorio, 801 F. Supp. 966, 977 (D. Conn. 1992) (maintaining that the second prong of the *Duren* test requires the court to ask whether a certain distinctive group is substantially underrepresented in the jury wheel); People v. Sanders, 797 P.2d 561, 569 (Cal. 1990) (outlining the necessary elements of the *Duren* test to prove a prima facie violation of the fair cross-section requirement).

30. *Duren*, 439 U.S. at 364. Systematic exclusion is exclusion resulting from some circumstance inherent in the juror allocation process. For instance, a large discrepancy occurring in every weekly jury venire for almost a year shows that the underrepresentation is

If a defendant successfully proves that a prima facie fair cross-section violation has occurred, the burden shifts to the government to show that "those aspects of the jury-selection process . . . that result in the disproportionate exclusion of a distinctive group" advance a significant state interest.[31]

II. THE CASE: *PEOPLE V. HUBBARD*

A Kalamazoo Circuit County court jury convicted Arthur Hubbard of assault with intent to commit great bodily harm less than murder, extortion, and two counts of possession of a firearm during the commission of a felony.[32] On appeal to the Court of Appeals of Michigan, the defendant alleged that the process used at the time to allocate prospective jurors from a master source list excluded African-Americans from the jury array.[33] The defendant claimed that the exclusion of African-Americans from the jury array violated his Sixth Amendment guarantee of an impartial jury drawn from a fair cross-section of the community.[34] After elaborating on the jury selection process employed at the time, the court reversed the convictions and remanded the case for a new trial.[35]

Since 1987, Michigan has required that petit juries for the Kalamazoo County courts be chosen from a source list consisting of county residents on driver registration or personal identification cardholder lists.[36] A jury board used a computer program to generate a source list, which identified the prospective jurors by name and

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systematic. *See id.* at 366. One or two instances of a venire being disproportionate, however, does not prove systematic exclusion. *See* People v. Hubbard, 552 N.W.2d 493, 504 (Mich. Ct. App. 1996) (citing Ford v. Seabold, 841 F.2d 677, 685 (6th Cir. 1988)).

31. *Id.* at 367-68. *See also Ford*, 841 F.2d at 681 (discussing the government's burden as outlined in *Duren*).

32. *See Hubbard*, 552 N.W.2d at 496.

33. *See id.* at 498.

34. *See id.* at 496-97.

35. *See id.* at 497, 504.

36. MICH. COMP. LAWS § 600.1300 (1996) (defining the terms "driver's license list" and "personal identification cardholder list"); MICH. COMP. LAWS § 600.1304 (1996) (describing the manner in which the jury board selects prospective jurors).

address but not by race.[37] The computer program assigned a zip code corresponding to a resident's city and street address if the resident had a post office box address.[38] After assigning zip codes to all county residents, the computer program added "sector segment extensions"[39] to the zip codes.[40] The computer program then used the zip codes, the sector segment extensions, and sometimes the street addresses to determine the court jurisdiction in which each prospective juror resided.[41] The computer then randomly sorted and assigned names from the source list to each court.[42] The computer allocated prospective jurors first to the two Ninth District Courts, then to the Eighth District Court, and lastly to the circuit court.[43] Finally, the computer assigned those individuals on the source list who lacked a sector segment extension to the circuit court.[44]

The 1990 census figures revealed that African-American adults residing in Kalamazoo County composed 7.4% of the county's population.[45] The data also showed that African-Americans residing in the City of Kalamazoo composed 14.77% of the city's population.[46] However, the Kalamazoo County jury allocation system resulted in the exclusion of 75% of the African-American adults eligible for jury service from service in the circuit court.[47]

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37. *See Hubbard*, 552 N.W.2d at 499.

38. *See id.*

39. A sector segment extension is "a four-digit numerical code added to the end of the five-digit zip code to identify an individual by residence location." *Id.*

40. *See id.*

41. *See id.*

42. *See id.* The jury coordinator determined the number of qualifying questionnaires to be sent to each court based on each court's anticipated need for jurors and past numbers of jurors needed. *See id.*

43. *See id.* This allocation process, of which Hubbard's jury was a product, was in effect from the mid-1980s until July 1992. The juror allocation system used after July 1992 selected jurors first for the circuit court followed by the various district courts. The change occurred after an outside study concluded that the old juror allocation process resulted in a significant underrepresentation of the residents of the City of Kalamazoo in circuit court venires. *See id.* at 500.

44. *See Hubbard*, 552 N.W.2d at 499.

45. *See id.* at 500.

46. *See id.*

47. *See id.* The largest population of African-Americans residing in Kalamazoo County live in the City of Kalamazoo. *See id.* Thus, because the juror allocation system substantially

In order to establish a fair cross-section violation, Hubbard had to fulfill the three elements of the *Duren* test.[48] The court found that for fair cross-section purposes, African-Americans are considered a constitutionally cognizable group.[49] Thus, the court held that the defendant satisfied the first prong of the *Duren* test.[50]

The court next determined that Hubbard fulfilled the second prong of the *Duren* test.[51] Hubbard satisfied the second prong by showing that the Kalamazoo County jury allocation system substantially underrepresented African-Americans in the jury pool.[52] The problem in addressing the second prong was that the United States Supreme Court has not definitively spoken on the issue of disparity created by underrepresentation.[53] The Supreme Court has stated neither the means by which courts should measure disparity, nor the constitutional limits of permissible disparity.[54]

As a result of the Supreme Court's lack of direction, courts have created and applied three different tests by which to measure disparity.[55] These three methods include: (1) the absolute disparity test;[56] (2) the comparative disparity test;[57] and (3) the standard

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underrepresented residents of the City of Kalamazoo, it resulted in a significant underrepresentation of African-Americans in the circuit court venires. *See id.* at 504.

48. *See supra* notes 26-31 and accompanying text.

49. *See Hubbard*, 552 N.W.2d at 501. *See supra* notes 27-28 and accompanying text.

50. *See Hubbard*, 552 N.W.2d at 501.

51. *See id.* at 504.

52. *See id.* at 501.

53. *See id.*

54. *See id.; see also* People v. Sanders, 797 P.2d 561, 570 (Cal. 1990) (noting the Supreme Court's lack of direction on the constitutional limit of permissible disparity); People v. Bell, 778 P.2d 129, 143-44 (Cal. 1989) (discussing the several statistical tests recognized by the Supreme Court and employed by lower federal and state courts but acknowledging that the Supreme Court has yet to select one specific test by which to measure disparity). Note, however, that the Supreme Court did use the absolute disparity test in *Duren*. *See infra* note 56.

55. *See infra* notes 56-58 and accompanying text. *See generally* David Kairys et al., *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 CAL. L. REV. 776 (1977) (attempting to quantify standards for inclusiveness and representativeness); Cynthia A. Williams, Note, *Jury Source Representativeness and the Use of Voter Registration Lists*, 65 N.Y.U. L. REV. 590, 608-16 (1990) (discussing statistical methods used by various courts to determine disparity).

56. *See Hubbard*, 552 N.W.2d at 501. The absolute disparity test is also known as the absolute numbers or absolute impact test. *See id.* For discussions on the use of the absolute disparity test, see *United States v. Jackman*, 46 F.3d 1240, 1246-48 (2d Cir. 1995); *Ramseur v.*

deviation test.[58] In Sixth Amendment fair cross-section cases, courts typically apply the absolute disparity test.[59]

The trial court in *Hubbard* failed to properly identify which test it used to determine the level of disparity.[60] The correct disparity test for the court to apply was an issue of first impression in Michigan.[61] Although the absolute disparity test is typically applied in fair cross-section cases,[62] the *Hubbard* court refused to adopt this test for

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Beyer, 983 F.2d 1215, 1231 (3d Cir. 1992); *United States v. Biaggi*, 909 F.2d 662, 678 (2d Cir. 1990); *United States v. McAnderson*, 914 F.2d 934, 941 (7th Cir. 1990); *United States v. Test*, 550 F.2d 577, 587 (10th Cir. 1976); *United States v. Osorio*, 801 F. Supp. 966, 977-78 (D. Conn. 1992). *See also infra* notes 64-67 and accompanying text.

57. *See Hubbard*, 552 N.W.2d at 501. Comparative disparity is determined by dividing the absolute disparity by the population figure for a population group. Comparative disparity measures the diminished likelihood that people in an underrepresented group will be summoned for jury duty when compared to the general population. *See Ramseur*, 983 F.2d at 1231-32. *See also Sanders*, 797 P.2d at 570 n.5 (offering the following formula for calculating comparative disparity: "[(A - B) / A] x 100 = the comparative disparity, where: A = the percentage of the community making up the cognizable group in question, . . . and B = the percentage of the jury venire which is composed of the cognizable group in question").

58. *See Hubbard*, 552 N.W.2d at 501; *see also Ramseur*, 983 F.2d at 1232 n.17 (stating that the standard deviation calculation measures the likelihood of a deviant result occurring by chance and providing an example of standard deviation analysis). The standard deviation test is also referred to as the deviation from expected random selection test or the statistical decision theory. *See Hubbard*, 552 N.W.2d at 501. *See generally* Michael O. Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 HARV. L. REV. 338 (1966) (using statistical decision theory to show the extreme improbability that nondiscriminatory selections occurred in situations where courts have refused to find a violation of the Fourteenth Amendment).

59. *See Hubbard*, 552 N.W.2d at 501; *see also Bell*, 778 P.2d at 142 n.14 (recognizing that many federal court have approved the absolute disparity test as the means for a defendant to prove a fair cross-section violation). Courts are more likely to apply the comparative disparity and the standard deviation tests in equal protection cases. *See* Castaneda v. Partida, 430 U.S. 482, 495-96 (1977) (applying the statistical decision theory to an equal protection jury claim); Alexander v. Louisiana, 405 U.S. 625, 626-31 (1972) (discussing the statistics used in an equal protection claim in the context of a grand jury); Ramseur v. Beyer, 983 F.2d 1215, 1231-33 (3d Cir. 1992) (examining all three methods in determining the validity of an equal protection claim and a Sixth Amendment claim); Alston v. Manson, 791 F.2d 255, 258-59 (2d Cir. 1986) (concluding that the statistical decision theory is a reliable tool in determining whether there is substantial underrepresentation in the jury array because it reveals the possible role of chance and works well where a small sample is involved).

60. *See Hubbard*, 552 N.W.2d at 501. *See infra* note 99 (discussing the appellate court's same failure to identify which disparity test it used).

61. *See Hubbard*, 552 N.W.2d at 501.

62. *See supra* note 59.

several reasons.[63]

The absolute disparity test measures the difference between the proportion of the general population the distinctive group represents and its proportion on the source list.[64] The absolute disparity in *Hubbard* was 3.4% to 4.1%.[65] Under the absolute disparity test, disparities between 2.0% and 11.2% are statistically insignificant.[66] Therefore, numbers falling within this range, including the absolute disparity of 3.4% to 4.1% found in *Hubbard*, do not constitute substantial underrepresentation.[67]

The distinctive group in *Hubbard*, African-Americans, constituted a small percentage of adults available and qualified to serve as jurors.[68] The *Hubbard* court believed that applying the absolute disparity test would create a dangerous precedent.[69] If the juror allocation process used in Kalamazoo County had excluded all African-Americans in the adult Kalamazoo County population, the absolute disparity would have been 7.4%.[70] This number, however, still would have failed to constitute substantial underrepresentation.[71] Hypothetically, the juror selection method employed by Kalamazoo

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63. *See Hubbard*, 552 N.W.2d at 501.

64. *See id.; see also* Ramseur v. Beyer, 983 F.2d 1215, 1231 (3d Cir. 1992); People v. Sanders, 797 P.2d 561, 570 n.5 (Cal. 1990).

65. *Hubbard*, 552 N.W.2d at 502. Residents of the City of Kalamazoo regularly composed between 2% and 17% of the prospective jurors made available for circuit court jury service. Adult African-Americans constituted 7.4% of the Kalamazoo County population. Based on statistical estimates, adult African-Americans composed 3.3% to 4% of the Kalamazoo Circuit Court venires between July 10, 1990 and July 9, 1991. The absolute disparity of 3.4% to 4.1% in *Hubbard* resulted from subtracting 4% from 7.4% and subtracting 3.3% from 7.4%. *See id.*

66. *See Hubbard*, 552 N.W.2d at 501. For cases holding that absolute disparities between 2% and 11.5% fail to constitute substantial underrepresentation, see *United States v. Hafen*, 726 F.2d 21, 23 (1st Cir. 1984); *Bryant v. Wainwright*, 686 F.2d 1373, 1377-78 (11th Cir. 1982); *United States v. Hawkins*, 661 F.2d 436, 442 (5th Cir. 1981); *United States v. Clifford*, 640 F.2d 150, 155 (8th Cir. 1981); *United States ex rel. Barksdale v. Blackburn*, 639 F.2d 1115, 1126-27 (5th Cir. 1981); *United States v. Potter*, 552 F.2d 901, 906 (9th Cir. 1977); *Thompson v. Sheppard*, 490 F.2d 830, 832 (5th Cir. 1974).

67. *See Hubbard*, 552 N.W.2d at 502.

68. *See id.* ("[A]dult African-Americans composed 7.4 percent of the Kalamazoo County population.").

69. *See id.*

70. *See id.* This number is obtained by subtracting 0% from 7.4%.

71. *See id.*

County could have barred all African-Americans from serving on juries and still have satisfied the absolute disparity test.[72] If the *Hubbard* court had adopted the absolute disparity test, a Sixth Amendment challenge would not have been possible because the total percentage of African-American adults in Kalamazoo County constituted a percentage less than what is required to be statistically significant for a fair cross-section violation.[73]

Rather than apply the absolute disparity test to determine the level of disparity present, the *Hubbard* court chose to follow the approach taken in *United States v. Osorio*.[74] In *Osorio*, the United States District Court for the District of Connecticut held that the unintentional exclusion of residents from the jury wheel, which resulted in the exclusion of two-thirds of African-Americans and Hispanics, constituted systematic exclusion of those groups from the jury selection process.[75] Thus, the *Osorio* court determined that the jury selection process violated the fair cross-section of the Sixth Amendment.[76]

The *Osorio* court applied the absolute disparity test when evaluating whether the defendant had satisfied the second element of the *Duren* test.[77] Although the absolute disparity was only 3.26% for African-Americans,[78] the *Osorio* court found that the defendant had shown substantial underrepresentation under a Sixth Amendment analysis where the disparity resulted from "non-benign" circumstances.[79]

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72. *See id.*

73. *See Hubbard*, 552 N.W.2d at 502.

74. *See id.* at 502-03 (referring to United States v. Osorio, 801 F. Supp. 966 (D. Conn. 1992)).

75. *See Osorio*, 801 F. Supp. at 980.

76. *See id.*

77. *See id.* at 977-78.

78. *See id.* at 978. The absolute disparity for Hispanics was 4.3%. *See id.*

79. *See id.; see also* United States v. Jackman, 46 F.3d 1240, 1246-48 (2d Cir. 1995) (using a method similar to the *Osorio* court to find that the underrepresentation was substantial enough to violate the Sixth Amendment).

The *Osorio* court recognized the Second Circuit's warning[80] regarding the weaknesses of the absolute disparity test.[81] The Second Circuit acknowledged that the degree of underrepresentation found in *United States v. Biaggi*[82] pushed the absolute disparity test to its limit.[83] In *Biaggi*, the Second Circuit determined that it would be more likely to find a Sixth Amendment violation "if the underrepresentation had resulted from any circumstance less benign than voter registration lists."[84] Following the Second Circuit, the *Osorio* court held that the exclusion of certain residents from the jury wheel was not due to random chance and therefore the underrepresentation was not benign.[85] As in *Hubbard*, the lack of a representative sample of African-Americans (and Hispanics) in the *Osorio* jury pool led to the lack of minorities on the jury.[86]

The *Hubbard* court determined that the level of disparity in Kalamazoo County was similar to the level of disparity in *Osorio*.[87] The evidence in *Hubbard* disclosed that the jury selection process used by Kalamazoo County before July 1992—and not merely random chance—caused the underrepresentation of African-

80. *See* United States v. Biaggi, 909 F.2d 662, 678 (2d Cir. 1990).

81. *See Osorio*, 801 F. Supp. at 978.

82. *See Biaggi*, 909 F.2d at 678.

83. *See Osorio*, 801 F. Supp. at 978 (citing *Biaggi*, 909 F.2d at 678). The risk of employing the absolute disparity test is that it does not consider the size of the underrepresented group. *See id.* According to the *Biaggi* court,

> The risk of using [the absolute disparity approach] is that it may too readily tolerate a selection system in which the seemingly innocuous absence of small numbers of a minority from an average array creates an unacceptable probability that the minority members of the jury ultimately selected will be markedly deficient in number and sometimes totally missing.

Biaggi, 909 F.2d at 678.

84. *Biaggi*, 909 F.2d at 678. The *Biaggi* court held the underrepresentation of African-Americans and Hispanics to be "benign" because there was no evidence that the underrepresentation had ensued from any circumstances other than random selection of names from the voter registration lists. *See id.*

85. *See Osorio*, 801 F. Supp. at 978 (stating that the facts in *Osorio* "reveal circumstances far less benign than the use of voter registration lists").

86. *See id.* at 978-79.

87. *See Hubbard*, 552 N.W.2d at 503.

Americans on the jury panel.[88] Concluding that the level of disparity present in *Hubbard* constituted substantial underrepresentation for Sixth Amendment purposes, the court determined that the defendant satisfied the second prong of the *Duren* test.[89]

Finally, the court found that Hubbard had fulfilled the third prong of the *Duren* test.[90] The defendant showed that the underrepresentation of African-Americans was due to systematic exclusion.[91] Specifically, the court found that the jury selection system used by Kalamazoo County between the mid-1980s and mid-1992 was the primary cause of the underrepresentation of African-Americans in the circuit court venires.[92] Both statistical and testimonial evidence showed that African-Americans were significantly underrepresented in the jury pool.[93] Thus, the *Hubbard* court concluded that the defendant had satisfied all three prongs of the *Duren* test and consequently found that the Kalamazoo County juror allocation system violated the Sixth Amendment's fair cross-section requirement.[94]

III. FUTURE IMPLICATIONS

Inevitably the *Hubbard* decision will affect subsequent Michigan cases regarding which level of disparity test to apply in cases of Sixth Amendment fair cross-section violations. Rather than advocating one of the existing tests, the Michigan court opted to apply the absolute disparity test but declined to follow it.[95] Thus, *Hubbard* leaves future Michigan courts uncertain as to which disparity test to apply. Additionally, the *Hubbard* court warned that future fair cross-section

88. *See id.*

89. *See id.* at 504.

90. *See id. See also supra* note 30 and accompanying text.

91. *See Hubbard*, 552 N.W.2d at 504.

92. *See id.*

93. *See id.* Statistics of the racial arrangement of the jury arrays for a forty-nine week period from July 1990 to July 1991 showed that African-Americans were significantly underrepresented in the venires. *See id.*

94. *See id.*

95. *See supra* notes 51-89 and accompanying text.

cases should be determined on a case-by-case basis.[96]

The *Hubbard* court did not desire the result yielded by the absolute disparity test.[97] The absolute disparity found in *Hubbard*, 3.4% to 4.1%, did not constitute substantial underrepresentation as generally defined by courts applying the absolute disparity test.[98] The *Hubbard* court chose to find the juror allocation system unconstitutional based on the policies behind the Sixth Amendment. Although the court could have applied any of the disparity tests, it needed to precisely state which test it endorsed. May Michigan courts in the future apply the absolute disparity test and then, regardless of its results, decide whether the juror allocation system violates the Sixth Amendment? Rather than apply the absolute disparity test, should Michigan courts in the future employ the comparative disparity or the standard deviation tests? By failing to definitively choose a test, the *Hubbard* decision does not answer these questions.[99]

The *Hubbard* court could have opted to apply all three tests and weigh the different results. In both Sixth and Fourteenth Amendment cases, courts have analyzed the level of substantial underrepresentation in the jury array on the basis of more than one disparity test.[100] If the *Hubbard* court had applied another test, it may

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96. *See Hubbard*, 552 N.W.2d at 505. The *Hubbard* court warned that the decision would have retroactive application only to the extent of either (1) direct appeals that are currently pending or (2) appeals that are filed after the *Hubbard* decision where the juror allocation process was correctly raised in the trial court. *See id.* at 504-05. The *Hubbard* court alerted judges and juries that its decision did not entail automatic reversal of otherwise valid convictions from the Kalamazoo Circuit Court obtained while Kalamazoo County employed the flawed juror allocation process. *See id.* at 505. *See, e.g.*, People v. Dixon, 552 N.W.2d 663, 667 (Mich. Ct. App. 1996) (holding that because the defendant's challenge to the same juror allocation process found unconstitutional in *Hubbard* was untimely, the defendant forfeited appellate consideration of the Sixth Amendment jury issue).

97. *See supra* notes 74-89 and accompanying text.

98. *See supra* notes 65-66.

99. Ironically, the Court of Appeals in *Hubbard* criticized the trial court for failing to identify which test it applied to determine the level of disparity. *See Hubbard*, 552 N.W.2d 493 at 501.

100. *See, e.g.*, *Ramseur*, 983 F.2d at 1231 (applying all three tests of absolute disparity, comparative disparity, and standard deviation to ascertain whether a substantial underrepresentation occurred).

have found a fair cross-section violation while providing lower courts with a clear guideline to follow in future cases. The court's rationale seems result-oriented. Although the question of which test to use was a question of first impression in Michigan, the *Hubbard* court did not succinctly state which test, if any, it employed.[101]

Substantively, however, the result reached in the *Hubbard* case is promising. Despite the court's lack of clarity regarding which test to apply, the court's detailed reasoning advances the policies behind the Sixth Amendment.[102] Optimistically, after *Hubbard*, Michigan juror selection processes will not result in substantial underrepresentation of African-Americans[103] but will instead promote overall confidence in the fairness of the criminal justice system.[104] Random selection from voter registration lists[105] consistently underrepresents racial minorities.[106] For a variety of reasons, some members of society may not be registered to vote.[107] Thus, jury wheels often do not represent a fair cross-section of the community. Although it is important for courts to recognize this widespread phenomenon, it may be equally necessary to consider different juror allocation systems[108] that could

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101. *See supra* note 99. Note, however, that both federal and state courts generally tend to avoid employing per se formulas. *See supra* notes 65-66 and accompanying text. *See also* Walter P. Gewin, *An Analysis of Jury Selection Decisions, attached as an appendix to* Foster v. Sparks, 506 F.2d 805, 830-36 (5th Cir. 1975).

102. *See supra* notes 17-20 and accompanying text.

103. African-Americans are one example of a "distinctive" group. There are, however, numerous other groups constituting "distinctive" groups for purposes of Sixth Amendment analysis. *See supra* notes 27-28 and accompanying text.

104. For a more thorough discussion of the notions of democratic heritage and public confidence in the legal system, see *Taylor v. Louisiana*, 419 U.S. 522, 530-31 (1975).

105. Voter registration lists are the most common source for juries. *See* Brown, *supra* note 19, at 451. "[C]ourts have permitted the exclusive use of voter registration lists as a juror source except where cognizable groups are poorly reflected or statutory restrictions prevent a group's presence on the voting rolls." Druff, *supra* note 5, at 1563.

106. *See supra* notes 103, 105. *See also infra* note 107.

107. *See* FUKARAI, *supra* note 23, at 18, 54-55 (declaring that racial minorities have lower rates of voter registration and contending that they possess a "widespread mistrust of government and those with legal authority" and, as a result, have come to mistrust institutions such as law enforcement agencies).

108. Especially at the state level, some jurisdictions have attempted to obtain more representative jury wheels by supplementing voter registration lists with other sources, such as driver registration records, public benefits records, property tax records, and annual local census data. *See id.* at 46-47.

solve the fair cross-section requirement. The *Hubbard* decision is a step forward in creating juror allocation systems that attempt to provide juries representing a fair cross-section of the community.

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