

MEMORANDUM

TO: Jerome P. Reiter
From: James P. Scanlan
Subject: Response to Question of December 4, 2015
Date: December 14, 2015

Introduction

This responds to the questions that you put as follows in your email of December 4, 2015:

1. Can you point us to specific instances of law or policy being made explicitly to reduce disparities in adverse outcomes, and materials describing those rationales, that we can study?
2. Put another way, are some government agencies recommending lowering standards to reduce the disparities between groups? If so, can you point us to materials that we can study?

In the four sections below, I describe situations relating to lending, public school discipline, criminal justice, or employment that I think are along the lines of what you are seeking. A few preliminary points are in order.

First, the broader point of my October 8, 2015 letter to the American Statistical Association (ASA) involves the fact that standard measures of differences between outcome rates tend to be systematically affected by the frequency of an outcome and therefore are unsound measures of the strength of the forces causing outcome rates of advantaged and disadvantaged groups to differ. The more limited point, as discussed in Section B (at 36-40) of the letter and which I understand to be the subject of your note, involves the pattern whereby the rarer an outcome (or put more precisely, the more the outcome is restricted to the segment of the overall population that is most susceptible to it) the greater tends to be the relative difference in experiencing the outcome and the smaller tends to be the relative difference in avoiding the outcome, and the corresponding pattern whereby the rarer an outcome the greater tends to be the proportion the group most susceptible to the outcome makes up of persons experiencing the outcome and of persons avoiding the outcome.

The particular anomaly addressed in that section arises from initiatives aimed at generally reducing adverse outcome rates that are prompted by (a) large relative demographic differences in rates of experiencing the outcome or (b) large differences between the proportion

disadvantaged groups makes up of persons potentially experiencing the outcome and the proportion such groups make up of persons actually experiencing the outcome. Since the latter perspective is somewhat cumbersome to state, I will usually refer to it as the “PP/PO difference” (for “proportion of pool” and “proportion of outcome”) As explained in the ASA letter (at 9), the PP/PO difference is a function of the relative difference between outcome rates and, whether measured in relative terms or absolute terms, the PP/PO difference for the group more susceptible to an outcome will always change in the same direction as the relative difference between the rate at which the group experiences the outcome and the rate at which the less susceptible group experiences the outcome.

I try always to be clear that the points I make about the way that reducing the frequency of an adverse outcome tends to increase a perception of disparity as to the outcome pertains to the relative difference in that outcome (or the associated PP/PO difference for that outcome). If one were to measure disparity in terms of the relative difference in the corresponding favorable outcome, one would find that reductions in the frequency of an adverse outcome tend to reduce the disparity (and the associated PP/PO difference for the favorable outcome). Also, given the rate ranges at issue for the adverse outcome in circumstances where observers usually rely on relative difference in adverse outcome rather than relative difference in favorable outcome to measure demographic disparities, when the frequency of an adverse outcome is reduced, the absolute difference between the rates at which advantaged and disadvantaged groups experience that outcome (or the opposite outcome) tends to decrease. To put that point more concretely, in most if not all of the situations discussed in Section B.6 *infra* where general reductions in discipline rates have been accompanied by increased relative differences in discipline rates and increased PP/PO differences, absolute differences between discipline rates decreased.¹

Second, one will find little or nothing in the way of articulated rationales for the perception that the large relative differences in the adverse outcome arise from the frequency of an outcome (or that stringent standards tend to cause larger relative differences rates of experiencing the adverse outcome). Rather, policy makers appear to take for granted that stringent standards are particularly harmful to disadvantaged groups, and, thus, all measures of differences between outcome rates increase as the stringency of standards increases and will decrease as the stringency of the standard is reduced. I have on occasion suggested that this expectation comes from the correct expectation that lowering test cutoffs will tend to relative differences in pass rates, along with the failure to consider the possibility that doing so would not also reduce relative differences in failure rates. In general, apart from the National Center for Health Statistics documents discussed in “[Race and Mortality Revisited](#),” *Society* (July/Aug. 2014) at 331-335, I do not believe that I have ever seen recognition in a publicly available government document of the possibility that any standard measure of disparity in outcomes might change in a different direction from another standard measure, even when documents

¹ In the school discipline context, a few researchers rely on absolute differences and commonly report conclusions about the directions of changes in the disparities, or about the comparative size of disparities in different settings, that are the opposite of those based on relative differences in adverse discipline outcomes or PP/PO differences for those outcomes.

discuss differences in perceptions about the size of disparities depending on which measure is employed.²

But one observes much the same thing with regard to absence of rationale in the social sciences. It remains common for observers to state such things as that “despite general declines in mortality,” relative racial differences in mortality have increased. Although such observations take for granted that reductions in mortality should reduce relative differences in mortality I have never seen a rationale articulated for that expectation. I assume that a thoughtful person who attempts to articulate such a rationale would come to recognize that the correct expectation is that reductions in mortality will tend to increase relative differences in mortality (while reducing relative differences in survival).

Third, in the ASA letter (at 2) I discuss implications of reducing the frequency of adverse outcomes in lending and school discipline with reference to relaxing standards. I have in other places made the point more carefully in terms of relaxing standards or “otherwise reducing the frequency” of an outcome. For there are a variety of actions that would not necessarily be perceived as relaxing of standards but that, like relaxing of standards, will tend to restrict the outcome to increasingly more susceptible segments of the overall population. These can include such things as, in a range of contexts, adding a level of review to make sure that all persons designated to experience an adverse outcomes were properly so designated (or giving some number of persons in such group the benefit of the doubt), or, in the school discipline context, diverting some persons who otherwise would be suspended to a counseling program.

Fourth, I hope it is clear enough in the ASA letter (and as stated most explicitly at page 27) that the pattern I describe is merely a tendency that will interact with other forces and hence may not always be observed (even when having an important role). Further, some of the situations discussed in the sections below involve the possibility that bias against certain groups is playing a role in the observed difference in outcome rates. In such circumstances, in conjunction with generally reducing the frequency of an outcome, decision-makers may (a) take actions that reduce any bias that may be present or (b) make demographic-conscious decisions to counter patterns of differences irrespective of bias. Such actions will tend to reduce all measures of differences between outcome rates. While such actions conceivably could fully counter the tendency for reducing the frequency of an outcome to increase relative differences in rates of experiencing it, materials on particular jurisdictions referenced in Section B.6 *infra* indicate that, at least in the school discipline context, there so far is little evidence that any such actions have done so. In any case, issues related to the role of other factors that interact with the prevalence-related patterns that I describe do not detract from the importance that decision-makers

² See the CDC’s 2013 [Health Disparities and Inequalities Report](#) at 4. Even among nongovernment researchers the recognition that a relative difference and the absolute difference can, or in a particular situation did, change in different directions remains uncommon (though increasing). But those recognizing such patterns have yet to show an understanding of any systematic aspect to the pattern or acknowledge the existence of a second relative difference. That is so even though anytime it is mentioned that a relative difference changed in the opposite direction of the absolute difference, the unmentioned relative difference will necessarily have changed in the opposite direction of the mentioned relative difference and the same direction as the absolute difference.

understand those patterns, including understanding that reducing the frequency of an outcome tends to increase, not reduce, relative differences in experiencing it.³

Fifth, in the ASA letter and elsewhere I have noted the anomaly whereby, as a result of the government's misunderstanding of the implications of reducing the frequency of adverse lending and discipline outcomes, lenders and school districts that comply with government guidance increase the chances that the government will sue them for discrimination. That occurs because the government believes, for example, that a larger relative difference in rejection rates is stronger evidence of discrimination than a smaller one regardless of the prevalence of the outcome and regardless of the fact that relative differences in approval rates would support an opposite conclusion. That is, the government fails understand that there is no rational basis to distinguish between the strength of the forces causing outcome rates to differ in the two rows of Table 1 (at 11) or among the four rows of Table 5 (at 22), either on the basis of relative differences in the adverse outcome that tell one story or the relative differences in the favorable outcome that tell an opposite story (or the other measures that tell different stories from either relative difference). Thus, while in accordance with Section B of my letter I do think it important to advise the government of its mistaken view that reducing the frequency of an outcome will tend to reduce relative differences in rates of experiencing the outcome, the advising should not be done in a manner to suggest that the relative difference in either outcome is a useful measure. Such advice to governments should be consistent with what I expect to be an eventual recognition that standard measures of differences between outcome rates are unsound measures of association that ought not to be used at all, but certainly should not be used without recognition of the ways they tend to be affected by the frequency of an outcome.

A. Lending

A general overview of the way the relaxing of lending standards came about as a result of perceptions about the disparate impact of standard lending criteria may be found in Liebowitz, Stan, [*Anatomy of a Train Wreck: Causes of the Mortgage Meltdown*](#), The Independent Institute (2008) (especially Section 2 at 7-15). The items below are examples of situation where, approaching the matter from a disparate impact perspective, the government has encouraged covered entities to modify practices in a manner that will tend to reduce relative differences in experiencing favorable borrower outcomes while increasing relative differences in adverse borrower outcomes. The government then generally appraises the size of lending disparities in terms of relative differences in adverse outcomes presumably because, given the rate ranges at issue for the favorable/adverse borrower outcomes, relative differences in adverse outcomes tend to be much larger than relative differences in favorable outcomes. See my "[Getting it Straight When Statistics Can Lie](#)," *Legal Times* (June 23, 1993), regarding the way that in 1992, the Comptroller of the Currency was advising lenders that they would be facing intense scrutiny if rejection rates for black mortgage applicants were twice the rejection rates for white mortgage applicants.

³ Eliminating adverse outcome respecting a particular category of conduct (or particular criterion) where, in real sense, the demographic difference in susceptibility is greater than in other categories may also tend to counter the effects of a general reduction in the adverse on relative difference in experiencing. But it is difficult to figure out the precise effects in a particular situation, though eliminating a category in which only members of the disadvantaged group fell would tend to reduce all measures of differences between outcome rates.

To the extent that government actors have any sort of concrete statistical understanding of the implications of its approach, they presumably assume that relaxing a standard will tend to reduce relative differences in failing to meet the standard in the same way that relaxing the standard tends to reduce relative differences in meeting the standard.

1. 1994 Interagency Policy Statement

In April 1994 the ten federal agencies responsible for enforcement of fair lending laws issued a [Policy Statement on Lending Discrimination](#) (commonly termed the Interagency Policy Statement) providing that a lender could be found to violate the Fair Housing Act or the Equal Credit Opportunity Act if its practices had a disparate impact on protected groups and could not be justified by sound business purposes. See Statement at pages 9-10. The statement cited a minimum loan amount as a policy that could have a disparate impact on certain groups and therefore must be justified by a sound business purpose. It also discussed “factors related to the adequacy of the borrower's income to carry the loan, the likely continuation of that income, the adequacy of the collateral to secure the loan, the borrower's past performance in paying obligations, the availability of funds to close, and the existence of adequate reserves” as criteria that could have a discriminatory effect if they were “more stringent than customary.” The statement thus provided a clear message that it was the stringency of a practice that must be justified.

2. FDIC 1996 Guide to Fair Lending

In 1996, the Federal Deposit Insurance Corporation issued a “[Guide to Fair Lending](#)” manual. Most of the practices that it cited as examples of those with potential for a disparate impact were of a nature that, if relaxed or eliminated, would tend to increase relative differences in rejection rates while reducing relative differences in approval rates.⁴ Other agencies have similar guides and various guides have been updated. But nothing has changed materially with regard to the cautioning of lenders against practices that (though unknown to regulators) if made more lenient or eliminated would, by restricting adverse borrower outcomes to the segment of applicants most susceptible to such outcomes, will tend to increase relative differences in rates of experiencing the outcomes.

⁴ See discussion of minimum loan amounts at 23. See also listing of items with possible impact at 31:

- A requirement that the property securing a mortgage loan must not exceed a particular age, or appraisal practices that establish unrealistically low values for older properties
- Restricting mortgage lending to loans for certain types of properties, such as single family homes, properties having no more than two floors, those with large lots, garages, or with large square footage requirements
- A policy of not making loans on properties in certain locations or appraisal practices that arbitrarily discount the value of a property because of its location
- A policy of making mortgage loans only to applicants who have previously owned a home
- Establishing highly restrictive down payment or income requirements, e.g. requiring a 25 percent down payment or setting a very low (such as 20 percent) maximum monthly mortgage payment to income ratio
- Setting high minimum mortgage loan amounts that effectively exclude low income borrowers or low maximum loan amounts that limit the financial institution's participation in the mortgage market
- Arbitrarily excluding FHA or VA mortgage loans

B. School Discipline

Below are six subsections discussing policies based on perceptions that generally reducing public school discipline rates should reduce relative racial/ethnic differences in discipline rates and PP/PO differences in discipline. The belief is essentially universal.

1. January 2014 Department of Education and Department of Justice Dear Colleague Letter

In January 2014 the Departments of Education and Justice issued a Dear Colleague [letter](#) titled “[Nondiscriminatory Administration of School Discipline](#).” Citing large racial relative differences in suspensions and expulsions and PP/PO suspension differences, the letter urges schools to adopt practices aimed at generally reducing discipline rates. While the letter does not explicitly state that generally reducing discipline rates will tend to reduce the referenced differences, that is the clear import of the letter and the way it has been interpreted by readers. That also is no doubt the belief of the authors, just as it is the near universal belief in the social science community. See *Washington Post* [article](#) and *Education Week* blog [item](#) on the release of the letter.⁵

2. December 2014 Department of Health and Human Services and Department of Education Dear Colleague Letter and Policy Statement on Preschool Discipline

In December 2014, the Department of Health and Human Services and Department of Education jointly issued a [Dear Colleague Letter](#) and “[Policy Statement on Expulsion and Suspension Policies in Early Childhood Settings](#).” The points in B.1. apply here except that the appraisal of disparities are all based on comparison of the proportions disadvantaged groups make up of the student population and the proportion such groups make up of persons suspended. The Policy Statement’s purpose, according to the letter, is “to assist States and their public and private local early childhood programs in preventing and severely limiting expulsions and suspensions in early learning settings.”

⁵ An August 24, 2015 *New York Times* article “[Analysis Finds Higher Expulsion Rates for Black Students](#)” gives a fair overview of impressions about the issues, including with respect to the government’s belief that generally reducing discipline rates will reduce disparities in discipline rates. The article principally discusses a University of Pennsylvania Center for the Study of Race & Equity in Education study titled, “[Disproportionate Impact of K-12 Exclusion and Expulsion on Black Students in Southern States](#),” which measured disparities in terms of the ratio of the proportion blacks made up of students to the proportion they make up of persons suspended and which regards the relaxing of zero tolerance discipline practices as a means of reducing the disparities. Studies by the organization Texas Appleseed, which is discussed in the *Times* article, are subjects of my April 7, 2015 [letter](#) to Texas Appleseed and my August 31, 2015 [letter](#) to McKinney, Texas Independent School District with regard to the organization’s mistaken view that reducing the frequency of adverse outcomes will tend to reduce the proportion disadvantaged groups make up of persons experiencing the outcomes.

The December 2014 materials are the subject of my August 24, 2015 [letter](#) to the issuing agencies that I reference in the ASA letter at 4, 5, 7, 9, 15, 16, 19, 30, 31, 37, 38, and 39.

3. Section 612(a) (22) of the Individuals with Disabilities Education Improvement Act of 2004 (Public Law 108-446).

Section 612(a) (22) of the [Individuals with Disabilities Education Improvement Act of 2004](#) (Public Law 108-446) requires that in order to be eligible for federal assistance under the law, a state must determine whether “significant discrepancies are occurring in the rate of long-term suspensions and expulsions of children with disabilities” in particular districts compared with other school districts or compared with non-disabled children within the district. If such discrepancies are found, the state must review and consider revising “practices, and procedures relating to the development and implementation of [individualized education programs], the use of positive behavioral interventions and supports, and procedural safeguards” to ensure compliance with the law.

Typically, the discrepancies will be measured in terms of relative differences in suspension rates. See September 2011 Data Accountability Center a guide titled “[Measuring Significant Discrepancy: An Indicator B4 Technical Assistance Guide](#).” The required remedies (in particular, the positive behavioral interventions and procedural safeguards) are of the types that tend to generally reduce suspension rates and thus tend to increase relative difference in suspension rates.⁶

4. Section 618 (d) of the Individuals with Disabilities Education Improvement Act of 2004 (Public Law 108-446).

Section 618(d) of the [Individuals with Disabilities Education Improvement Act of 2004](#) (Public Law 108-446) provides that in order to be eligible for federal assistance under the law, a state must determine whether within school districts there exists significant disproportionality by race/ethnicity (a) with regard to identification of students for special education programs (or particular types of programs) or (b) with regard to suspension of expulsions among special education students. When such disproportionality is found as to (a), districts must review and, if appropriate, revision of the policies, procedures and reserve 15% of special education funds “to provide comprehensive coordinated early intervening services to serve children in the local educational agency, particularly children in those groups that were significantly overidentified”

A Government Accountability Office February 2013 report titled “[Individuals with Disabilities Education Act: Standards Needed to Improve Identification of Racial and Ethnic Overrepresentation in Special Education \(GAO-13-137\)](#)” (at 36-40) showed that in the 16 states

⁶ Significant discrepancies may be found both with respect to (a) differences between the suspension rates of disabled and nondisabled students within districts (b) differences between the suspension rates of disabled students in different districts. There will be some tendency of districts that are more susceptible to identification pursuant to be (b) (i.e., district with generally higher suspension rates) to be less susceptible to identifications pursuant to (a). Assuming implementation of procedures pursuant to identifications of significant discrepancies tends to generally reduce suspension rates within the district, identification pursuant to either (a) or (b) will tend to increase prospects for further identification pursuant to (a) but reduce prospects for further identification pursuant to (b).

studied significant disproportionality was usually examined in terms of relative differences in special education assignment rates. Generally, the lower the rates of assignment to special education and the lower the discipline rates among special education students, the greater the likelihood that a district will be determined to have significant race/ethnic disproportionality in assignment to special education or discipline rates among special education students. The effects of the actions triggered by the determination on relative differences in assignment to special education or relative differences in discipline rates may vary.

The provision does not require any action where significant disproportionality is found as to discipline. But with regard to the review and revise requirement, Department of Education 2009 “Questions and Answers” regarding the provision do not distinguish between significant racial/ethnic disproportionality in assignment to special education and significant racial/ethnic disproportionality in discipline. In light of the general belief that reducing the frequency of adverse outcomes tends to reduce disparities, the review and revision requirement may lead to general reductions in both rates of assignment to special education and disciplining of special education students. To the extent that that occurs, one will tend to observe increases in relative racial /ethnic differences as to assignment to special education and as to discipline.

The effects of early intervening services on relative differences in assignment rates will tend to depend on how the districts interpret “particularly children in those groups that were significantly overidentified.” Assuming such services reduce the likelihood that a child will be assigned to special education, providing services solely to members of overidentified groups should reduce all measures of differences between assignment rates of those groups and other groups, including relative differences in assignment rates. Providing services to all at-risk students, by generally reducing assignment rates, will tend to increase relative differences in assignment rates.

While Section 618(d) may be less directly an encouragement/requirement to do things in response to large relative differences in adverse outcomes that will tend to increase those relative differences than Section 618(a) (22), Section 618(d) warrants consideration by the Committee simply because of the amount of state and local education authority resources devoted to significant disproportionality issues.

5. Keep Kids in School Act

On March 4, 2015 Senator Robert P. Casey, Jr. introduced the “[Keep Kids in School Act](#)” (S. 672) containing a number of provisions aimed at generally reducing suspensions and expulsions in public preschool programs and public elementary and secondary schools. Though the bill contains provision for record-keeping on suspensions and expulsions by demographic group, it makes no specific reference to and demographic differences prompting the legislation.

In introducing the bill, however, Senator Casey principally emphasized large relative demographic differences in discipline rates currently observed. See March 4, 2015 [press release](#) titled “Casey Bill: Reduce Suspensions in Schools Across PA, Nation Keep Kids in School Act Would Ask States to Place Priority on Plans that Reduce Suspensions / Black Students Are Suspended And Expelled At A Rate Three Times Higher Than White Students; Students With

Disabilities Are More Than Twice As Likely To Be Suspended As Those Without.” Those differences clearly played an important role in prompting Senator Casey to introduce the bill.

The bill, which has not been acted on, is the subjects of my March 20, 2015 [letter](#) to the Senate Committee on Health, Education, Labor and Pensions.

6. State and Local Initiatives

The greatest impact of federal government guidance on school discipline, such as that discussed in Sections B.1 and B.2 above, likely involves the modification of state and local practices, either by legislation/local ordinance or informally. Numerous jurisdictions have modified their practices in recent years to generally reduce discipline rates, though the extent to which the underlying purpose is to reduce relative demographic difference in discipline rates and the extent to which that purpose is explicitly stated may vary. Googling group of words like “bill to reduce school suspensions” or “reduce school suspensions disparities persist” (without quotation marks) will give one a notion of the scope of the attention to the subject, the extent to which the efforts to reduce suspensions are a response to large relative racial/ethnic differences in suspension rates (or large PP/PO differences for suspensions), and the commonplace findings that relative racial/ethnic differences (or PP/PO differences) increased with reduced suspensions.⁷ A November 14, 2014 article in the Madison, Wisconsin *Cap Times*, “[Madison School Suspensions fall by half this year, but race disparities persists](#),” is fairly illuminating with regard to the motivations of efforts to reduce suspension rates and reactions to the fact that relative racial differences between rates increased.⁸

Recent situations where overall decreases in discipline rates have generally been accompanied by increased relative racial/ethnic differences in discipline rates, with discussion in some cases of pertinent governmental action are discussed on the following subpages of the [Discipline Disparities](#) page of [jpscanlan.com](#) (with jurisdiction indicated in title of the subpage): [Los Angeles SWPBS](#), [Denver Disparities](#), [Florida Disparities](#), [Maryland Disparities](#), [California Disparities](#), [Connecticut Disparities](#), [Maryland Disparities](#), [Minnesota Disparities](#), [Rhode Island Disparities](#), [St. Paul Disparities](#), [Minneapolis Disparities](#), [Beaverton \(OR\) Disparities](#), [Portland \(OR\) Disparities](#), [Montgomery County \(MD\) Disparities](#), and [Henrico County \(VA\) Disparities](#). These happen to involve situations where published discussion of a matter caught my attention at when I had time to create a page.

No findings of reduced relative differences (or PP/PO differences) caught my attention. I assume, however, that the pressure to reduce racial differences (with response that could include reduction or elimination of any biased decision-making or race-conscious action irrespective of bias) have resulted in some cases where reductions in discipline rates have been accompanied by reductions in relative racial/ethnic differences in discipline rates.

⁷ Sometimes the matter will be phrased in terms of the fact that discipline rates of disadvantaged groups were reduced to a proportionately smaller degree than advantaged groups. As discussed in the ASA letter (at 9-10), such pattern is a corollary to the pattern of relative differences described in the introduction.

⁸ While accounts may more commonly refer to disparities as “persisting” than “increasing,” usually the data in the account will reveal an increase in the relative racial/ethnic difference (or PP/PO) in adverse discipline outcomes.

Discussion of state or local authorities' interpretations of data or contemplated responses to large relative differences in adverse discipline outcomes may be found in my letters to [Vermont Senate Committee on Education](#) (Feb. 26, 2015) and [Portland, Oregon Board of Education](#) (Feb. 25, 2015). Also important regarding actions of state and local government are the pressures placed on them by public interest groups that promote the view that generally reducing adverse school discipline outcomes will tend to reduce relative differences in discipline rates or PP/PO differences. See my letters to [Texas Appleseed](#) (Apr. 7, 2015), [McKinney, Texas Independent School District](#) (Aug. 31, 2015), and [Boston Lawyers' Committee for Civil Rights and Economic Justice](#) (Nov. 12, 2015).

C. Criminal Justice

As in other areas, the belief that relaxing standards or otherwise reducing the frequency of adverse outcome will tend to reduce relative racial differences (and PP/PO differences) in such outcomes is essentially universal. I treated perceptions about this issue in 19 years ago in "[Mired in Numbers](#)," *Legal Times* (Oct. 12, 1996). Perceptions seem to have changed not at all since then.

1. Department of Justice Report on the Police and Court Practices of Ferguson, Missouri

On March 4, 2015 report the Department of Justice issued its [Investigation of the Ferguson Police Department](#) finding that Ferguson, Missouri's law enforcement practices have a disparate impact on its black citizens. The report found this disparate impact principally on the basis of the difference between the proportion blacks make up of the population of Ferguson (67%) and the proportion blacks make up of persons experiencing some adverse outcome in Ferguson's criminal justice system, including the traffic enforcement/adjudication component of that system. The report emphasize such things that an arrest warrant would be issued for a single failure to appear in court on a traffic citation, and that blacks comprised 96 percent of persons who were arrested after traffic stops solely for having an outstanding warrant.

The report reflects no understanding that if the practices were more lenient, blacks would tend to make up an even higher proportion of persons experiencing adverse outcomes than they do now. Most obviously, increasing the number of missed court appearances necessary to trigger an arrest warrant for failure to appear would tend to increase the proportion blacks make up of persons against whom such warrants are issued.

Presumably, the same approach to statistical analysis will underlie like Department of Justice investigations across the country, including those recently announced for Baltimore and Chicago. Presumably, many jurisdictions, relying on the mistaken perceptions in the Department of Justice's Ferguson report, will be attempting to generally reduce arrest rates in order avoid investigation by the Department.

The Ferguson report is the subject of my March 9, 2015 [letter](#) to the United States Department of Justice and City of Ferguson, Missouri.

2. ACLU Report on Racial Disparities in Arrests in Minneapolis

On May 29, 2015 the American Civil Liberties Union (ACLU) of Minnesota released a study on the racial impact of Minneapolis police practices “[Picking Up the Pieces, Policing in America, A Minneapolis Case Study](#).” A premise of the study is that high frequency of arrests for less serious offenses causes large relative racial differences in arrests for such offenses and causes blacks to comprise a much higher proportion of persons arrested than they comprise of the city’s populations.

In the last reportage on this subject with which I am familiar, the city and police department were considering how to respond. The response that would be consistent with the theme of the ACLU report, as well as the Department of Justice approach to measuring disparate impact reflected in its Ferguson report, would be to reduce the frequency of arrests for low level offenses. The ACLU Minneapolis report is the subject of my June 8, 2015 [letter](#) to the City of Minneapolis.

Both the Ferguson report and the ACLU Minneapolis report are likely to prompt like reports in other jurisdictions, particularly given that there will exist substantial relative racial differences in arrests (and PP/PO differences) in all major jurisdictions. Each such jurisdiction will be provided additional incentive to that already provided by the Ferguson report to generally reduce arrests, while thinking that doing so will tend to reduce relative racial differences (and PP/PO differences) in arrests.

It will be some time, however, before there will be evidence as to the extents of such actions in Minneapolis or anywhere else or as to the changes in relative racial differences (and PP/PO differences) in arrests following such actions.⁹

D. Employment

Employment discrimination issues involving selection are commonly analyzed in terms of relative differences in favorable outcomes and, thus, relaxing standards or otherwise reducing the frequency of adverse outcomes will tend to reduce disparities as they are commonly measured. But there are exceptions and item 20 of the [Questions and Answers to the Uniform Guidelines for Employee Selection Procedures](#) specifically provides for relying on relative differences in adverse outcomes where the outcome is comparatively rare and where relative difference in favorable outcomes will tend to be small.

One situation occasionally in the news in recent years involves the impact of background checks and refusals to hire persons with criminal records, where disparate impact is measured in terms of relative differences in disqualification rates. In general, government guidance calls for

⁹ Observers are noting that in consequence of events in Ferguson, Missouri and Baltimore, Maryland, police presence, and aggressiveness, in racial/ethnic minority neighborhoods is being reduced. Such reductions would tend to reduce all measures of racial/ethnic difference in arrests and associated PP/PO differences, as would, of course, anything that generally reduces the strength of the forces causing higher arrest rates for racial/ethnic minorities than for whites.

the limiting of the scope of the disqualifications based on such policies, whether by modifying the terms of the policy or by individual determinations as to individuals falling in certain criminal record categories. See [EEOC Enforcement Guidance on Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964](#). Such limiting of the scope of these policies will tend to increase the relative difference in disqualification rates based on the policies as well as the PP/PO arising from such policies. Similar issues exist with regard to any selection matter where the adverse outcome is sufficiently uncommon that the tendency is to measure the demographic disparities in terms of relative difference in adverse outcomes (or PP/PO differences).

Where termination of current employees for cause or for poor performance is involved, disparities will commonly be measured in terms of relative differences in adverse outcomes, though invariably without recognition by employers or others that relaxing of standards will tend to increase relative differences in failure to meet them. See my "[Getting it Straight When Statistics Can Lie](#)," *Legal Times* (June 23, 1993), discussing, inter alia, (a) an appellate case that assumed that a large relative difference in failure to meet a performance standard was a function of the stringency of the standard; (b) an Internal Revenue Service response to large relative racial differences in termination rates for workplace infractions that assumed that race-neutral measures aimed at generally reducing terminations for workplace infractions would tend to reduce those disparities; and (c) a study of racial differences in termination rates among Postal Workers that failed to recognize the role of procedural safeguards in large relative differences in terminations.

It would be difficult to determine how often government and nongovernment employers modify standards as a means of reducing relative demographic differences in failure to meet standards or terminations for cause. But it would seem a safe assumption that in considering ways of reducing demographic differences in termination or disciplinary measures for failure to meet some performance or disciplinary standard, employers proceed under the mistaken assumption that relaxing standard or otherwise reducing the frequency of adverse outcomes will tend to reduce relative differences in rates of experiencing those outcomes.