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July 7, 2016

The Honorable Jeremy Fogel  
Director  
Federal Judicial Center  
Thurgood Marshall Federal Judiciary Building  
One Columbus Circle NE  
Washington DC 20002-8003

Re: Teaching Judges That, Contrary to Beliefs Underlying Federal Civil Rights Law Enforcement Policies, Reducing the Frequency of an Adverse Outcome Tends to Increase Relative Differences Between Rates at Which More and Less Susceptible Groups Experience the Outcome and Increase the Proportion More Susceptible Groups Make Up of Persons Experiencing the Outcome

Dear Judge Fogel:

The purpose of this letter is to explain to the leadership and staff of the Federal Judicial Center (FJC), and to urge the FJC to explain to federal judges, that, contrary to the beliefs underlying many federal civil rights law enforcement policies, reducing the frequency of an adverse outcome tends to increase relative differences between rates at which more and less susceptible groups experience the outcome and increase the proportions groups more susceptible to the outcome make up of persons experiencing it.

Virtually all analyses of discrimination issue in law enforcement proceedings have been unsound either (a) because such analyses have failed to reflect an understanding of patterns by which measures of differences between outcome rates, and measures of differences between the proportion a group makes up of persons potentially experiencing an outcome and the proportion it makes up of persons actually experiencing the outcome, tend to be affected by the frequency of an outcome or (b) because such analyses examine information solely on persons accepting some outcome or situation. See my *amicus curiae* [brief](#)<sup>1</sup> in *Texas Department of Housing and Community Affairs et al. v. The Inclusive Communities Project, Inc.*, Sup. Ct. No. 13-1371 (Nov. 2014) (TDHCA brief); “[The Perverse Enforcement of Fair Lending Laws](#),” *Mortgage Banking* (May 2014); “[The Mismeasure of Discrimination](#),” Faculty Workshop, University of Kansas

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<sup>1</sup> To facilitate consideration of issues raised in letters such as this by their recipients and others I include links to referenced materials in electronic copies of the letters. Such copies may be found by means of the Institutional Correspondence subpage of the Measuring Health Disparities page of [jpscanlan.com](http://jpscanlan.com).

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School of Law (Sept. 2013) (Kansas Law paper). See also, with respect to varied implications of the failure to understand patterns by which measures tend to be affected by the frequency of an outcome regarding the interpretation of data on demographic differences in the social and medical sciences (as well as the law), my “The Mismeasure of Health Disparities,” *Journal of Public Health Management and Practice* (July/Aug. 2016); “[Race and Mortality Revisited](#),” *Society* (July/Aug. 2014)<sup>2</sup>; [Measuring Health and Healthcare Disparities](#),” Proceedings of the Federal Committee on Statistical Methodology 2013 Research Conference (March 2014); and letter to the [American Statistical Association](#) (Oct. 8, 2015). At some point, I may more fully address the issues discussed in the above materials in a letter to FJC similar to those I have written to other institutions or organizations whose activities, or whose members’ activities, involve or are affected by interpretations of data on demographic differences.<sup>3</sup>

This letter, however, is limited to a discrete issue involving the belief underlying many federal civil rights law enforcement activities that relaxing standards and otherwise reducing the frequency of an adverse outcome tends to reduce relative differences between rates at which more and less susceptible groups experience the outcome and to reduce the proportions more susceptible groups make up of persons experiencing the outcome. While the letter is limited to

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<sup>2</sup> See especially the section of “Race and Mortality Revisited” titled “Illogical Expectations and Flawed Inferences” (at 339-341) regarding the drawing of inferences based on the comparative size of a relative difference in rates of experiencing an outcome (or the comparative size of proportionate effects on an outcome), without recognition of the role of the frequency of the outcome and without consideration that the comparative size of the relative difference in rates of experiencing the opposite outcome (or that the comparative size of the proportionate effects on the opposite outcome) would commonly support a quite different, if not opposite, inference.

<sup>3</sup> In addition to the American Statistical Association, recipients of such letters since 2009 include: [University of Oregon Institute on Violence and Destructive Behavior and University of Oregon Law School Center for Dispute Resolution](#) (July 3, 2016), [New York City Center for Innovation through Data Intelligence](#) (June 6, 2016), [Consortium of Social Science Associations](#) (Apr. 6, 2016), [Population Association of America and Association of Population Centers](#) (Mar. 29, 2016), [Council of Economic Advisers](#) (Mar. 16, 2016), [City of Madison, Wisconsin](#) (Mar. 12, 2016), [Stanford Center on Poverty and Inequality](#) (Mar. 8, 2016), [City of Boulder, Colorado](#) (Mar. 5, 2016), [Houston Independent School District](#) (Jan. 5, 2016), [Boston Lawyers’ Committee for Civil Rights and Economic Justice](#) (Nov. 12, 2015), [House Judiciary Committee](#) (Oct. 19, 2015), [American Statistical Association](#) (Oct. 8, 2015), [Chief Data Scientist of White House OSTP](#) (Sept. 8, 2015), [McKinney, Texas Independent School District](#) (Aug. 31, 2015), [Department of Health and Human Services and Department of Education](#) (Aug. 24, 2015), [Agency for Healthcare Research and Quality](#) (July 1, 2015), [City of Minneapolis, Minnesota](#) (June 8, 2015), [Texas Appleseed](#) (Apr. 7, 2015), [Senate Committee on Health, Education, Labor and Pensions](#) (Mar. 20, 2015), [United States Department of Justice and City of Ferguson, Missouri](#) (Mar. 9, 2015), [Vermont Senate Committee on Education](#) (Feb. 26, 2015), [Portland, Oregon Board of Education](#) (Feb. 25, 2015), [Wisconsin Council on Families and Children’s Race to Equity Project](#) (Dec. 23, 2014), [Financial Markets and Community Investment Program, Government Accountability Office](#) (Sept. 9, 2014), [Education Law Center](#) (Aug. 14, 2014), [IDEA Data Center](#) (Aug. 11, 2014), [Institute of Medicine II](#) (May 28, 2014), [Annie E. Casey Foundation](#) (May 13, 2014), [Education Trust](#) (April 30, 2014), [Investigations and Oversight Subcommittee of House Finance Committee](#) (Dec. 4, 2013), [Mailman School of Public Health of Columbia University](#) (May 24, 2013), [Senate Committee on Health, Education, Labor and Pensions](#) (Apr. 1, 2013), [Federal Reserve Board](#) (March 4, 2013), [Harvard University et al.](#) (Oct. 26, 2012), [Harvard University](#) (Oct. 9, 2012), [United States Department of Justice](#) (Apr. 23, 2012), [United States Department of Education](#) (Apr. 18, 2012), [The Commonwealth Fund](#) (June 1, 2010), [Institute of Medicine](#) (June 1, 2010), [National Quality Forum](#) (Oct. 22, 2009), [Robert Wood Johnson Foundation](#) (Apr. 8, 2009).

that subject, the references cited in the second paragraph should cause FJC to recognize the need to address broader issues regarding the soundness of analyses of discrimination issues.

With respect to the discrete issue on which this letter is focused, for at least two decades the government has encouraged lenders to relax mortgage lending standards in order to reduce relative racial/ethnic differences in adverse borrower outcomes like rejection of mortgage loan applications. For at least several years the government has encouraged public schools to relax discipline standards in order to reduce relative racial and other differences in adverse discipline outcomes like suspension and expulsion. Recently, government agencies, including the Departments of Justice, Education, and Health and Human Services, have cast that encouragement in terms of generally reducing discipline rates in order to reduce the proportion racial minorities and students with disabilities make up of students who are disciplined.<sup>4</sup> In March 2015, the Department of Justice issued a report on the police and court practices of the City of Ferguson, Missouri, finding that unduly aggressive policing and unjustifiably harsh court procedures caused African Americans to make up a much higher proportion of persons experiencing adverse interactions with the police and courts than they make up of the city's population. In February 2016, the Department of Justice brought suit against Ferguson based on the same theory, which suit was resolved by a consent decree in April 2016.

These actions on the part of the government are based on an understanding of statistics that is the exact opposite of reality. Relaxing standards and otherwise reducing the frequency of an adverse outcome tends to increase, not decrease, relative differences in rates of experiencing the outcome and the proportion groups more susceptible to the outcome make up of persons experiencing it. Unaware of such fact, the government has continued to monitor the fairness of practices on the basis of relative differences in adverse outcomes or the proportions more susceptible groups make up of persons experiencing the outcome. Thus, by acceding to government encouragements to relax standards and otherwise reduce the frequency of adverse outcomes, entities covered by civil rights law increase the chances that the government (and others) will sue them for discrimination.

Extended treatments of the pertinent statistical principles may be found in each of the references cited in the second paragraph and in many of the letters to institutions or organizations listed in note 3. I call your particular attention to the letter to the American Statistical Association, which, in addition to urging the organization to form a committee to address a range of measurement issues, urges it to explain to government agencies that their beliefs about the effects of relaxing standards on measures of disparity in failing to meet the standards is incorrect.

Recent, more succinct treatments of these principles, with a focus on the government policies just mentioned, may be found in my "[Things DoJ doesn't know about racial disparities in Ferguson](#)," *The Hill* (Feb. 22, 2016); "[Things government doesn't know about racial disparities](#)," *The Hill* (Jan. 28, 2014); "[The Paradox of Lowering Standards](#)," *Baltimore Sun*

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<sup>4</sup> With respect to the recent focus on the proportions certain groups make up of disciplined students rather than relative difference, see my letter to [Department of Health and Human Services and Department of Education](#) (Aug. 24, 2015).

(Aug. 5, 2013); [“Misunderstanding of Statistics Leads to Misguided Law Enforcement Policies,”](#) *Amstat News* (Dec. 2012); [“‘Disparate Impact’: Regulators Need a Lesson in Statistics,”](#) *American Banker* (June 5, 2012); and [“The Lending Industry’s Conundrum,”](#) *National Law Journal* (Apr. 2, 2012). Older, somewhat longer, treatments of the misunderstanding of the effects of relaxing standards on measures of disproportionality, which involve a variety of settings and illustrate both how longstanding and how universal is that misunderstanding, may be found in my [“Mired in Numbers,”](#) *Legal Times* (Oct. 12, 1996); [“When Statistics Lie,”](#) *Legal Times* (Jan. 1, 1996); [“Getting it Straight When Statistics Can Lie,”](#) *Legal Times* (June 23, 1993); [“Bias Data Can Make the Good Look Bad,”](#) *American Banker* (Apr. 27, 1992); [“The Perils of Provocative Statistics,”](#) *Public Interest* (Winter 1991); and [“An Issue of Numbers,”](#) *National Law Journal* (Mar. 5, 1990).<sup>5</sup>

Extensive graphical and tabular illustrations of the pertinent patterns may be found in methods workshops given at arms of American universities between 2012 and 2015.<sup>6</sup> Illustrations by others in terms of the density function may be found in Lambert PJ, Subramanian S ([Disparities in Socio-Economic outcomes: Some positive propositions and their normative implications](#). *Soc Choice Welf* 2014;43:565-576), and Lambert PJ, Subramanian S ([Group inequalities and “Scanlan’s Rule”: Two apparent conundrums and how we might address them](#). Working Paper 84/2014, Madras School of Economics (2014)).

The pertinent patterns are (a) the pattern whereby the rarer an outcome the greater tends to be the relative difference in experiencing it and the smaller tends to be the relative difference in avoiding it and (b) the corollary pattern whereby the rarer an outcome the greater tends to be

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<sup>5</sup> I call your particular attention to the discussion in the 1996 *Legal Times* article regarding the fact that making a three-strikes law a four-strikes law would tend to increase the proportion African Americans make up of persons affected by the law; the discussion in the 1993 *Legal Times* article regarding a 1992 Seventh Circuit decision reflecting the mistaken belief that the large relative difference in rates of failing to meet a performance standard was a function of the stringency rather the leniency of the standard; and the discussion in the 1991 *Public Interest* article and the 1990 *National Law Journal* article of the widespread mistaken belief that the high proportion African Americans made up of persons disqualified from intercollegiate athletics by National Collegiate Athletic Association academic standards was a function of the stringency rather the leniency of the standards. The misunderstandings discussed in those items are as widespread (or universal) today as they were when the items were published.

<sup>6</sup> See [“The Mismeasure of Health Disparities in Massachusetts and Less Affluent Places,”](#) Department of Quantitative Health Sciences, University of Massachusetts Medical School (Nov. 18, 2015) [“The Mismeasure of Discrimination,”](#) Center for Demographic and Social Analysis, University of California, Irvine (Jan. 20, 2015); [“The Mismeasure of Demographic Differences in Outcome Rates,”](#) Public Sociology Association of George Mason University (Oct. 18, 2014); [“Rethinking the Measurement of Demographic Differences in Outcome Rates,”](#) Maryland Population Research Center of the University of Maryland (Oct. 10, 2014); [“The Mismeasure of Association: The Unsoundness of the Rate Ratio and Other Measures That Are Affected by the Prevalence of an Outcome,”](#) Minnesota Population Center and Division of Epidemiology and Community Health of the School of Public Health of the University of Minnesota (Sept. 5, 2014); [“The Mismeasure of Group Differences in the Law and the Social and Medical Sciences,”](#) Institute for Quantitative Social Science at Harvard University (Oct. 17, 2012); [“The Mismeasure of Group Differences in the Law and the Social and Medical Sciences,”](#) Department of Mathematics and Statistics of American University (Sept. 25, 2012).

the proportion groups most susceptible to the outcome make up of persons experiencing the outcome and persons avoiding the outcome.<sup>7</sup> The patterns can be easily illustrated with normally distributed test score data. Table 1 below, which is a modified version of Table 1 (at 329) of "Race and Mortality Revisited" (at 329) and Table 1 (at 9) of the TDHCA brief, and which reflects the same hypothetical described in the recent succinct treatments of this subject, is based on a situation where the means of normal test score distributions of an advantaged group (AG) and a disadvantaged group (DG) differ by half a standard deviation and both distributions have the same standard deviation. In addition to showing the pass and fail rates of each group, the table shows the ratio of AG's pass rate to DG's pass rate and the ratio of DG's fail rate to AG's fail rate at each cutoff.<sup>8</sup> Based on a situation where AG and DG each make up half of the test takers, the final two columns show the proportion DG makes up of persons who pass and persons who fail at each cutoff.

**Table 1. Illustration of effects on relative differences in pass and fail rates of lowering a cutoff from a point where 80% of AG passes to a point where 95% of AG passes, with proportions DG comprises of persons who pass and of persons who fail (when mean scores differ by approximately half a standard deviation and DG comprises 50% of test takers)**

Cutoff	AG Pass	DG Pass	AG Fail	DG Fail	AG/DG Pass Ratio	DG/AG Fail Ratio	DG Prop of Pass	DG Prop of Fail
High	80%	63%	20%	37%	1.27	1.85	44%	65%
Low	95%	87%	5%	13%	1.09	2.60	48%	72%

According to the specifications underlying the table, at the cutoff where 80% of AG passes the test, approximately 63% of DG would pass the test (with corresponding failure rates

<sup>7</sup> The patterns turn on the frequency of an outcome (or, more precisely, the extent to which it is restricted to those most susceptible to it) without regard to the whether it is a favorable or an adverse outcome. I cast the issue in terms of the adverse outcome in the reference line and the first and third paragraphs because it is in circumstances where the focus is on the adverse outcome that the patterns are so widely misunderstood.

<sup>8</sup> While I discuss changes in relative differences, the table actually presents rate ratios. The relative difference is the rate ratio minus 1 where the rate ratio is above 1 (in which case the larger the rate ratio the larger the relative difference) and 1 minus the rate ratio where the rate ratio is below one (in which case the smaller the rate ratio the larger the relative difference). One should be careful not to mistakenly refer to the rate ratio as the relative difference. But the distinction between the two terms is not pertinent to the discussion here of patterns by which relative differences tend to be affected by the frequency of an outcome. On some occasions – most notably in "[Divining Difference](#)," *Chance* (Fall 1994), and "[Can We Actually Measure Health Disparities?](#)," *Chance* (Spring 2006) – I have used the disadvantaged group's rate as the numerator in the rate ratio for the favorable outcome (which is the approach of the "four-fifths" or "80 percent" rule for identifying disparate impact under the Uniform Guideline for Employee Selection Procedures) yielding a rate ratio for the favorable outcome that was below 1. In recent years, however, I usually present the rate ratios for both outcomes with the larger figure in the numerator, in which case, as to both outcomes, the larger the rate ratio, the larger the relative difference. Choice of numerator in the rate ratio, however, has no bearing on the patterns by which the two relative differences tend to be affected by the frequency of the outcome.



of 20% for AG and 37% for DG). The ratio of AG's pass rate to DG's pass rate would be 1.27 while the ratio of DG's fail rate to AG's fail rate would be 1.85.

When the cutoff is lowered to the point where the pass rate for AG is 95%, the pass rate for DG would be approximately 87% (with corresponding failure rates of 5% for AG and 13% for DG). The ratio of AG's pass rate to DG's pass rate would thus decrease to 1.09 (from 1.27), while the ratio of DG's fail rate to AG's fail rate would increase to 2.60 (from 1.85). That is, the relative difference in the outcome that was reduced in frequency (test failure) increases, while the relative difference in the opposite outcome (test passage, which increased in frequency) declines.

It warrants note at this point that the pattern whereby lowering a test cutoff tends to reduce relative differences in pass rates is well known. It underlies the universal belief that lowering test cutoffs tends to reduce the disparate impact of employment and other tests where some groups outperform others as well as the requirement that employers justify how high they have set a test cutoff.<sup>9</sup> But even though the fact that lowering a cutoff will tend to increase relative differences in failure rates is implied in the widely known fact that lowering the cutoff tends to reduce relative differences in pass rates (see American Statistical Association letter at 10 n.14), at least so far as the published record reveals, the fact that lowering a cutoff tends to increase relative differences in failure rates is virtually unknown. That seems to be the case even among agencies like the Departments of Justice and Education that have been dealing with issues concerning demographic differences in testing outcomes for decades.

As shown in the final two columns of Table 1, lowering the cutoff and reducing the frequency of test failure caused an increase in the proportion DG makes up of those who pass the test (from 48% to 52%) and the proportion DG makes up of persons who fail the test (from 65% to 72%). Because the proportion DG makes up of persons taking the test is unaffected by the cutoff, lowering the cutoff would increase both the relative difference and the absolute difference between the proportion DG makes up of test takers and the proportion it makes up of persons who fail (while reducing both the relative difference and the absolute difference between the proportion DG makes up of test takers and the proportion it makes up of persons who pass).

These patterns are not peculiar to test score data or the numbers I used to illustrate them. Rather, they are inherent in the shapes of other that highly irregular risk distributions and will be found in virtually any data showing points on a continuum of a quantifiable factor associated with experiencing an outcome. Table 1 and Figures 2 and 3 (at 48-49) of "[Can We Actually Measure Health Disparities?](#)," *Chance* (Spring 2006), show that lowering an income requirement, while tending to reduce relative racial differences in rates of meeting the requirement, will tend to increase relative racial differences in rates of failing to meet it. Figure 1 (at 4) of the letter to the [Federal Reserve Board](#) shows that lowering a credit score requirement,

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<sup>9</sup> Whether relaxing a standard in fact reduces the standard's impact, properly measured, is a complex subject. See Section E (at 27-32) of the Kansas Law [paper](#).

while tending to reduce relative racial differences in rates of meeting it, will tend to increase relative racial differences in rates of failing to meet it.

The more extensive treatments of the issues discussed earlier also show many situations where, in fact, a reduction in the frequency of an outcome was associated with an increased relative difference in rates of experiencing the outcome or the relative difference in the outcome was larger in the setting where the outcome is less common. And anytime one observes that a relative difference and absolute difference have changed in a different direction, it will necessarily be the case that the relative difference for the increasing outcome decreased while the relative difference for the decreasing outcome increased.

Many example of this pattern may also be found by means of the web pages of [jpscanlan.com](http://jpscanlan.com) devoted to measurement issues.<sup>10</sup> Warranting particular mention are the subpages of the [Discipline Disparities](#) page discussing situations where recent reductions in some form of discipline were accompanied by increased relative differences in discipline rates. The subpages (with jurisdictions indicated in the titles) include [California Disparities](#), [Colorado Disparities](#), [Connecticut Disparities](#), [Maryland Disparities](#), [Minnesota Disparities](#), [Oregon Disparities](#), [Beaverton, OR Disparities](#), [Denver Disparities](#), [Henrico County, VA Disparities](#), [Los Angeles SWPBS](#), [Minneapolis Disparities](#), [Montgomery County, MD Disparities](#), [Portland, OR Disparities](#), [St. Paul Disparities](#).<sup>11</sup> See also the [DOE Equity Report](#) subpage of the Discipline Disparities page, which discusses a Department of Education report showing that relative racial differences in expulsions are larger in school districts without zero tolerance policies than school districts with such policies.

In sum, while the patterns I describe will not always be observed (as I continually point out), their existence is hardly debatable. It is true that, so far as the published record reveals, few statisticians understand that reducing the frequency of an adverse outcome will tend to increase relative differences in experiencing it (or the proportions disadvantaged groups make up of persons experiencing it), even though most statistician fully understand that reducing the frequency of a favorable outcome tends to increase relative differences in that outcome. Further, there is a great deal of literature reflecting the view that reducing an adverse outcome ought to reduce relative differences in experiencing (though much of the time that view is reflected in puzzlement that a decline in an adverse outcome was accompanied by an increase in the relative difference in rates of experiencing it, as in the many cases where observers have noted that

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<sup>10</sup> The principal measurement pages are: [Measuring Health Disparities](#), [Scanlan's Rule](#), [Mortality and Survival](#), [Statistical Reasoning](#), [Immunization Disparities](#), [Educational Disparities](#), [Disparate Impact](#), [Discipline Disparities](#), [Lending Disparities](#), [Employment Discrimination](#), [Feminization of Poverty](#), and [Vignettes](#). The pages have close to a hundred subpages.

<sup>11</sup> These jurisdictions generally caught my attention as a result or news coverage of discipline disparity issues in the jurisdictions. There have no doubt also been cases where a general reduction in discipline rates was accompanied by a reduction in relative differences in discipline rates. But I have not seen news coverage of such situations. Reportage of declines in disparities during periods of general reductions in discipline rates has involved situations where disparities were measured in terms of absolute differences between rates.

“despite” general declines in some type of mortality relative differences in mortality increased). But confronted with the points made in this letter, and carefully considering the matter, few if any competent statisticians will dispute that reducing any outcome in a manner that tends to restrict it to those most susceptible to it will tend to both increase relative differences in experiencing it and increase the proportions those most susceptible to the outcome make up of persons experiencing it.

But it is possible that no federal judge even understands that lowering a test cutoff tends to increase relative differences in failure rates. It is also possible that no federal judge understands that is even possible for the two relative differences to change in opposite direction as a standard is altered much less that this tends to occur systematically. See discussion on the [Jones v. City of Boston](#) subpage of the [Discipline Disparities](#) page of [jpscanlan.com](#) regarding a First Circuit decision that discussed differing perspectives regarding a disparate impact depending on whether it was measured in term of relative differences in the favorable outcome or relative differences in the corresponding adverse outcomes. The decision also discussed the possibility for a less discriminatory alternative to the challenged practice. Nowhere in the discussion of these matters was there suggestion of a recognition that modifications to the disqualifying criterion that reduced the overall number of disqualifications would tend to increase the relative difference in the adverse outcome at the same time that it reduces the relative differences in the favorable outcome.

Possibly, there exist constitutional issues arising from the referenced statistical pattern and the failure of government agencies or courts to understand it when addressing issues concerning obligations to implement less discriminatory alternatives to practices causing a disparate impact.<sup>12</sup> Unquestionably, there exist issues regarding those obligation arising from fact that relaxing a standard tends to increase one relative difference while decreasing the other relative difference. See the TDHCA brief at 21-23 and the Kansas Law paper at 27-32. Complex issues also exist regarding inferring intent on the basis of the size of a disproportionate effect. For a court to effectively address such issues would seem to require, at a minimum, an understanding of the patterns illustrated in Table 1 including that there is no rational basis for maintaining that the strength of the forces causing the rates of AG and DG to differ varies between the two rows.<sup>13</sup> See also the discussion of Table 5 of "Race and Mortality Revisited" at

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<sup>12</sup> See my "[Is the Disparate Impact Doctrine Unconstitutionally Vague?](#)," Federalist Society Blog (May 6, 2016), and "[Is HUD's Disparate Impact Rule Unconstitutionally Vague?](#)," *American Banker* (Nov. 10, 2014)

<sup>13</sup> See my [Submission re Ferguson Consent Decree](#) (Apr. 11, 2016) in *United States v. City of Ferguson*, NO. 4:16-cv-000180-CDP (E.D. Mo.), regarding provisions of the consent decree resolving the Department of Justice's suit against Ferguson, Missouri that, both with regard to police and court practices and with regard to police employment policies, contains obligations regarding the implementation of less discriminatory alternative to practices with disparate impact both regarding matters cast in favorable terms and matters cast in adverse terms. Notwithstanding my Submission, it is unlikely that the court or anyone involved with the monitoring of the decree will understand the reasons to expect that actions that reduce adverse outcome rates will tend to result in decreased relative differences for the matters cast in favorable terms and increased relative differences for matters cast in adverse terms.



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336 and Table 2 of the TDHCA brief at 15-16. Thus, I repeat that FJC should carefully consider all the issues raised in the more extensive references cited in the second paragraph of the letter.

But, such matters aside, the FJC ought to give a high priority to explaining to federal judges that relaxing standards and otherwise reducing the frequency of an adverse outcome tends to increase, not decrease, relative differences between rates at which more and less susceptible groups experience the outcome and the proportion more susceptible groups makes up of persons experiencing the outcome. Such understanding on the part of judges ought to lead a like understanding on the part of federal agencies enforcing civil rights laws.

Sincerely,

James P. Scanlan