

Mired in Numbers

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Legal Times

Oct. 21, 1996

Those referred to this item by Paul Mirengoff's March 8, 2015 PowerLine [post](#) on the Department of Justice's report on racial disparities in the Ferguson, Missouri, may find of interest my March 9, 2015 [letter](#) to officials DOJ and the City of Ferguson explaining that the report's premise that high frequency of adverse outcomes tends to cause high black representation among persons experiencing the outcomes is incorrect. The higher the frequency of such outcomes, the lower tends to be the black representation among persons experiencing the outcome.

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Some find it difficult to look at seemingly stark racial disparities in criminal justice statistics without concluding that discrimination must be playing some role and that reform is imperative. Yet sometimes such disparities are not exactly what they seem.

Consider some data on race and the criminal justice system reported earlier this year. Two studies released in February and March by the San Francisco-based Center on Juvenile and Criminal Justice (CICJ) presented data showing that African-Americans are quite disproportionately affected by California's criminal justice system. While they constitute 7 percent of the state's population, African-Americans make up 18 percent of persons arrested and 32 percent of persons incarcerated. Blacks are particularly disproportionately affected by California's three-strikes law accounting for 70 percent of those sentenced under that law in the state's five largest counties. African-Americans are charged under the three-strikes law at 17 times the rate of whites in Los Angeles and 13 times the rate of whites in San Francisco.

The CICJ argues that the fact that "blacks are progressively overrepresented at deeper stages of the criminal justice process tells us that blacks do not get a fair shake at the hands of California's system of justice." And concluding that African-Americans are unfairly bearing the brunt of the war on drugs, the CICJ has called for a variety of actions aimed at reforming the state's criminal justice system. Its recommendations include diverting nonviolent offenders to community-based alternatives such as drug treatment programs and requiring racial impact statements on all crime legislation. A book-length report released this summer by the National Criminal Justice Commission reached similar conclusions on the basis of nationwide criminal justice statistics.

According to a March op-ed piece in *The Washington Post*, even for federal death penalty prosecutions authorized by attorney general, 80 percent of the 61 defendants have been minorities and 66 percent have been blacks. Incredulous that such a large disparity could occur by chance, the author, William Matthewman, called upon Congress to conduct an in-depth review of all federal death penalty prosecutions.

Yet such disparities must be interpreted with an understanding of certain statistical tendencies found whenever one group is more susceptible to some adverse

circumstance than another. The tendency and some of its implications can be readily observed in income data. Blacks are disproportionately represented among the poor. So efforts to reduce poverty are generally considered especially beneficial to African-Americans. But because they make up an even higher proportion of the very poor than the somewhat poor, reducing poverty causes African-Americans to be even more disproportionately represented among those who remain poor, and causes racial disparities in poverty rates to increase.

Examining the data, closely, however, one also finds that reducing poverty causes African-Americans to increase their representation among the nonpoor, and decrease the racial disparity in rates of avoiding poverty.

Similarly, a group that has a lower average score on a test typically comprises a larger proportion of persons falling below each progressively lower cutoff point. Thus, lowering the cutoff score causes the lower-scoring group to make up a higher proportion of those who continue to fail the test, and increases the disparity in failure rates. But lowering the cutoff also reduces the disparity in passing rates and causes the lower-scoring group to make up a larger proportion of those who pass. This is why lowering cutoff scores is universally regarded as a way of reducing the discriminatory impact of a test.

In the criminal justice context, these tendencies have implications both for interpreting the meaning of certain statistical disparities and for recognizing the probable outcomes of recommended solutions. Consider the conclusion of the CJCJ and the National Criminal Justice Commissions that the fact that blacks are increasingly overrepresented at each deeper stage of the criminal justice process means that racial discrimination is influencing that process.

The reasoning is fundamentally unsound. Since blacks tend on average to commit more crimes than whites, they will tend on average to commit more serious crimes and to have prior criminal records more often than other persons committing the same crime. Thus, the pattern cited in the CJCJ study is to be expected regardless of whether there is any discrimination in the system.

It also has to be recognized that at the very deepest stages in the criminal justice system, including the situations where prosecutors invoke the three-strikes law, or where the attorney general approves a federal death penalty

prosecution, there is reason to expect racial disparities to be very large even if race never enters into a decision.

With regard to recommended reforms, it should first be recognized that most reforms aimed at perceived arbitrariness in administering sanctions tend to restrict the most severe sanctions to an increasingly limited set of circumstances, where racial disparities would be even greater. For example, if California's three-strikes law were changed to a four-strikes law, there is every reason to expect that the disparity between the rates at which prosecutors invoke the law against blacks and against whites will increase, simply because the diminished pool to which the law would be applied would be even more disproportionately black.

The June 21, 1996, decision of the California Supreme Court in *People v. Superior Court of San Diego County*, 96 C.D.O.S. 4494, which held that trial judges had some discretion not to impose a life sentence in a three-strikes case, presumably will reduce the total number of such sentences imposed under the law. But very likely, a higher proportion of those still receiving such sentences will be African-Americans.

Tightening guidelines on prosecutors' discretion to invoke such a law typically results in their invoking the law only in the most extreme cases. That, too, probably will increase the racial disparities in rates of sentencing under the law, notwithstanding that the tighter guidelines might also weed out some racially motivated decisions. The same applies to the scrutinizing of federal death penalty prosecutions, where there is rather less reason to believe racial discrimination is involved.

For the same reasons, community-based alternatives to prison, particularly for drug-related offenses, are likely to cause blacks to make up a higher proportion of the prison population than they do now. As to racial impact statements, at least for those crimes that African-Americans are more likely to commit than whites, the more prison sentences are restricted to the most serious offenses and repeat offenders, the greater will be the disproportion in the rates at which blacks and whites are sentenced under such laws.

That is not to say that such reforms are bad for black defendants, just as lowering cutoffs on employment tests is not bad for black job applicants, even if it causes them to make up a higher proportion of persons failing the test. But we ought to be clear just what the data mean, and we ought to recognize that the seemingly enormous racial disparities in the imposition of some extreme sanctions that are prompting the calls for reform often are but the reverse side of usually quite small disparities in avoiding the sanction.

Nor is this to say that there ought not to be debate about the wisdom of seemingly draconian measure like the three-strikes law. And the CJCJ recommendations for greater funding of alternatives to prison may deserve serious consideration. These issues, however, can probably be better debated without bringing race into the picture.

Prosecutors' Bias Alleged

There may also be reason to examine whether prosecutors are allowing race to influence their charging decisions. One of the CJCJ studies cites a public-defender's view that prosecutors will more often give the benefit of the doubt to a white defendant, perceived as someone who may have merely made a mistake, than to a minority defendant, perceived as someone who is going to end up in prison in any event. The public defender's view of how prosecutors act is entirely plausible. And the very fact that there is a statistical basis for the prosecutors' perceptions is the more reason for concern that prosecutors will allow such perceptions to influence their decisions about particular individuals.

But the inquiry into whether racial discrimination exists, never an easy one, ought to be carried out with a better understanding of the rules of statistical inference than is usually evident in studies of these issues. In particular, if measures like those recommended by the CJCJ studies are in fact implemented, we should read with caution studies several years hence showing that racial disparities actually have increased.