

The misunderstood effects of the Baltimore police consent decree

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Last week, the monitoring team for the Baltimore Police Department consent decree submitted its final first-year monitoring plan to the court. Soon, the decree should be fully implemented and eventually we will observe its effects on the racial disparities identified in the Department of Justice's 2016 investigative report. The effects may differ substantially from what the parties and the public expect.

A key premise of the decree is that modifications of police practices that generally reduce adverse criminal justice outcomes will also tend to reduce racial disparities in those outcomes. The premise comports with the belief long underlying civil rights enforcement policies involving lending, school discipline, employment and voter qualification, as well as criminal justice, that relaxing standards or otherwise reducing adverse outcomes will tend to reduce (a) percentage racial differences in rates of experiencing the outcomes and (b) the proportions racial minorities make up of persons experiencing the outcomes.

In fact, however, the opposite is the case.

The point can be easily illustrated with normally-distributed test score data. Such data show that lowering test cutoffs tends to reduce percentage differences between the pass rates of higher- and lower-scoring groups. That is why lowering cutoffs is regarded as reducing the disparate impact of employment and other tests on which some groups outperform others.

But while lowering cutoffs tends to reduce percentage differences in test passage (the increasing outcome), it also tends to increase percentage differences in test failure (the decreasing outcome).

The pattern whereby reducing the frequency of an outcome and thereby increasingly restricting it to those most susceptible to it tends to increase percentage differences in rates of experiencing the outcome is not limited to the testing context. It exists in any situation where groups have more or less normal risk distributions regarding some outcome and its opposite.

The Department of Justice's August 2016 racial disparity findings were generally cast in terms of comparisons between the proportion African Americans make up of Baltimore residents and the proportion they make up of persons experiencing adverse criminal justice outcomes. Patterns of changes in proportions a group makes up of persons experiencing favorable and adverse outcomes are simply corollaries to the pattern of percentage differences described above. That is, in terms of the testing example, lowering cutoffs tends to increase the proportion the lower-scoring group makes up of persons who pass the test. But it also tends to increase the proportion that group makes up of persons who fail the test.

Department of Education data nicely illustrate the latter pattern with respect to modifications of practices that generally reduce school suspensions rates. The data show that African Americans

make up a larger proportion of students with two or more suspensions than they make up of students with one or more suspensions. Thus, giving all students a reprimand rather than what would otherwise be their first suspension will tend to increase, not reduce, the proportion African Americans make up of students with one or more suspensions.

There are reasons why we might see some departures from these patterns following implementation of the police consent decree. To the extent that racial bias contributes to observed disparities and the decree reduces that bias, all measures of racial disparity will be reduced. Changes in policies with respect to different types of crimes and different neighborhoods may also affect measures of racial difference in any number of ways.

But consider, for example, the provisions of the decree and the monitoring plan that promote use of diversion programs where certain offenses are handled in ways that do not lead to a criminal conviction. As illustrated by the school suspension data, the simple fact that African American offenders tend more often to have prior convictions means that such programs will tend to increase the proportion African Americans make up of persons with convictions.

Unless the parties and the monitoring team understand these things, and can make the public understand them, many people may be both surprised and disturbed by the patterns of racial disparity observed following implementation of the decree.

Additional Information:

A simple illustration of the test score example in the above commentary with pass and fail rates may be found in reference 1 and in Table 1 of references 2 to 4. The figures underlying the example regarding school suspensions may be found in Table 4 of reference 4. Reference 5 discusses data in a recent study of racial disparities in the United Kingdom showing why the study's recommendation regarding diversion programs would tend to increase the proportion blacks make up of persons with criminal convictions. Reference 6 discusses some of the adverse consequences of leading the public to believe that modifications to practices will tend to reduce certain measures of racial disparity when in fact the actions will tend to increase them. Reference 7 is an April 13, 2017 letter to Attorney General Jeff Sessions advising the Department of Justice of the responsibility to inform the court in the Baltimore Police case of ways in which the Department's actions have misled the court regarding the decree's likely effects on measures of racial disparity on which the Department relies. Reference 8 is a July 17, 2017 letter to the heads of the Department of Education, Justice, and Health and Human Services advising the recipient agencies of their responsibility to explain to the public and school administrators that the agencies' prior guidance regarding the effects of relaxing public school discipline standards on measures of racial disparity was incorrect.

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4. "Measuring Discipline Disparities," Statement of James P. Scanlan Prepared for U.S. Commission on Civil Rights Briefing "The School to Prison Pipeline: The Intersection of Students of Color with Disabilities" (Dec. 8, 2017) http://jpscanlan.com/images/Measuring_Discipline_Disparities_.pdf
 5. "United States Exports Its Most Profound Ignorance About Racial Disparities to the United Kingdom," Federalist Society Blog (Nov. 2, 2017) <https://fedsoc.org/commentary/blog-posts/united-states-exports-its-most-profound-ignorance-about-racial-disparities-to-the-united-kingdom>
 6. "The Pernicious Misunderstanding of Effects or Policies on Racial Differences in Criminal Justice Outcomes," Federalist Society Blog (Oct. 12, 2017). <https://fedsoc.org/commentary/blog-posts/the-pernicious-misunderstanding-of-effects-of-policies-on-racial-differences-in-criminal-justice-outcomes>
 7. Letter to Department of Justice (Apr. 13, 2017) http://jpscanlan.com/images/Letter_to_U.S._Department_of_Justice_Apr._13,_2017_.pdf
 8. Letter to United States Departments of Education, Health and Human Services, and Justice (July 17, 2017) http://www.jpscanlan.com/images/Letter_to_Departments_of_Education,_HHS,_and_Justice_July_17._2017_.pdf