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February 18, 2020

ELECTRONICALLY TRANSMITTED

Jim McDonough, Executive Committee Director
Jeffrey L. Sedgwick, Executive Director
Members of the Executive Committee
Justice Research and Statistics Association
1000 Vermont Ave., NW. Suite 450
Washington, DC 2005

Re: Failure of the Justice Research Community to Understand That Reducing Adverse Criminal Justice Outcomes Tends to Increase, Not Reduce, Relative Racial Differences in Rates of Experiencing the Outcomes

Dear Executive Committee Director McDonough, Executive Director Sedgwick, and members of the JRSA Executive Committee:

This letter may be compared to many letters collected on the [Measurement Letters¹](#) page of jpscanlan.com that discuss the way organizations' activities, including research and the providing of guidance on research methods, are undermined by the failure to understand patterns by which measures of differences between outcome rates of advantaged and disadvantaged groups tend to be affected by the prevalence of an outcome. Such patterns are explained at length in my "[Race and Mortality Revisited](#)," *Society* (July/Aug. 2014), and [Comments for the Commission on Evidence-Based Policymaking](#) (Nov. 14, 2016), and somewhat more briefly in "[The Mismeasure of Health Disparities](#)," *Journal of Public Health Management and Practice* (July/Aug. 2016). I encourage the Justice Research and Statistics Association (JRSA) to master all of the issues discussed in those works, as well as in my "[The Mismeasure of Discrimination](#)," faculty workshop paper, University of Kansas School of Law (Sept. 20, 2013), and my amicus curiae [brief](#) in *Texas Department of Housing and Community Development, et al. v. The Inclusive Communities Project, Inc.*, Supreme Court No. 13-1731 (Nov. 17, 2014).

This letter, however, principally addresses a single issue and one that trained researchers should find to be fairly simple once they give matter careful thought. Research into racial differences in criminal justice outcomes, and policies regarding such differences, have long been premised on the belief that generally reducing adverse criminal justice outcomes will tend to reduce relative racial differences in rates of experiencing the outcomes (as commonly cast in terms of the ratio of the black rate to the white rate). As explained in the above references,

¹ To facilitate consideration of issues raised in documents such as this I include links to referenced materials in electronic copies of the documents. Such copies are available by means of the Measurement Letters page.

however, reducing any outcome tends to increase, not reduce, relative differences in rates of experiencing the outcomes (while reducing relative differences in rates of experiencing the opposite outcome). Some recent discussions of this issue, and the failure to the government and social science community to understand it, with regard to racial differences in criminal justice outcomes (or the closely related matter of racial differences in school discipline outcomes) may be found in my "[Usual, But Wholly Misunderstood, Effects of Policies on Measures of Racial Disparity Now Being Seen in Ferguson and the UK and Soon to Be Seen in Baltimore,](#)" Federalist Society Blog (Dec. 4, 2019), "[COPAA v. DeVos and the Government's Continuing Numeracy Problem,](#)" Federalist Society Blog (Sept. 12, 2019), "[The misunderstood effects of the Baltimore police consent decree,](#)" *The Daily Record* (Feb. 15, 2018), "[United States Exports Its Most Profound Ignorance About Racial Disparities to the United Kingdom,](#)" Federalist Society Blog (Nov. 2, 2017), "[The Pernicious Misunderstanding of Effects or Policies on Racial Differences in Criminal Justice Outcomes,](#)" Federalist Society Blog (Oct. 12, 2017),² "[The Government's Uncertain Path to Numeracy,](#)" Federalist Society Blog (July 21, 2017), "[Racial Impact Statement Laws in New Jersey and Elsewhere,](#)" Federalist Society Blog (Mar. 20, 2017), "[Compliance Nightmare Looms for Baltimore Police Department,](#)" Federalist Society Blog (Feb. 8, 2017), "[Things the President Doesn't Know About Racial Disparities,](#)" Federalist Society Blog (Aug. 5, 2016), and "[Things DoJ doesn't know about racial disparities in Ferguson,](#)" *The Hill* (Feb. 22, 2016).

An older discussion of the issue with regard to mistaken perceptions about effects of policies on measures of racial disparity in criminal justice outcomes may be found in my "[Mired in Numbers,](#)" *Legal Times* (Oct. 12, 1996). And the key point is implicit in the discussions of disqualification of job applicants due to criminal records in "[Getting it Straight When Statistics Can Lie,](#)" *Legal Times* (June 23, 1993). and "[An Issue of Numbers,](#)" *National Law Journal* (Mar. 5, 1990) (though neither reflects a sound understanding of the measurement issues later addressed in places like "Race and Mortality Revisited").

As JRSA endeavors to understand this issue, I suggest that it would be useful to consider the following with regard to the illustration in Table 1 of "Race and Mortality Revisited," an illustration also relied up in many other of the above references. That table shows that lowering a test cutoff, while tending to reduce relative differences between the pass rates of higher- and lower-scoring groups, tends to increase relative differences between the groups' failure rates. Figure 1, at page 22, of the Comments for the Commission on Evidence-Based Policymaking shows how the pattern exists across the full range of test scores.

It is important to understand that agencies like the Departments of Justice and Education that have promoted the belief that reducing adverse criminal justice and school discipline outcomes will tend to reduce relative racial differences in rates of experiencing the outcomes have not reasoned as follows: while it is true that lowering test cutoffs and thus reducing test failure rates tends to increase relative differences in failure rates, there are reasons why one

² See the closing paragraphs of this item regarding the fact that the American Statistical Association, though seeming to understand this issue, specifically refused to advise arms of the federal government that generally reducing adverse outcomes tends to increase relative differences in rates of experiencing the outcomes.

would not expect that pattern to be observed with regard to adverse criminal justice or school discipline outcomes (and reasons why reducing those outcomes should in fact reduce relative differences in rates of experiencing the outcomes). Rather, despite dealing with demographic difference in test outcomes for decades, the agencies have shown no sign that they yet understand that lowering a test cutoff tends to increase relative differences in failure rates. The same failure of understanding regarding test outcomes appears to pervade the social science community, even though, once giving the matter thought or examining actual data, virtually all members of the community should be capable of readily understanding the matter.

It would also be useful to consider the fact that no one has ever advanced a reason why reducing an outcome ought to reduce relative differences in rates of experiencing the outcome. Rather, even in the countless instances where observers have noted that “despite” some decline in an outcome relative demographic differences in rates of experiencing the outcome increased, that reducing the outcome ought to reduce the relative difference in rates of experiencing the outcome has simply been taken for granted. The fact that in a great majority of cases reductions in an outcome are accompanied by increased relative differences in rates of experiencing the outcome has seemed to cause no one to question the assumption that one should expect the opposite. And the mistaken assumption has persisted even though, as explained in the first three references in the first paragraph, the National Center for Health Statistics recognized a decade and a half ago that reducing adverse health and healthcare outcomes tends to increase relative differences in rates of experiencing the outcomes.

Finally, I call your particular attention to the Federalist Society Blog posts of September 12, and December 4, 2019. In addition to explaining the harms of leading the public to believe policies will tend to reduce measures of racial disparity when in fact the policies tend to increase those measure, those items discuss the continuing difficulties the U.S. Departments of Justice and Education have in understanding this issue. Both of those matters provide compelling reason for the JRSA to understand the issue and to explain the issue to the many entities that rely on JRSA guidance. If JRSA receives any funding from federal or state governments, I suggest that such funding would entail an obligation to explain the issue to those governments.

Be mindful, however, that, as important as it is to understand that reducing an outcome tends to increase relative differences in rates of experiencing the outcome, sound research involving outcome rates – whether they be the outcome rates of advantaged and disadvantaged demographic groups or the outcome rates of treated subjects and control subjects in a clinical trial – must also be informed by an understanding of all the issues addressed in the references in the first paragraph.

Sincerely,

James P. Scanlan