


## ORIGINAL ARTICLE

# Racial and ethnic disparities in sentencing: What do we know, and where should we go?

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## Abstract

Strong evidence of racial and ethnic disparities has been documented in recent government-led reports, suggesting the presence of discrimination in sentencing, with Black and ethnic minority defendants being systematically sentenced more harshly than their white counterparts. However, we still do not know how these disparities come about as most of the sentencing research has relied on quantitative designs focused on documenting the problem, rather than exploring its causes. In this exploratory study we use qualitative interviews with criminal law barristers to explore the different mechanisms that may give rise to these disparities. From our interviews we identified two predominant causal mechanisms: the differential consideration of mitigating and aggravating factors and indirect discrimination arising from defendants' socio-economic backgrounds and over-policing. Based on these findings, we suggest effective strategies such as explicitly listing social deprivation as a mitigating factor in the sentencing guidelines and increasing judicial diversity for redressing these disparities.

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## KEYWORDS

England and Wales, ethnic disparities, qualitative interviews, sentencing

## 1 | INTRODUCTION

Within the criminal justice system, sentencing is the most pivotal process (Ashworth & Kelly, 2021). Not only does it determine the fate of a defendant, but it furthermore holds a strong symbolic value. As such, evidence of disparities in sentencing decisions across different demographic groups directly appears to infringe the principle of equality and affect perceptions of fairness, which in turn undermines trust in, and compliance with, the criminal justice processes (Tyler, 2003).

The evidence base documenting such disparities is remarkably consistent. Studies from the US, where most of the research originates, point to Black and ethnic minority defendants receiving harsher sentences than their white counterparts (see Baumer, 2013; Mitchell, 2005). In England and Wales, Hood (1992) found that after controlling for relevant legal variables Black defendants had 5% greater probability of being incarcerated than their white counterparts. Sentencing studies since then and until recently have, however, been rather scarce.<sup>1</sup> This changed with the publication of a series of government reports. These reports illustrated the continuing presence of disparities in sentencing. Uhrig (2016), for example, found that Black and Asian men were 1.4 times more likely than white men to receive a custodial sentence in the Crown Court for drug offences. The 2017 Lammy Review into the treatment of, and outcomes for, Black, Asian and minority ethnic individuals in the criminal justice system renewed interest in the exploration of ethnic disparities in England and Wales. In the Lammy Review, disparities were noted across multiple stages, with some of the most striking observed in the sentencing process. For example, for the case of drug offences, Lammy (2017) reports 140% higher odds of incarceration for Black and ethnic minority people.

Despite the magnitude of these reported disparities, critics have been quick to point out that the extent to which they prove the existence of discriminatory practices in sentencing is questionable. Some scholars all-together reject the evidence of discrimination, arguing that the impossibility of controlling for every relevant variable considered by a judge means that one cannot truly know whether disparities are the result of discriminatory treatment (Halevy, 1995; Wilbanks, 1987; Wooldredge, 1998). Many others have rightly raised questions about the robustness of these findings. They are wary in claiming that disparities are definitely the result of discrimination since the evidence is inconclusive. These researchers highlight the pervasive methodological problem that has affected all sentencing research relying on observational data (Baumer, 2013; Holdaway 1997; Reiner, 1993; Ulmer, 2012). Confounding bias is inherent to regression models, which produce approximate comparisons but are unable to produce 'like with like' comparisons (Pina-Sánchez, Roberts & Sferopoulos, 2019; Roberts & Bild, 2021). For example, we would expect to see disparities in the length of custodial sentences as a result of different guilty plea rates across ethnic groups. If so, and while such disparities could be attributable to equally important problems of systemic discrimination stemming from differential exposure or lack of trust in the criminal justice system, they will not be reflecting direct discrimination in sentencing.

As such, uncertainty has prevailed over the interpretation of the evidence on sentencing disparities. However, in research for the Sentencing Council, Isaac (2020) demonstrated how this methodological impasse is not insurmountable. Based on survey data collected directly from Crown Court judges, Isaac (2020) simultaneously controlled for 42 different relevant factors specified in the drugs offence-specific sentencing guidelines, covering considerations of offence seriousness, offender culpability and personal mitigating factors, among others. Focusing on offences of supply, possession with intent to supply and conspiracy to supply a controlled drug of Classes A and B (the same offence types explored in the Lammy Review), and a sample of 14,000 sentences imposed in the Crown Court from 2011 to 2015, Isaac (2020) reports 40% higher odds of custodial sentences for Black defendants and 50% higher odds for Asian or Other ethnic defendants, compared with their white counterparts. In our view, these findings represent clear-cut evidence of discrimination in the sentencing of drug offenders in the Crown Court. Further, although Isaac (2020) focuses on a particular offence group, similar disparities have been noted in other government reports controlling for the number of previous convictions and whether a guilty plea was entered (see, e.g., Hopkins, Uhrig & Colahan (2016), where Black defendants had 55%, Asian defendants 53% and Chinese or Other 81% higher odds of incarceration).

More research is needed to document how widespread disparities are across different offence types (beyond drug offences), court locations (including magistrates) and sentence outcomes (including, but not limited to, custody). Yet, we believe we need to move past this methodological debate, which has sidelined concerns about discrimination in sentencing. Based on Isaac (2020) and Hopkins, Uhrig & Colahan (2016), the existence of discrimination in sentencing in England and Wales seems undeniable. Further quantitative studies could help estimate the specific location and prevalence of the problem, but to be able to redress the observed disparities, we also need to identify the causal mechanisms behind them. In response, we suggest shifting the research focus to prioritise the use of qualitative methods. Accordingly, one of the authors completed exploratory interviews with ten criminal barristers to discover the underlying mechanisms that give rise to sentencing disparities and identify the areas that are in need of further inquiry. Criminal barristers<sup>2</sup> were chosen for the interviews due to their extensive experience in court observations that allows them to identify the different ways in which discriminatory practices might take place.

It is important that we understand the causal mechanisms in order to be able to provide effective policy responses that seek to combat disparities and discrimination in sentencing. Without understanding how disparities arise, policy responses will be inadequate and ineffective. Qualitative studies are particularly well suited to reveal how indirect discrimination comes about, since if we focus solely on direct discrimination, we will only see an attenuated estimate of the true extent of disparities in sentencing. *Direct* racial/ethnic discrimination occurs if judges who are faced with Black or ethnic minority defendants and white defendants 'convicted of similar crimes and with similar prior criminal records impose harsher sentences on racial minorities than on whites' (Spohn, 2000, p.434). *Indirect* discrimination occurs when 'an independent variable influences a dependent variable through some other factor, rather than directly' (Spohn, 2000, p.434). For example, if pretrial detention significantly increases the chances of incarceration and Black and ethnic minority defendants are more likely than white defendants to be detained pretrial, then it can be said that race/ethnicity indirectly affects sentence severity via pretrial detention.

Having established that the evidence of discrimination seems unquestionable, we will now present details of our research to examine the possible causes and how to best combat it. In the next section we describe the research design; this is followed by our findings; and a discussion

section where we put forward the policy changes that could be considered to redress the problem of racial and ethnic disparities in England and Wales.

## 2 | RESEARCH DESIGN

The interviews with criminal barristers were conducted in 2020.<sup>3</sup> A total of ten interviews were conducted with barristers from three different sets of chambers. Three of the interviewees were met at a networking event; these barristers then emailed colleagues at their set of chambers with details about my plans to qualitatively examine discrimination in sentencing. This snowball sampling technique resulted in an additional seven barristers being recruited. The sample was diverse and varied; six female barristers and four male barristers were interviewed. Two barristers were Black and two were Jewish and there was an even mix of both junior and senior barristers. The interviews took place between 26 May 2020 and 12 June 2020. Interview data were anonymised (this was done by using pseudonyms in place of barristers' real names).

All but one of the interviews were conducted over Zoom, with the other interview being conducted on the phone. Interviews were short, ranging from ten to 20 minutes. Barristers were asked whether they had witnessed racial or ethnic discrimination from judges towards defendants or felt that defendants had been treated differently because of their race or ethnicity. Barristers were also asked whether they felt that indirect discrimination was an issue during sentencing and how discrimination in the courts could be combated. The interviews adopted a focused design appealing to elite groups with tight time frames and working schedules (Harvey, 2011). Even though the interviews were structured, as barristers developed their own observations, accounts of discrimination and instances of covert discrimination, the responses and their content were varied.

The interviews were transcribed and the raw data were manually coded<sup>4</sup> in two stages – 'First Cycle' and 'Second Cycle' coding – to gain a more thorough analysis of the issues and discrimination processes identified by the barristers. During 'First Cycle', *In Vivo* coding (Manning, 2017) was used to catalogue initial thoughts and themes established by the barristers. *Descriptive coding* was then used to better synthesise and engage with the points and concerns identified by the barristers and see how they were interrelated. After the data were 'handled', patterns and themes began to emerge and the data identified and coded in 'First Cycle' coding were reorganised and reanalysed in 'Second Cycle' coding (Saldaña, 2013).

## 3 | RESEARCH FINDINGS

### 3.1 | The inclusion of mitigating and aggravating factors

The consideration of mitigating and aggravating factors in the sentencing process was highlighted by the barristers as one of the most important causal mechanisms resulting in sentencing disparities. Including factors such as culpability, harm and remorse of the defendant is at the discretion of the judge who, for example, decides the level of culpability of the defendant or whether their remorse is genuine or not. The decision to include or not to include these factors as a feature of the case can hence be racially affected. John, a barrister, explains how mitigation is about 'how much the judge identifies with the defendant'. He explains how judges, just like the rest of us (Roets & Van Hiel, 2011) are prejudiced. For 'judges it just means they have preconceived notions based on

their experiences'. This might make it harder for white judges to sympathise with, or comprehend the wider circumstances surrounding, Black and ethnic minority defendants.

Remorse of the defendant is particularly problematic<sup>5</sup> since a judge's interpretation of a defendant's remorse can be tied to how much the judge sympathises or identifies with the defendant. With 93% of the judiciary being white (Ministry of Justice, 2020) this can result in sentencing disparities. The barristers interviewed certainly felt this to be the case. Tom explains that discrimination occurs in situations 'where a judge has given a white defendant a chance' and compares this to the 2018 Oxford student case<sup>6</sup> where the judge decided not to imprison the student who stabbed her boyfriend in the leg because she was 'too clever' and it would be devastating to her. Tom remarks how:

there seems to be an idea that if you're a young Black boy or man from south east London it kind of doesn't make much difference if you go to prison since you're not doing much anyway.

Tom proceeds to explain how:

some judges, they can identify more with defendants that look like them and made mistakes, so I think judges sometimes treat more favourably defendants with whom they feel they can identify more.

Prejudice and unconscious bias was one of the suggested explanations as to why judges might treat Black and ethnic minority defendants differently from their white counterparts. A study conducted by Rachlinski et al. (2009) also found this to be the case. Using the Implicit Association Test, which measures beliefs, behaviours and attitudes that people are unable or reluctant to report (Greenwald, McGhee & Schwartz, 1998), the study found that white trial judges had a firm 'white preference' and that this influenced their decision making. The judges were unaware of their racial biases and only when made aware were they able to suppress them. This is particularly worrying given the powerful false narratives surrounding Black criminality in England and Wales. These narratives can be traced back to the post-war period, particularly to the mid-1970s when mugging was declared a racial crime and Black men were deemed a law-and-order problem (Gilroy, 1987). The police narratives on Black criminality culminated in the 'sus' law – Section 4 of the 1824 Vagrancy Act – which gave police officers discretionary power to arrest anyone they suspected of loitering with intent to commit an arrestable offence. This law was not only racially disproportionate but also resulted in the racialisation of urban spaces, with differential police practices where Black residents lived. This resulted in 'area-based strategies which assumed that any inhabitant of a high-crime district could be treated as a criminal' (Gilroy, 1987, p.98). An example of this strategy was Operation Swamp, in which plain clothed officers in Brixton made over 1,000 stops and 150 arrests over the period of ten days (Jefferson & Grimshaw, 1984), leading to the 1981 Brixton riots.

Police, to date, continue to be direct contributors to narratives about Black criminality, as an analysis conducted by the Huffington Post (Turnnidge, 2021) reveals. The Metropolitan Police are more likely to issue a press release for sentenced Black defendants than white defendants; 45% of sentenced defendants were white but only 33% of press releases related to white defendants. This contrasted with 44% of press releases relating to Black defendants despite them only constituting 29% of sentenced people. This disproportionality increases for violent offences where 46% of sentenced people were white but only 21% of press releases concerned white defendants;

this contrasted with 28% of people sentenced being Black and 47% of press releases relating to Black defendants. With these press releases often being released as articles in newspapers that appear millions of times in social media newsfeeds, this influences and shapes the general public's perception of Black people, violence and criminality. This can result in unconscious bias which then leads to Black people receiving heftier sentences than their white counterparts. Judges, for example, might perceive Black defendants to be more dangerous than their white counterparts or could consider previous convictions of Black defendants more relevant than those of white defendants.

### 3.2 | Sentencing guidelines

According to the barristers, another underlying mechanism that can result in sentencing disparities are the drug sentencing guidelines. Rachel explained that:

Black defendants are disproportionately sentenced in relation to drug offences and drug offences have much higher sentencing guidelines,<sup>7</sup> and questions whether that should be taken into consideration and there should be shorter sentencing guidelines for drug offences or better rehabilitation, specifically targeted as you know they disproportionately affect minority communities.

The judges' approach to the drug sentencing guidelines have also been pinpointed by several barristers as a source of disparities. Anne reveals that 'very often young Black men are more likely to receive custodial sentences than their white counterparts, and this is because of the judges' approach to the sentencing guidelines'. Anne explains how:

most judges find reasons to put defendants, particularly young Black men, into a significant role category where for women or white or other ethnic backgrounds individuals, they would be more open to arguments that that individual is in a lesser role.<sup>8</sup> And that results in more custodial sentences and longer custodial sentences and I'm convinced that that is a thing.

Similarly, Tom remarks that 'occasionally you will see a judge say okay, I'm going to really give you a chance and I'm going to give you a suspended sentence even though the guidelines say this'. Tom explains that this leniency only tends to happen with white defendants since 'judges can identify more with defendants that look like them and made mistakes', so they will 'treat them more favourably'. Claire also explains how Black defendants are 'more likely to get assessed as dangerous, less likely to be given psychological or psychiatric reports', with this resulting in heftier sentences.

Black defendants are exorbitantly sentenced in relation to drug offences in part due to the disproportionate enforcement of drug laws against them as shown in Eastwood, Shiner & Bear's (2013) report. The report, based in England and Wales, found that Black people were stopped-and-searched for drugs at 6.3 times the rate of their white counterparts even though drug use is lower among Black people. The report also found that Black people in London were arrested for drug offences at six times the rate of white people and disproportionately received a harsher police response for possession of drugs. Black people were charged at six times the rate of white people for possession of cannabis, while 78% of Black people caught in possession of cocaine were

charged and only 22% received cautions compared with 44% of white people caught in possession being charged and 54% receiving cautions.

The potential for disproportional sentencing outcomes due to the drugs sentencing guidelines was recognised by the Sentencing Council (2020a) in their drug consultation response document. In further analysis conducted by the Sentencing Council sentencing disparities were found within the Misuse of Drugs Act (1971) Importation and Production offences. The Council also acknowledged that 'the guidelines could be interpreted in different ways' (p.25).

### 3.3 | Indirect discrimination<sup>9</sup>

All the barristers interviewed felt that indirect discrimination was an issue in sentencing. They revealed that ethnic minority defendants, and in particular Black defendants, are more likely to be detained pretrial. Anne explains how:

lots of young Black men are not in a position to have anyone in their family to offer surety to enable them to get bail and I think there's an expectation almost on the part of some judges 'oh well this person is not going to get bail and I'm not going to give him any consideration towards that'.

Similarly, Emily remarks that: 'if you don't have an address it can sometimes be very, very difficult to obtain bail', and that: 'you're more likely to not have a fixed address if you're from an ethnic background'.

Rose likewise reveals how for Black and ethnic minority defendants:

there'll be considerations in their lives that might mean they have non-standard backgrounds. So they may have come from poorer communities or they may move addresses more or they may have temporary housing. What can be perfectly innocent like moving address or no longer living somewhere can be something that makes them look less reliable or like a flight risk or something that might worry a judge and so because of that they're treated differently.

All the interviewed barristers expressed their concerns that discrimination occurred indirectly via pretrial detention due to the socio-economic conditions of defendants, with Black and ethnic minority defendants more likely to come from deprived socio-economic backgrounds (Phillips & Bowling, 2003, p.279). This is particularly alarming given recent statistics obtained by freedom of information requests from Liberty Investigates, which show that the proportion of Black and ethnic minority people in the total remand population was 34% by the end of September 2021, with 15% of that remand population being Black, despite Black people making up 3% of the population.<sup>10</sup>

The literature has shown us that indirect discrimination occurs in sentencing via remand and pretrial detention with ethnic minority defendants, notably Black defendants, more likely to be remanded pretrial, with this influencing the chances of receiving a custodial sentence and longer sentences. Tartaro & Sedelmaier's (2009) study in the USA found evidence of indirect effects via pretrial detention which was the biggest legal predictor, with defendants who had been incarcerated pretrial having 32% greater probabilities of imprisonment than those who had not been pre-detained, and Black defendants having 43% greater probabilities of being

pre-detained than white defendants. May et al.'s (2010) study in England and Wales similarly found indirect race effects via pre-detention decisions, with pre-detention being the biggest predictor of imprisonment and Black youth having 27% greater probabilities of being remanded than white defendants.

### 3.4 | Disproportionate policing

Another mechanism of indirect discrimination that the interviewees felt results in sentencing disparities relates to the policing of Black and ethnic minority people. Some of the barristers expressed concern about racism in policing and the fact that stop-and-search is disproportionately applied against Black and ethnic minority people. As Hannah illustrates:

the areas that have the highest BAME populations are over-policed compared to areas that are more sub-urban, so you're more likely to be arrested for something than if you were a white person doing the same thing.

The resulting issue of cumulative discrimination was highlighted by barristers as an underlying mechanism that results in sentencing disparities. Not only is stop-and-search disproportionately applied against ethnic minority people, notably Black people, it further influences sentencing decisions, something that is not widely acknowledged in the literature. Black and ethnic minority people, for example, may have more extensive criminal histories than white people as a result of over-policing. Additionally, as Claire explains:

Because stop-and-search is very disproportionately applied to the Black community the number of times where the element of a case has been the extent to which a client has been repeatedly stopped and searched, the judge seems to take the view that that's because they're up to something. Not because on ten times they weren't up to something and the one time that they were up to something doesn't mean that they were disproportionately affected by the previous ten times.

Claire suggests that:

there's a real reluctance for the judiciary to accept that policing is implemented in a racist way, so that affects where if they haven't followed the codes of practice for the police whether they're less likely to exclude evidence as a result of those breaches. So if they think well the police are only doing that because they must've been at it then if they've breached that, then they won't exclude the evidence. So it has an effect on the granting of bail, admissibility in trials, summing-up and sentencing in particular.

Statistical evidence shows that Black people in England and Wales are more likely to be stopped-and-searched, with Black people being nine times more likely to be stopped-and-searched than their white counterparts (Ministry of Justice, 2020). This racial disparity is even more extensive where discretion is greater; Black people are 43 times more likely to be stopped-and-searched than their white counterparts under Section 60 of the Criminal Justice and Public Order Act 1994, which does not require reasonable suspicion to be stopped-and-searched (Liberty, 2020).<sup>11</sup>



As argued by Bowling & Phillips (2007), these statistics together with research evidence on police racial bias, prejudice and stereotyping 'is consistent with the contention that the racial disproportionality in the use of police powers to "stop and search" results from unlawful racial discrimination' (p.960).

#### 4 | IMPLICATIONS AND POLICY RESPONSES

The Sentencing Council's study and the systematic finding of disparities in sentencing studies demonstrates the very realistic possibility of racial and ethnic discrimination in the sentencing of defendants in England and Wales. The implications of this ought to be seriously considered; it shows us that the principles of fairness and equality before the law may not always be followed. This results in Black and ethnic minority people being more likely to be imprisoned and spend more years in prison solely on account of their race. Black and ethnic minority people are more likely to have a criminal record and suffer from unemployment, homelessness and other hardships associated with it. There is also the stigmatising factor of knowing that you belong to a community that is being discriminated against. But this is something that is not new to Black and ethnic minority people in England and Wales who have been denouncing for decades the discrimination they suffer at the hands of the authorities and criminal justice system in particular. Reports (Dame Elish Angiolini, 2017; Denman, 2001; Lammy, 2017; Macpherson, 1999) evidencing institutionalised racism have not changed this and it seems that they, too, have been ignored, with only futile, tick-boxing policy changes being implemented.

It comes as no surprise therefore that over 75% of Black people in the UK do not feel their human rights are as equally protected with regards to white people (*Black people, racism and human rights* report (House of Commons, House of Lords, Joint Committee on Human Rights, 2020)). It is time for previous reports and evidence of discrimination to be taken seriously, a sincere report into systemic discrimination in England and Wales to be commissioned, Black and ethnic minority people's experiences of discrimination to be acknowledged and earnest policy changes to be made. The status quo and discrimination present need to be challenged; prompting the query of how many more reports, how many more claims and how many more people need to have their lives disrupted until this is done?

This raises the question of what we can do to combat discrimination in the courts. In this study we have demonstrated the potential areas where sentencing disparities arise, and their cumulative effects. The interviews with barristers have shed light on how judges' inability to sympathise with Black and ethnic minority defendants can result in sentencing disparities. One of the most important and effective ways that we can combat discrimination in the courts is therefore by increasing judicial diversity. This was also identified by the barristers as key to battling discrimination in the courts since 'ultimately it's up to the judge on an individual basis how to sentence someone'. Barristers explained that some Black and ethnic minority defendants get harsher sentences because judges are unable to identify with them and understand where they are coming from.

Greater diversity, as John remarks, is important because:

the whole concept of justice is being tried by your peers, if you're been tried by people who are closer to you in terms of where you come from then they're more likely to understand, see the human side of things, they're more likely to be sympathetic and they're certainly less likely to discriminate.

Judicial diversity is also crucial because it can help increase confidence in the system and help defendants feel like they are not being discriminated against. As Rachel explains:

magistrates are middle-class retired people who have no idea of what goes on out there, they've got little touch with the world. And you know they're sort of saying to a young Black kid who's had a very difficult life and upbringing 'you musn't carry a knife' you know that just doesn't hurdle his way. Greater diversity on the bench is desirable. It is desirable not only because it might have an impact on discrimination but it has an impact on confidence in the system.

The most predominant underlying mechanism identified by the barristers that results in sentencing disparities is the socio-economic status of defendants. Having no fixed address, lack of stable income, being unemployed or out of education negatively influences pretrial detention which, in turn, influences sentence severity. Due to the crossover between social deprivation and race/ethnicity, this disproportionately affects Black and ethnic minority defendants. We must hence seriously consider using deprivation as personal mitigation to combat discrimination in the courts. This idea was initially put forward by Ashworth (1994) and Tonry (1995) who proposed that judges be given greater discretion so they can take into consideration the circumstances of defendants 'who have, to some degree overcome dismal life chances' (Tonry, 1995, p.170). Although it is a good idea in principle to allow personal adversity to form part of mitigation, if it is not accompanied by stringent controls that stipulate when and how overcoming adversity can be considered mitigation, but rather by unsupervised discretion, this could backfire. Defendants could actually have their upbringing and life circumstances used against them (e.g., being denied bail) or as we have seen more recently, judges could use their discretion to achieve disparate outcomes for defendants with whom they sympathise. This was the case for the white supremacist who was convicted of being in possession of a bomb-making manual which can carry a jail term of up to 15 years and was, instead, sentenced to read books such as *Pride and prejudice* and *A tale of two cities*.<sup>12</sup> Justifying this the judge stated that the defendant's crime was likely to be an isolated 'act of teenage folly'. Although this decision has been corrected on appeal, we must seriously consider if the same outcome would have been achieved if it was a defendant who had been convicted of Islamic extremism.

We should therefore aim to make social deprivation per se, and not overcoming personal adversity, constitute grounds for personal mitigation; this would allow us to redress disparities present in sentencing as well as social injustices. Social deprivation would be used as mitigation in sentencing based on the premise that 'the moral blameworthiness of the deprived is different because the choices the deprived face and what motivates their action is different' (Odudu, 2003, p.418).

There is a well-established link between social deprivation and crime; the 2002 report from the Social Exclusion Unit found that most prisoners have a history of social exclusion, including high levels of family, educational and health disadvantage and poor prospects in the labour market (Social Exclusion Unit 2002, p.18). Similarly, Whitworth's (2012) analysis found that inequality was 'fairly strongly' correlated with violence, vehicle crime, robbery, burglary and to a smaller degree, criminal damage. According to strain theory, and Merton particularly, the link between social deprivation and crime is because 'the greatest pressures towards deviation are exerted upon the lower strata' (Merton, 1968, p.198). Socially disadvantaged people 'become estranged from a society that promises them in principle what they are denied in reality' (Merton, 1964, p.218) and this together with the hardships present in their lives means criminal activity is more likely.

Black and ethnic minority people are more likely than white people to be socially deprived. People from all ethnic minority groups except the white Irish, white Other, Indian and Chinese groups were more likely than the white British to live in the most overall deprived 10% of neighbourhoods in England and Wales (Ministry of Housing, Communities and Local Government, 2020). A report by the Social Metrics Commission found that nearly half of Black African and Caribbean people and a third of people with mixed ethnic heritage are in poverty compared with a fifth of white British people (Social Metrics Commission, 2020). Analysis conducted by Shelter of government statistics between April 2019 and March 2020 found that a quarter of people making homelessness applications to local councils were from a Black, Asian and minority ethnic group despite them making up just over a tenth of all households in England. Homeless disproportionately affects Black people, with one in 23 Black households becoming homeless or being threatened by homelessness in comparison with one in 83 households from all other ethnicities combined.<sup>13</sup> Black, Bangladeshi and Pakistani people additionally have the highest rate of unemployment from all ethnic groups – 8% – double that of white people (4%) (Ministry of Justice, 2021).

It is worrying, therefore, that social deprivation can lead to harsher sentences. The crossover between social deprivation and race/ethnicity is particularly alarming since studies have consistently pointed out how being denied bail results in harsher sentences (May et al., 2010; Spohn, 2008; Tartaro & Sedelmaier, 2009) and ‘ethnic minorities often fall into the category of people remanded in custody because of their increased chances of being homeless, unemployed, or in “disrupted” families, all of which may be perceived as being linked to failing to appear at court’ (Phillips & Bowling, 2003, p.279). Not only does social deprivation decrease the chances of a defendant getting bail, it furthermore has been found to also increase the risk score in risk assessment tools such as the Offender Assessment System which increases the likelihood of receiving a longer custodial sentence (van Eijk, 2017). This is due to factors such as employment, education, financial situation and accommodation status being able to increase a defendant’s risk score.

Permitting class-based factors that discriminate against the poor to influence sentencing decisions and effectively punish social deprivation ‘should be forbidden’ (Tonry, 1987, p.408). By allowing social deprivation to produce sentencing disparities not only are we exacerbating social deprivation but we are also heightening social inequalities. Particularly so given how prison sentences aggravate social deprivation by hindering a defendant’s chances of employment, education and access to social services such as housing. If we are serious about combatting disparities in sentencing, then social deprivation should be used as mitigation in sentencing; recognising the hardships that socially deprived people have had to endure and overcome in their lives and making sure it does not further marginalise them. Listing social deprivation as mitigation in the sentencing guidelines would allow us to redress social inequalities by producing a needs-based assessment of an individual that allocates services and resources to socially deprived people to help decrease social inequalities, reduce their crime involvement and increase their rehabilitative potential. It would also, importantly, allow us to tackle racial and ethnic disparities in sentencing due to the aforementioned race/ethnicity and social deprivation crossover.

A future avenue of research that can also help combat disparities is for studies to distinguish and contrast sentencing decisions for the different white groups.<sup>14</sup> White British should become the reference category against which racial and ethnic comparisons are made and there should be distinct white ethnic minority categories. By treating all whites as a homogenous group and making it the reference category, not only are we ignoring (for example) Travellers’ experiences

of discrimination (Drummond, 2015; James, 2006), we are also underestimating the true extent of disparities for Black and ethnic minority defendants.

Another avenue of research that can help redress discrimination in sentencing is the attachment of reminders to the sentencing guidelines. The Sentencing Council is aware that racial and ethnic disparities exist in sentencing and as a result they have started to attach reminders to the sentencing guidelines, directing judges and magistrates on how to fairly apply them. Due to disparities being more salient in sentencing outcomes for firearm and drug offences, it has attached these reminders to these guidelines. In them, judges and magistrates are reminded:

Sentencers should be aware that there is evidence of a disparity in sentence outcomes for this offence which indicates that a higher proportion of Black, Asian and Other ethnicity offenders receive an immediate custodial sentence than White offenders. There may be many reasons for these differences, but in order to apply the guidelines fairly sentencers may find useful information and guidance at Chapter 8 paragraphs 123 to 129 of the Equal Treatment Bench Book. (Step 2, Sentencing Guideline for production of a controlled drug). (Sentencing Council, 2020b)

The Sentencing Council explained that these reminders that draw the sentencers' attention to evidence of sentencing disparities form an integral part of the sentencing process and are an attempt to correct the existing disparities. While this is a step in the right direction, these reminders need to be included in all sentencing guidelines to remind judges and magistrates about the disparities that currently exist and the role they can play in reducing them. It is not enough that they be attached to a few sentencing guidelines when there is evidence that disparities exist along a broader range of offences.

There are also research avenues that can help improve quantitative studies. Sensitivity analysis can provide an adequate solution to the problem of unobserved case characteristics affecting research on ethnic disparities. Such techniques have been successfully implemented in other fields like epidemiology, for decades (Cornfield et al., 1959; VanderWeele & Ding, 2017) and have been recently advocated in criminal justice contexts too (Neil & Winship, 2019). In essence, sensitivity analysis allows us to estimate the uncertainty associated with the problem of unobserved case characteristics. This is done by considering the minimum required association: (i) between offender ethnicity and sentence severity; and (ii) between the unobserved case characteristics (e.g., offence seriousness) and sentence severity, to render the observed association between offender ethnicity and sentence severity (i.e., the reported ethnic disparity) non-significant.

One of the most crucial ways we can combat discrimination in the courts is by undertaking qualitative research that is able to highlight the different factors that affect sentencing decisions. Through court observations and interviews with different practitioners, we can find out at what stage unobserved variables influence sentencing, how they do so and whether they interact with other variables. Only when we understand how sentencing disparities come about will we be able to combat these disparities and provide tailored policy responses to do so. Qualitative research should also be conducted with defendants and ex-offenders. By bringing to the forefront the lived experiences of Black and ethnic minority people, studies that examine discrimination and racism will become more progressive and will be able to provide solutions that are moulded to the needs of these communities.

## 5 | CONCLUSION

In this article we have argued that the evidence of discrimination in sentencing is undeniable and that we need to refocus our sentencing efforts in order to discover and comprehend the underlying mechanisms that result in sentencing disparities. To do so we suggest using qualitative methods such as interviews with criminal justice practitioners that are able to highlight how disparities come about; this is precisely what we did in this article. The interviews with criminal law barristers revealed that the judge's interpretation of the sentencing guidelines, prejudice and unconscious bias via the inclusion of mitigating and aggravating factors and indirect discrimination via social deprivation and over-policing can give rise to sentencing disparities. We therefore proposed that one of the ways in which we can reduce disparities in sentencing and combat discrimination in the courts is by explicitly listing social deprivation as a mitigating factor in the sentencing guidelines. Another important policy solution identified was increasing judicial diversity. Indispensable to combatting discrimination in the courts is the need to examine discrimination through a qualitative lens. Only when we understand how discrimination occurs and comprehend the underlying mechanisms that give rise to it, will we be able to provide tailor-made responses and prevent it from occurring in the future.

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### ENDNOTES

- <sup>1</sup>Shute, Hood & Seemungal (2005) conducted a qualitative study with defendants that revealed that one in five Black defendants and one in eight Asian defendants who appeared in the Crown Court perceived their treatment to have been influenced by racial bias.
- <sup>2</sup>Barristers are lawyers that specialise in courtroom advocacy, defending and representing clients in courts.
- <sup>3</sup>Interview data were initially gathered for Ana Veiga's MPhil dissertation for Cambridge University: 'Race and sentencing: a systematic review and exploration of discrimination in the courts'.
- <sup>4</sup>Coding of the interviews was conducted by Ana Veiga as part of her dissertation.
- <sup>5</sup>This is something recognised by the Sentencing Council in their *Drug offences guideline: response document*, wherein it is recognised that defendants' cultural norms affect the perception of remorse which in and of itself is very subjective: see: <https://www.sentencingcouncil.org.uk/wp-content/uploads/Drugs-consultation-response-document-web.pdf> [Accessed 9 July 2022].
- <sup>6</sup>See: <https://www.independent.co.uk/voices/lavinia-woodward-stab-boyfriend-no-jail-prison-sentence-oxford-medical-student-too-clever-talent-judge-a7967971.html> [Accessed 9 July 2022].
- <sup>7</sup>Rachel is referring here to higher sentences.
- <sup>8</sup>A 'significant' or 'lesser' role has to do with the culpability demonstrated by the offenders' role. Among the characteristics listed by the drug sentencing guidelines for a 'significant role' are: 'an operational or management function within a chain' and 'involves others in the operation whether by pressure, influence, intimidation or reward'. The guidelines explain that these characteristics are not exhaustive. The characteristics listed for a 'lesser role' include: 'performs a limited function under direction' and 'engaged by pressure, coercion, intimidation'. See Step One: Determining the offence category in the drug sentencing guidelines for more detailed information.
- <sup>9</sup>Although we only included the sources of indirect discrimination identified by the barristers – remand and disproportionate policing – and supported these with evidence from the literature, it is important to recognise that many have demonstrated that guilty plea is the main source of indirect discrimination (see Ashworth, 1998; Tonry, 2009).
- <sup>10</sup>See: <https://www.theguardian.com/society/2022/mar/17/proportion-of-remand-prisoners-who-are-minority-et-hnic-rises-17-in-six-years> [Accessed 10 July 2022].
- <sup>11</sup>See: <https://www.libertyhumanrights.org.uk/fundamental/stop-and-search/> [Accessed 11 July 2022].

- <sup>12</sup>See: <https://www.theguardian.com/world/2021/sep/28/court-of-appeal-to-review-sentence-of-white-supremacist-told-to-read-classics> [Accessed 11 July 2022].
- <sup>13</sup>See: [https://england.shelter.org.uk/media/press\\_release/black\\_people\\_are\\_more\\_than\\_three\\_times\\_as\\_likely\\_to\\_experience\\_homelessness](https://england.shelter.org.uk/media/press_release/black_people_are_more_than_three_times_as_likely_to_experience_homelessness) [Accessed 11 July 2022].
- <sup>14</sup>Travellers, oftentimes referred to as Roma people in other countries, are a distinct ethnic group who lead a nomadic lifestyle.

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