
ETHNICITY AND CUSTODIAL SENTENCING

A review of the trends, 2009-2019

Julian V. Roberts and Jonathan Bild

EXECUTIVE SUMMARY

- Over the past 30 years a number of official reports have demonstrated differences in overall sentencing outcomes between different ethnic groups. However, many of these reports do not control for legally-relevant case characteristics, such as previous criminal records and whether or not a guilty plea has been entered, which will have an impact on custody rates and sentence lengths. Ensuring that all legally-relevant factors have been taken into account when seeking to draw comparisons about outcomes between different ethnic groups is a key challenge for research in this area.
- In common with previous editions, the most recent *Statistics on Race and the Criminal Justice System* publication from the Ministry of Justice (published in 2019 using data from 2018) demonstrates that, for indictable offences, non-White ethnic groups had a higher custody rate and a longer average custodial sentence length.
- All published reports present the data on custody rates and on average custodial sentence lengths separately. In this report, we combine these two measures to form a new measure of punitiveness for indictable offences: the 'Expected Custodial Sentence'. This measure provides a more comprehensive measure of the use of imprisonment.
- Whilst the Expected Custodial Sentence increased for all ethnic groups throughout the period 2009-2019, the figure for White offenders is consistently lower than for other ethnic groups. In 2019, the Expected Custodial Sentence for an indictable offence ranged between 6.6 months for a White offender and 10.2 months for an Asian offender. However, the overall Expected Custodial Sentence figure masks considerable variation across offence categories, with the greatest divergence evident for violent offences against the person.
- Despite the accumulated research, our knowledge of differential sentencing across ethnic groups remains imperfect. Many gaps exist in terms of the nature and extent of the problem. In particular, very little is known about any variations in outcomes in the magistrates' courts. Understanding the magnitude and nature of differential sentencing across all courts is vital to devising appropriate remedies.

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1. INTRODUCTION

Are sentencing outcomes different for ethnic minority defendants? Which ethnic groups attract the harshest sentences? Over the past 30 years a number of official reports have addressed the role of race and ethnicity in criminal justice decision-making. Although several studies have focused on sentencing, to date, no review or synthesis of these studies has been conducted. Many questions remain unanswered. This report explores sentencing patterns for different offender profiles. The focus is upon trends emerging from court statistics over the period 2009-2019. Two key issues emerge: *ethnic disproportionality* in criminal justice statistics and *differential sentencing outcomes*. Disproportionality is expressed by comparing the percentage of Black, Asian and Minority Ethnic (BAME) individuals appearing at stages of the criminal justice system (e.g. arrest; charge; custodial admissions) to their proportion in the general population. Differential sentencing compares the outcomes for categories of offender. This report concentrates on sentencing outcomes, and more specifically, on custody rates and prison sentence lengths.

Overview of Report

This report first discusses methodological issues, including the ways of classifying individuals according to their ethnic backgrounds. Then it summarises sentencing patterns using two indicators of sentence severity: rates of immediate imprisonment ('custody rates') and average custodial sentence lengths ('ACSL's). Official reports generally present these measures separately, and conflicting findings sometimes emerge: groups with high custody rates do not necessarily attract the longest sentence lengths. In order to provide a more comprehensive portrait of the relative use of imprisonment we employ an Imprisonment Index defined as the Expected Custodial Sentence (ECS) which combines the probability of imprisonment with the average custodial sentence length. This report examines sentencing patterns for adults (aged 18 or over), although research has documented that differences emerge for children as well (Ministry of Justice 2020; Bhamra and Uhrig 2017). Finally, it provides a summary of key findings and identifies research priorities.*

2. ETHNICITY CLASSIFICATIONS AND METHODOLOGICAL CHALLENGES

Under Section 95 of the Criminal Justice Act 1991, the Ministry of Justice has a duty to publish statistics documenting any differences between participants at all stages of the criminal justice system. As a result, the Government publishes a biennial report '*Statistics on Race and the Criminal Justice System*'. The most recent of these reports was published in 2019 using data from 2018. This

* The authors are grateful to the peer reviewers for comments on earlier drafts of this paper.

report documents racial/ethnic differences throughout the criminal justice system, and suggests that disproportionality is highest at the early stages of the criminal process. As an illustration, BAME adults accounted for just over 40% of stop and search incidents, but only approximately one fifth of custodial sentences (Ministry of Justice 2019, p. 2).

The statistics presented in these biennial reports are uncorrected for a range of legally-relevant case characteristics. These factors may explain different custody rates or sentence lengths. For example, if visible minority offenders have more extensive criminal histories, or are less likely to plead guilty, this may help account for higher custody rates.¹ Comparisons of raw rates uncorrected for such variables can therefore be misleading. In recognition of this limitation, these reports caution against drawing direct inferences of discrimination: ‘No causative links can be drawn from these summary statistics... Differences observed may indicate areas worthy of further investigation, but should not be taken as evidence of bias or as direct effects of ethnicity’ (Ministry of Justice 2019, p. 2).²

Ensuring that groups are equated on all legally-relevant factors affecting sentence is not easy. Some variables may not be captured by data forms, or they may be too subjective to measure and record. Remorse is one of several such factors. Research by the Sentencing Council (2012) has demonstrated that remorse may make the difference between the offender receiving a community-based sanction rather than immediate imprisonment.³ Yet court files do not record whether the offender appearing for sentencing was remorseful. The consequence is that ‘raw’ comparisons of custody rates, or average prison sentence lengths uncorrected for key sentencing factors must be treated with caution.

Classifications of Ethnicity

In order to determine whether differential sentencing exists, researchers need a reliable and valid means of categorising people being sentenced. Some studies employ classifications of ethnicity made by police officers or court administrators; others use self-reported ethnicity. The two approaches may yield different classifications: individuals may differ in their classifications of others, and people may hold multiple ethnic identities. Self-reported and external classifications of ethnicity may diverge (although the extent to which this occurs is unknown). For this reason, several publications warn of reliability issues regarding ethnic classifications.⁴

Variability in classification is therefore a potential source of error in studies comparing sentencing outcomes for different ethnic groups.⁵ Differences in methods of classification also complicate

¹ Research has demonstrated both effects: BAME defendants are less likely to plead guilty, and as a group more likely to have a more serious criminal history.

² For further discussion, see Raynor and Lewis (2011).

³ See also Maslen and Roberts (2013).

⁴ For example, the author of a Ministry of Justice report warns that ethnicity classifications ‘may not always be reliable’ (Hopkins 2015, p. 2).

⁵ It also complicates computations of disproportionality at different stages of the criminal justice process. For example, statistics for individuals cautioned use a classification derived from police officer identification, while court and prison statistics tend to rely upon self-reported ethnicity.

comparisons between different studies. The biennial Ministry of Justice publications use both sources of ethnicity data, officer-identified and self-identified ethnicity, but where the data are available (and of sufficient coverage), the reports employ self-identified ethnicity. Ethnicity is based upon five categories: White, Black, Asian, Mixed, and Chinese and other. However, in 2018, ethnicity was missing for 25% of indictable offences (Ministry of Justice 2019, p. 66).

The ethnicity categories used in the Court Proceedings database (and which form the BAME designation) are neither exhaustive nor clearly defined. Moreover, other categorisations may be disproportionately represented in criminal justice statistics, or may attract different sentencing outcomes. These include groups such as Muslims or other classifications such as ‘Gypsies, Roma and Travellers’ (GRT).⁶ Nationality is also associated with differential outcomes: non-UK nationals have a higher likelihood of receiving an immediate prison sentence (Hopkins 2014). Moreover, people may occupy multiple categories, and this multiplicity of identities may attract differential sentencing. Finally, just as the BAME designation includes several distinct ethnicities, aggregating offenders under the label ‘White’ may also mask differences in sentencing outcomes between groups falling within this heading. This report generally follows the ethnicity categories employed in the research reviewed. We also use the BAME⁷ designation, as most of the biennial Ministry of Justice reports note that ‘it is sometimes necessary or appropriate to consider the minority ethnic groups together’ (Ministry of Justice 2019, p. 7).⁸

Population Statistics by Ethnic Background

Disproportionality analyses require a breakdown of the general population in terms of ethnicity. In official reports, the term ‘ethnic minority’ connotes all people except those in the ‘White’ ethnic group in Great Britain, and all those apart from the ‘White’ and ‘Irish Traveller’ categories in Northern Ireland. In 2019, approximately 14.4% of the UK population came from an ethnic minority background (Uberoi and Lees 2020). The most recent Census data derive from 2011 and break down as follows: White: 87%; Black: 3%; Asian: 6%; Mixed: 2%; Chinese and Other: 2%. The Annual Population Survey provides the most up to date estimates of the proportions of the general population belonging to different ethnic groups in the UK. The 2019 administration of the Annual Population Survey generated the following distribution: White: 85.6%; Asian/Asian British: 7.3%; Black/African/Caribbean/Black British: 3.4%; Mixed/multiple ethnic groups: 1.7%; Other ethnic groups: 1.8% (House of Commons Library 2021, p. 28).

These breakdowns may be roughly compared to the latest distribution of sentenced offenders across all courts in 2018: White: 80%; Black: 10%; Asian: 6%; Mixed ethnic groups: 3%; Chinese and

⁶ A recent report notes that despite accounting for only 0.1% of the general population, it is estimated that this group accounts for about 5% of the prison population (Ministry of Justice 2020, p. 13).

⁷ Unlike previous reports, the most recent *Statistics on Race and the Criminal Justice System* report does not employ the ‘BAME’ acronym. However, since other recent Ministry of Justice documents such as the response to the Lammy Review, and indeed the Lammy Review report itself uses the term, we also employ it in this document. One plausible alternative designation is ‘visible minority’.

⁸ A recent Ministry of Justice report elaborates: ‘We understand that this term leaves little room for individuality or distinction and are aware of the limitations of the term’ (Ministry of Justice 2020, p. 5). The same report notes that some ethnic minority groups such as Gypsy, Roma and Traveller (GRT) have been excluded.

Other 1% (Ministry of Justice 2019, p. 28). Finally, with respect to data sources, most of the research is based on court data, although some academic publications use alternate data sources and methodologies (see, for example, Pina-Sánchez et al. 2019).

Academic Research and a Note on Methodology

Early academic research published by Roger Hood found significant race-based sentencing differentials in Crown Court centres in the West Midlands. Overall, the proportion of Black offenders sentenced to custody in these court centres (in 1989) was just over 8% higher than for White offenders (Hood 1992, pp. 194-195). Differences between group custody rates varied greatly across courts. For example, the custody rate for Black offenders was 17% higher in the Dudley and Warwick courts but lower than the rate for White offenders in Coventry.⁹ In the almost 30 years since that landmark study was published, additional research has accumulated, using different methodologies. The analyses have generated a complex pattern of findings.

3. SENTENCING TRENDS: THE USE OF IMMEDIATE IMPRISONMENT

Ministry of Justice Data on Custody Rates and Custodial Sentence Lengths

Since they first appeared, the biennial Ministry of Justice reports have repeatedly documented higher custody rates for BAME offenders. Our analyses focus on trends for the past decade (2009-2019) as data published prior to 2009 adopted a slightly different methodology and used 'ethnic appearance' (rather than self-reports) as the source of ethnic classifications.

Custody Rates

The most recent *Statistics on Race and the Criminal Justice System* report reveals that across all offences, custody rates for indictable offences were highest for 'Chinese or Other' and Asian (both categories 37%), followed by Black (35%), Mixed (34%) and then White offenders (33%) (Ministry of Justice 2019, p. 28). A decade earlier these reports used slightly different categories (White; Black; Asian; Other; Unknown), thus preventing direct comparisons over time. However, ethnicity-based custody rate differences may have diminished over the period. In 2008, just under 29% of White adult offenders convicted of an indictable offence were sentenced to immediate custody while BAME groups ranged from 42% to 52% (Ministry of Justice 2010, p. 38). In contrast, in our analysis using the Ministry of Justice's 'Outcomes by offence data tool',¹⁰ in 2019 the White offender custody

⁹ Custody rates were 65% vs 48% in the Dudley courts (Hood 1992, p. 195).

¹⁰ Available at: <https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2019>

rate for indictable offences was 34% while the other ethnic groups ranged between 34% and 37% (see Table 1 below).

Average Custodial Sentence Lengths (ACSL)

The most recent *Statistics on Race and the Criminal Justice System* report also found that the ACSL by ethnicity in 2018 for indictable offences was as follows: Asian (29.1 months), Black (28.1 months), Chinese and other (23.3 months), Mixed (22.2 months) and White (18.4 months) (Ministry of Justice 2019, p. 28). This report also noted that, in contrast to the custody rate trends, the disparity in average custodial sentence length for males between ethnic groups has increased: In 2016, the ACSL for Asian males was 34% longer than White males, a disparity which had increased to 54% by 2018 (Ministry of Justice 2019, p. 46).

Finally, the report suggests that the differences in average sentence lengths ‘can be attributed to several factors, including the varying offence mix across ethnic groups’ (Ministry of Justice 2019, p. 34). These trends require further research to determine the causes of the differential outcomes. Are the differences due to direct/indirect discrimination or can they be explained by legally-relevant factors not captured in the analyses?

Some findings are difficult to explain. Asian offenders attracted the highest custody rates *and* the longest average prison sentences. However, they also had the least serious criminal histories *and* were least likely to be re-convicted.¹¹ Since the number of prior offences and the likelihood of further offending are important determinants of whether the offender is imprisoned, the higher custody rates (and longer prison sentences) for Asian offenders are puzzling. This is one of several findings which require more detailed and granular research in order to determine the cause of differences in custody rates and sentence lengths.

Variation in Ethnic Disparities Across Offences in 2019

Racial/ethnic sentencing differentials vary across offences. For example, while ‘Chinese and other’ offenders were associated with the highest overall custody rate, our analysis using the ‘Outcomes by offence data tool’ found that their custody rate for weapons offences was the *lowest* of all groups. This finding has emerged repeatedly in recent years. Although Black offenders had a higher custody rate than White offenders overall, their custody rate for sexual offences was the lowest of all groups. Finally, the data show that while BAME offenders received an average of 27 months in custody (compared to 20 months for White offenders), the difference was greater for some offences. BAME offenders received an average of 37 months imprisonment for violence against the person offences, compared to 20 months for White offenders.¹²

¹¹ The proven re-offending rate for Asian offenders in 2018 was 24% compared to 31% for White offenders and 33% for Black offenders (Ministry of Justice 2019, p. 46). Consistent with this finding, in their review of risk assessments, Raynor and Lewis found that ‘minority ethnic offenders with lower criminogenic needs (i.e., ..who are less likely to continue to offend) have tended to receive the same sentences as higher-risk white majority offenders’ (2011, p. 1366).

¹² Ministry of Justice, Criminal justice statistics quarterly, December 2019, Outcomes by Offence Data Tool.

Historical Trends in Custody Rates, ACSLs, and Expected Custodial Sentences, 2009-2019

Table 1 summarises custody rate trends for indictable offences over the period 2009-2019.¹³ Over the entire period, 'Chinese and other' attracted the highest custody rate (39%), 10% higher than the rate for White offenders. In addition, all visible minority groups had higher levels of imprisonment than the White group. As can be seen in Table 1, the gap in the custody rate between White and other ethnicities has narrowed over the period, largely as a result of the increases in custody rates for White offenders, which rose from 24% in 2009 to 34% in 2019. In contrast, the rate for Black offenders rose only by 3% during this period while the custody rate for 'Chinese and other' declined by 5%.

Table 1: Custody Rates by Ethnic Group, 2009-2019

	White	Black	Asian	Mixed	Chinese & other
2019	34%	36%	36%	36%	37%
2018	34%	38%	39%	37%	39%
2017	34%	35%	37%	35%	37%
2016	32%	34%	36%	34%	35%
2015	30%	33%	35%	31%	37%
2014	28%	32%	33%	31%	38%
2013	28%	32%	33%	31%	39%
2012	27%	34%	34%	31%	42%
2011	27%	34%	33%	31%	40%
2010	25%	32%	32%	27%	41%
2009	24%	33%	31%	27%	42%
Average, 2009-2019	29%	34%	34%	32%	39%

Source: Outcomes by offence data tool, 2019. Adult offenders sentenced for an indictable offence, excluding offenders where the ethnicity is 'not stated'; percentages rounded.

Another way of representing this convergence in custody rates is to compare the difference between White custody rates and the other groups. Using the first 3 years (2009-2011), the average difference between the White custody rate and the highest of the other groups was 16%. In the most recent 3-year period (2017-2019) the average difference was only 4%. Without further analyses it is hard to explain why White offender custody rates increased at a higher rate over this period. One possibility is that there has been a disproportionate increase in offences with a high custody rate and which White offenders account for a high percentage of cases.

Table 2 presents trends for average custodial sentence lengths for indictable offences during the same period and reveals a different pattern. Over the entire period, Black offenders are associated

¹³ The web-based Ministry of Justice court statistics do not appear to be available before 2009.

with the longest ACSL (24.6 months), followed by Asian offenders (24.3 months). Both means are well above the average of 17 months for White offenders. In fact, the ACSL for White offenders has been consistently lower than all other ethnic profiles over the entire period. However, unlike the custody rate trends, the gap between ACSLs has not declined over time. In fact, it has increased. The average ACSL for Asians offenders in the most distant 3-year period (2009-2011) was 36% longer than the average ACSL for White offenders. In the most recent period (2017-2019), the Asian ACSL was 52% longer than the White offender average.

Table 2: Average Custodial Sentence Length (in Months) by Ethnic Group, 2009-2019

	White	Black	Asian	Mixed	Chinese & other
2019	19.3	28.1	28.2	23.6	23.1
2018	18.3	28.5	29.2	22.2	23.2
2017	18.3	25.8	27.3	22.1	21.1
2016	17.9	24.3	24.9	20.7	23.3
2015	17.8	25.5	25.0	19.9	21.6
2014	17.0	24.9	25.1	20.1	19.3
2013	17.0	24.5	23.1	19.6	18.7
2012	16.0	23.8	22.6	20.1	17.3
2011	15.8	23.3	22.2	18.2	17.1
2010	15.1	21.7	20.2	17.6	16.6
2009	14.8	20.6	19.7	16.5	16.8
2009-2019 Average	17.0	24.6	24.3	20.1	19.8

Source: Outcomes by offence data tool, 2019. Adult offenders sentenced for an indictable offence, excluding offenders where the ethnicity is 'not stated'.

A Better Measure of Imprisonment Use: The Expected Custodial Sentence

All published reports (including the Lammy Review) present separate analyses for Custody Rates and ACSLs. This approach makes it harder to determine which ethnic group is associated with the greatest use of imprisonment as a sanction. For example, in the most recent report, the category 'Chinese and other' had the highest custody rate, but amongst the shortest average prison sentence. A more comprehensive idea of the association between ethnicity and imprisonment can be gained by combining the two measures into an '**Expected Custodial Sentence**' for indictable offences. For example, for White offenders in 2019, the Expected Custodial Sentence (ECS) was 6.6 months.¹⁴ The ECS may also be considered an index of imprisonment as it captures both components of a custodial sentence. The ECS makes the imprisonment differences between groups clearer. Table 3 provides

¹⁴ Probability of an immediate custodial sentence for an indictable offence = .34 X average custodial sentence of 19.3 months = 6.6 months.

the ranking of ethnicity categories from 2019, from which it can be seen that when both measures are combined, Asian and Black offenders attract the highest levels of imprisonment.

Table 3: Expected Custodial Sentence (in Months) by Ethnic Group, 2019

Ethnicity	Expected Custodial Sentence
Asian	10.2
Black	10.1
Chinese and other	8.5
Mixed ethnicity	8.5
White	6.6

Notes: Based on 2019 court statistics; ECS = probability of immediate custody X ACSL.

Although Asian offenders had the highest use of imprisonment in 2019, a single year may not be representative of longer-term trends. In fact, there has been considerable shifting over the past decade. Table 4 summarises trends using the ECS as a measure of the use of immediate imprisonment.

Table 4: Expected Custodial Sentence (in Months) by Ethnic Group, 2009-2019

	White	Black	Asian	Mixed	Chinese & other
2019	6.6	10.1	10.2	8.5	8.5
2018	6.2	10.8	11.4	8.2	9.0
2017	6.2	9.0	10.1	7.8	7.8
2016	5.4	8.3	8.0	7.0	8.2
2015	5.3	8.4	8.8	6.2	8.0
2014	4.8	8.0	8.3	6.2	7.3
2013	4.8	7.8	7.6	6.1	7.3
2012	4.3	8.1	7.7	6.2	7.3
2011	4.3	7.9	7.3	5.6	6.8
2010	3.8	6.9	6.5	4.8	6.8
2009	3.6	6.8	6.1	4.5	7.1
2009-2019 Average	5.0	9.2	8.4	6.5	7.6

Data source: Outcomes by offence data tool, 2019; numbers rounded. ECS = probability of immediate custody X ACSL.

As demonstrated in Table 4, Black offenders were associated with the most severe outcome, with an ECS almost double that of White offenders (9.2 vs 5.0). The average Expected Custodial Sentence

for White offenders in the most recent three years (2017-2019) was 6.3. This compares to 10.0 for Black offenders, 10.6 for Asian offenders and 8.4 for the category 'Chinese and other'. The imprisonment gap between White and Black categories appears to have declined over the decade. In the first three-year period covered by the analysis (2009-2011) the Black offender ECS was 85% higher than the White figure. In contrast, the ECS for Black offenders was 54% higher in the most recent period (2017-2019). The convergence in the Expected Custodial sentences reflects a sharper increase in the use of imprisonment for White offenders over the period (as noted in relation to the custody rate trends).

Finally, the ESC masks considerable variation across offence categories, as seen in Table 5. For violent offences against the person, the highest visible minority ECS is almost 3 times as great as the White offender value (20.0 vs 7.4). Put another way, the White group score is 37% of the Black offender group score. For other offences such as public order offences, the group scores are far more uniform.

Table 5: Expected Custodial Sentence (in Months) by Ethnic Group, Principal Offences 2019

	White	Black	Asian	Mixed	Chinese & other
Violent Offences against the person	7.4	20.0	14.7	14.0	16.1
Robbery*	49.4	46.6	54.6	46.5	48.6
Theft	3.6	4.4	3.8	4.2	3.6
Drug Offences	8.6	10.2	11.1	9.5	10.9
Possession of weapons offences	4.3	7.0	5.4	6.8	3.5
Public Order Offences	2.4	2.7	2.3	2.7	2.0

* very small numbers for certain ethnic categories. Data source: Outcomes by offence data tool, 2019. ECS = probability of immediate custody X ACSL.

Again, however, the raw custody rates and ACSLs (which determine the ECS) are uncorrected for the mix of offences being sentenced by different groups.¹⁵ In order to take the nature and seriousness of the offence into account we turn to several individual studies published by the Ministry of Justice in recent years.

Other Research Publications and Data Sources

Other Ministry of Justice Research

Several ‘one off’ studies published by the Ministry of Justice employ additional statistical analyses to control for case characteristics that influence sentencing outcomes and which may contribute to the differences between groups documented in the biennial Ministry of Justice reports. These studies have used different data sources, time periods, and ethnicity classifications, and these differences may affect the conclusions drawn.

Hopkins analysed 2011 data from the Police National Computer (PNC). Police or court staff classified cases to one of five categories (White; Black; Asian; Other; Unknown). The last four categories formed the BAME group. This research found higher percentages of BAME offenders were sentenced to custody¹⁶ compared to White offenders. The custody rate for BAME females was 11.4%, compared to 7.6% for White female offenders; custody rates for males were, respectively, 20.7% and 16.2% (Hopkins 2015, p. 2). The report describes these differences as ‘small but statistically significant’ (Hopkins 2015, p. 1).

Overall, whilst holding other factors constant, coming from a BAME background increased the odds of being sentenced to prison by 39% (compared to White offenders). The ethnicity-based differentials were greater for male than female offenders. BAME male offenders had a 40% higher odds of imprisonment than White males. Female BAME offenders, however, were associated with 30% higher odds of custody than White females (Hopkins 2015, p. 6). The report concludes that: ‘police-recorded ethnicity was independently associated with being sentenced to prison when offence group, criminal record, and other characteristics were held constant, although the effect was small. BAME offenders (particularly male BAME offenders) were more likely to be sentenced to prison than White offenders... under similar criminal circumstances’ (Hopkins 2015, p. 7). Limitations remain, however, as the report acknowledges that many factors were omitted (including the offender’s plea) and it called for further research using more factors to enable ‘a more accurate estimation of the ‘ethnicity effect’ on imprisonment’ (Hopkins 2015, p. 7).

A subsequent report analysed Crown Court data from 2015 having controlled for more relevant case characteristics. Hopkins et al. found that offenders who self-reported as Asian or Black had a higher

¹⁵ The number of offences being sentenced may also play a role, if there are variations across ethnicities. In almost half of all cases the offender is sentenced for several offences. In addition, offenders sometimes ask courts to take other, unprosecuted, offences into account at sentencing. Multiple count cases attract longer and/or more severe penalties than single convictions. Some ethnic groups may be more likely to be sentenced for multiple crimes and, if so, this would affect custody rates and average sentence lengths.

¹⁶ The report does not specify that it is restricted to immediate prison sentences, but we assume that suspended sentences of imprisonment are excluded. The differential use of suspended sentence orders is clearly another research priority (see later sections of this report).

likelihood of imprisonment (relative to White offenders); the authors described this difference as ‘statistically significant and medium sized’ (2017, p. 5). Offenders who self-classified as Chinese had an even higher likelihood of being sentenced to imprisonment. The report notes that:

‘Self-reporting as Asian, Black, or Chinese or other was associated with an increased odds of imprisonment compared with the White category. Self-reporting as Asian or Black was associated with a 50-55% increase, whilst self-reporting as Chinese or other saw an 80% increase in the odds of imprisonment rates. Each of these effects was statistically significant and medium sized’ (Hopkins et al. 2017, p. 5).

Some of the differences in custody rates for Black and Asian offenders and White offenders were due to different guilty plea rates – BAME defendants were less likely to plead guilty and therefore less likely to benefit from plea-based sentence reductions.¹⁷ However, the discrepancies remained statistically significant even after controlling for plea.

This research also examined three offence categories. For offences classified as ‘acquisitive violence’ or ‘sexual offences’, custody rates were comparable across ethnic groups. For drugs offences, however, significant differences emerged. The odds of receiving imprisonment for BAME offenders were more than two times those of White offenders. However, the report cautions that ‘variations in the rates of imprisonment could potentially arise from variations in the mix of offences’ (Hopkins et al. 2017, p. 9).

Another recent Ministry of Justice report (Uhrig 2016) used a different methodology to identify whether disproportionality existed at various stages of the criminal justice system, including sentencing. One advantage of this study is that it compared ethnic groups sentenced in the magistrates’ courts and the Crown Court using self-reported ethnicity.¹⁸ The aim was to identify the stages in the criminal justice system where ethnic disproportionality increased or decreased for BAME individuals. This analysis replicates similar analyses reported in the US, and was recommended by the Lammy Review. The Relative Rate Index compares groups and provides information about the difference between groups at stages of the criminal justice system.

Uhrig reports that in the magistrates’ courts, Black males were ‘about 20% less likely than white men to be sentenced to custody’ but, in the Crown Court, Black men were ‘about 12% *more likely* than white men to receive a custodial sentence’ (2016, p. 19). The author described this effect as ‘small, but statistically significant’ (Uhrig 2016, p. 19). Another divergence from the Hopkins research was that the ethnicity-based differentials were greater for female offenders. For women, the differential in the Crown Court was even more striking: Black women were about 25% more likely than White women to be sentenced to custody.

¹⁷ This finding has emerged repeatedly from research since the Hood study of data from 1989.

¹⁸ The categories in this research were: (1) White; (2) Black; (3) Asian; (4) Mixed ethnic; (5) Other ethnic, including Chinese.

Consistent with earlier research, this study also uncovered variation across offences. No ethnicity-based differences emerged for robbery offences. For sexual offences, however, Black men were more likely, and Asian men less likely than White males to receive a custodial sentence. For drug offences, Black and Asian offenders were about 1.4 times more likely than White offenders to receive a custodial sentence. Black women were about 2.3 times more likely to receive a custodial sentence compared to White women. Uhrig concluded that: ‘disproportionality in prison for BAME men and Black women convicted of drugs offences can be traced by back to a combination of disproportionate arrest and disproportionate custodial sentencing at the Crown Court’ (2016, p. 22).

Summary of Trends from Ministry of Justice Research

Although the Ministry of Justice research studies have controlled for the effects of many variables affecting sentencing (such as plea) they are still unable to account for all relevant factors. As the Lammy Review noted, these studies ‘could not account for the impact of aggravating and mitigating factors, or for the possibility that BAME offenders may have been convicted of more serious drugs offences than their White counterparts, but it was able to take account of sex, ethnicity, age, previous criminal history and the plea decisions’ (2017, p. 33).

Sentencing Council Research: Drug Offences

Research published by the Sentencing Council in 2019 overcame some of the limitations of previous research. Isaac (2019) drew upon the Sentencing Council’s *Crown Court Sentencing Survey* (CCSS) in which sentencers identified the principal factors that they had taken into account at sentencing. The advantage of this unique data source¹⁹ over the PNC or courts data is two-fold.

First, the data are provided by the sentencer directly, and not simply coded by a researcher or administrator. As a result, the information is more accurate. For example, when researchers code an offender’s previous convictions there is no way of knowing how many (if any) were actually taken into account at sentencing.²⁰ In the CCSS, the sentencer records the number of prior offences actually taken into account at sentencing. Second, the CCSS captures information which is unavailable from the court files, but which may have had an important influence on the sentence imposed. These include factors reflecting personal mitigation, such as remorse and whether the offender was a caregiver. As noted earlier, these and other offender-related variables are not recorded in court statistics.²¹ Isaac was thus able to control for all mitigating and aggravating factors taken into account by the court.²² Since the Sentencing Council discontinued this survey in 2015, the data analysed are restricted to the Crown Court during the period 2012-2015.

¹⁹ For discussion of the limitations of this survey, see Roberts and Hough (2015, p. 8) and, more generally on the use of sentencing data, see Dhimi and Belton (2015).

²⁰ Many previous convictions will have no aggravating effect on sentence because they were too old, too trivial or insufficiently related to the current offence. See Roberts and Pina-Sánchez (2014).

²¹ These factors include many aspects of the offence as well as the offender’s personal circumstances. For example, whether the offence was planned or spontaneous or whether the offender had good character.

²² That is, all the guideline factors noted on the CCSS form. The sentence may have been affected by sentencing factors not specified in the guideline and which would not have been recorded by the form.

For the drugs offences studied,²³ an offender's ethnicity²⁴ was associated with a statistically significant increase in the likelihood of receiving an immediate prison sentence, after controlling for 'many (but not all) of the main factors that sentencers are required to take into account when sentencing these three specific offences' (Isaac 2019, p. 1). The analysis showed that the odds of a Black offender receiving an immediate custodial sentence were 40% higher than for a White offender. The ethnic disparities documented in the Sentencing Council's study were smaller than those found in the Ministry of Justice research (see above), reflecting, presumably, the larger number of case characteristics included.

No differences emerged between the lengths of prison sentences imposed on Black offenders compared to White offenders but Asian offenders received slightly longer prison sentences (4% longer) than White offenders (Isaac 2019, p. 19). This difference was described as 'small'²⁵ but was statistically significant. Finally, despite this being the most comprehensive analysis to date (in the sense of the case characteristics controlled for), the report states that 'the results of this analysis should not be regarded as conclusive' (Isaac 2019, p. 4).

4. SUMMARY AND RESEARCH PRIORITIES

Despite the accumulated research, our knowledge of differential sentencing across ethnic groups remains imperfect.²⁶ Many gaps exist in terms of the nature and extent of the problem. That said, we draw the following preliminary conclusions from the studies published to date.

* Research on sentencing outcomes has used both third-party and self-reported ethnicity, although the most common approach uses self-identification. While differences in the manner of classification may affect statistical patterns, the general finding that BAME groups are associated with a greater use of imprisonment remains unaffected.

* While visible minority offenders consistently attract higher custody rates than White offenders, the ordering of different groups varies from study to study. The most recent biennial Ministry of Justice report found that the categories 'Chinese and other' and 'Asian' attracted the highest custody rate (averaged over all offences).

²³ The analyses included sentences imposed in the Crown Court for the offences of supply, possession with intent to supply, and conspiracy to supply a controlled drug of classes A and B.

²⁴ Cases were assigned to ethnicity categories by a police officer or an administrator and were 'based on the visual appearance of the offender' (Isaac 2019, p. 7).

²⁵ The 4% difference equates to approximately one additional month on the length of sentence (Isaac 2019, pp. 3-4).

²⁶ This said, it is worth noting that as a result of the duty under section 95 of the Criminal Justice Act 1991, much more is known about sentencing of minority defendants in England and Wales than most other jurisdictions. Few countries routinely collect and publish sentencing statistics broken down by the race or ethnicity of the offender.

- * Although group-based differences in custody rates and custodial sentence lengths are relatively modest, they are consistently statistically significant.
- * To date, research has focused on two measures of imprisonment: custody rates and average custodial sentence lengths. There is long-standing evidence of ethnicity-based differences using both measures.
- * An 'Expected Custodial Sentence' which combines both measures reveals that all BAME groups are associated with higher use of custody as a sanction, with Asian and then Black ethnic profiles attracting the highest imprisonment scores in 2019. Over the period 2009-2019, Black offenders attracted the most punitive imprisonment levels.
- * The differences between ethnic groups are striking for some offences, more modest for others, and absent for many categories of offending. Ethnicity-based differences have emerged most consistently and strongly for drug offences. This is the only category of offending that has been explored using the most detailed (yet time-limited) sentencing database (the Sentencing Council's Crown Court Sentencing Survey).
- * Most studies published to date have been restricted to indictable offences in the Crown Court. Little is known about ethnicity-related sentencing differentials in the magistrates' courts.²⁷
- * Since the research has examined only custody rates and average custodial sentences, no conclusions may be drawn about ethnicity differentials with respect to the other principal sanctions, including fines, suspended sentence orders and community orders.

Research Priorities

Understanding the magnitude and nature of differential sentencing is vital to devising appropriate remedies. Although the biennial Ministry of Justice reports document ethnicity-based differences, these are uncorrected for a range of factors which affect sentencing outcomes. The annual court statistics provide a useful historical record, but additional, multivariate analyses which control for all legally-relevant factors are needed. The Sentencing Council's CCSS which has been used to explore sentencing outcomes for drug offences should be used to explore sentencing outcomes for other offences. This survey has the advantages noted earlier of generating a more accurate portrait of sentencing practices. However, as noted, data collection ceased in 2015, so fresh research is also required. Several research priorities exist.

²⁷ The biennial Ministry of Justice reports covering the period before 2009 provide sentencing outcomes for BAME groups in both the magistrates' courts and the Crown Court.

Magistrates' Courts

It is important to extend the research to encompass the magistrates' courts where the vast majority of offenders are sentenced. As noted, the Ministry of Justice reports discontinued publication of sentencing trends in the magistrates' courts some time ago.

Other Offences

Ethnicity-based sentencing differentials appear greatest for drug offences. Drug offences also have the second highest rate of ethnic minority individuals. Other offences in which BAME defendants are over-represented include robbery, possession of weapons and fraud.

Local Variation

The Ministry of Justice reports summarise sentencing outcomes across England and Wales. Almost nothing is known about differences at the local level. As noted earlier, the Hood research found significant local variation in ethnicity-based differentials. Similarly, earlier reports provided sentencing outcomes for selected areas, revealing differences in the extent of differences.

Other Sanctions and Court Orders

Research is needed to examine any potential ethnicity-based differentials with respect to: the magnitude of fines; the use and duration of suspended sentence orders; use and length of community orders; the number and severity of requirements imposed on offenders serving either a community order or a suspended sentence order; and the use of Out of Court Disposals (OOCs).²⁸

Sources of Information for Courts

The key question is *why* certain ethnic categories are associated with higher custody rates or longer ACSLs. Other questions also arise. Which factors explain these differences, and how many are legally-relevant? In order to answer such questions, researchers will need to explore a range of hypotheses. We have already noted that BAME defendants are less likely to plead guilty. This effect contributes to, but does not fully explain their higher Expected Custodial Sentence score. Another explanation for differential sentencing outcomes could involve Pre-Sentence Reports (PSRs). These reports provide information about the offence and the offender and courts consider the recommendations contained in PSRs when determining whether to impose a custodial sentence. PSRs can therefore exercise an important influence on sentencing outcomes. Ethnic differences emerge with respect to the relationship between the PSR's sentence recommendation and the sentence imposed by the court. The two sentences (recommended or imposed) were the same in over 90% of cases involving White offenders, but only 61% of Black offenders (Ministry of Justice 2019, p. 32). What explains this discrepancy and what consequences does it have for BAME defendants? In-depth research into the PSR may shed light on the higher use of imprisonment for BAME defendants.

²⁸ The Lammy Review called for the Open Justice Initiative to 'explore whether BAME defendants were equally likely to receive prison sentences and community sentences – or whether they received a particular type of sentence or order more often in comparison with White defendants at the same court' (2017, p. 34).

Qualitative Research

The research reviewed in this report was all quantitative. Qualitative research with defendants and practitioners will be needed to explore aspects of differential sentencing which are not, or cannot be, captured by statistical databases. In addition, the sentencing differentials and trends documented in the various reports should be compared to surveys of offenders and the general public. Research has demonstrated that BAME respondents express less confidence in criminal justice agencies and professionals. To what extent do the lower levels of confidence in sentencing and criminal justice track ethnic differences in sentencing outcomes? Do members of BAME communities express less confidence in the criminal justice system because they perceive it treats BAME defendants more harshly?

5. CONCLUSION

For many years now, rates of immediate imprisonment have been higher for Black and other ethnic minority groups than for White offenders. In order to ensure that the sentencing process treats all offenders equally it is necessary to understand both the magnitude and causes of differential sentencing. This report has demonstrated that while custody rate differences may have declined in recent years, ethnic minority offenders are still associated with more punitive sentencing outcomes – at least with respect to the use and duration of immediate terms of imprisonment. These differences have been documented for decades. Now the challenge to researchers is to determine the causes of any disparities of outcome. As the Lammy Review noted, it is important to produce evidence-based explanations for striking differences in sentencing outcomes in order to allay any fears of bias at sentencing (2017, p. 33). The challenge to the Government, the courts and possibly the Sentencing Council, is to devise appropriate remedies for any disparities which cannot be explained by reference to legitimate sentencing factors. First, however, we need a more complete understanding of the problem.

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