

Racially Determined Case Characteristics: Exploring Disparities in the Use of Sentencing Factors in England and Wales

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There is little understanding of how documented ethnic disparities in sentencing outcomes in England and Wales come to be and, consequently, how to address them. We argue that disparities in sentence outcomes could stem from how cases are constructed. We hypothesize that case characteristics determined through a high degree of judicial discretion and an assessment of the offender have a high risk of being racially determined, and therefore, operate as precursors of ethnic disparities in sentencing. We test this using Crown Court Sentencing Survey and Court Proceedings data. We identify three sentencing factors (remorse, good character and ability to rehabilitate) clearly favouring White offenders. We contextualize their operation and argue that all three should be classified as racially determined and sources of ethnic disparity. We conclude by setting out targeted policy solutions.

KEYWORDS: sentencing, guidelines, disparities, ethnicity, Crown Court

INTRODUCTION

A number of studies have now shown the presence of ethnic disparities in sentencing outcomes in England and Wales (Hopkins 2015; Hopkins *et al.* 2016; Isaac 2020). Such disparities undermine the fundamental principle of equality under the law and damage trust and confidence in both the sentencing process and the criminal justice system more broadly (Tyler 2001; Hough *et al.* 2013). Cognizant of its implications, the Lammy Review (2017: 7) proposed a principle for observed ethnic disparities in the criminal justice system, ‘explain or reform’; that is, if an evidence-based explanation for apparent disparities between ethnic groups cannot be provided, then reforms should be introduced to address those disparities.

To date, however, neither explain nor reform has been pursued sufficiently. We believe this is, in a large part, due to the lack of understanding as to where disparities are stemming from. Most of the literature on sentencing disparities focuses on sentencing outcomes, generally disregarding other key judicial decisions that impact the final sentence imposed. Such absence of an adequate understanding

of the mechanisms behind ethnic disparities makes it difficult both to explain them and address them through targeted policies. In this article, we seek to overcome this current impasse by changing the focus from outcomes to inputs and, in doing so, identify potential sources of disparities stemming from a key part of the sentencing process: the judicial construction of a case.

A large part of a criminal case will be 'constructed' prior to a sentencing hearing and will be presented to the judge by the prosecution at the outset of the hearing. For most offences, there will be a sentencing guideline which judges must follow in determining what sentence to impose, which might provide an impression of limited judicial autonomy. However, a judge's role is not simply to apply a sentencing guideline to the case presented to determine the final sentence. Judges too have a role in the construction of a case. Judges decide whether a case characteristic/sentencing factor is considered relevant and taken-into-account in determining the final sentence (Ashworth and Kelly 2021). For some factors, judges will have little discretion (e.g. whether the offence was committed on bail is an objective reality) but for others, judges will have wide discretion (e.g. whether an offender is remorseful represents a subjective judgment). The exercise of this discretion in deciding whether to accept and taken-into-account the sentencing factor in any given case will impact the final sentence imposed.

A further division can be made between sentencing factors in terms of whether they relate to the offence or the offender. Offence-related factors involve an assessment of the criminal act or the circumstances in which it took place (e.g. committed against those working in the public sector). Offender-related factors involve an assessment of the individual being sentenced (e.g. whether an offender is of good character). We believe these two criteria (high judicial discretion and an assessment of the individual) are key in exploring potential ethnic disparities stemming from the sentencing stage. By focusing on highly discretionary factors, we can hone in on key judicial decisions at the sentencing stage. Within these highly discretionary sentencing factors, we hypothesize that it is particularly those that relate to offender characteristics, that have the greatest risk of being 'racially determined' and, therefore, operating as a source of ethnic disparity in sentencing outcomes.

Specifically, by racially determined factors, we mean legal factors where the offender's ethnicity could affect whether the judge deems the factors to be constitutive of the case to be sentenced (Pina-Sánchez *et al.* 2023).¹ Such effect could take place either through direct judicial discrimination, or more indirectly as a result of the criteria or approach used by judges (often set out by the Court of Appeal or in Sentencing Guidelines) to assess factors and decide if they should be taken-into-account in any given case.

To test our hypothesis, we first identify and select sentencing factors involving both a high degree of judicial discretion and an assessment of the offender. We then use survey data from the Sentencing Council combined with administrative data from the Ministry of Justice capturing offenders' ethnicity, to determine whether and to what extent the suspected factors are unevenly distributed across ethnic groups. We do this for two high-volume offence groups: assault and public order offences and drug offences. For each of the factors identified as having a substantive disparity in their use in favour of the White group, we proceed to delve into how these factors are used in practice, so we can assess whether they should be classified as racially determined and a likely source of ethnic disparity in sentencing outcomes. We conclude by discussing our findings and presenting a range of potential reform options.

CATEGORIZING SENTENCING FACTORS

We start our analysis by reviewing factors that were listed in the sentencing guidelines for assault and drug offences. Specifically, we focus on Step One and Step Two factors listed in the assault guidelines,

¹ These have also been referred to as 'non-neutral' factors elsewhere in the literature (Omori and Petersen 2020; Ugwudike 2020).

and just Step Two factors from the drug guidelines since these are the ones included in the data reported by the Sentencing Council. Step One sentencing factors comprise the principal factual elements of the offence. They assess the offender's culpability and the harm caused by the offence. When sentencing, a judge will first assess Step One factors and place the case at a starting point and within a sentence/category range. Step Two factors are aggravating and mitigating factors relating to the context of the offence and to the offender. Each guideline provides a non-exhaustive list of these factors. Judges will identify whether any of the listed factors, or any other relevant factors, are present and then make an upward or downward adjustment from the starting point.

Table 1 includes the Steps One and Two sentencing factors listed in the assault and drug guidelines that were also available in the data provided by the Sentencing Council, and therefore considered in our initial screening. Out of 75 sentencing factors considered, we identify 5 that involve a high degree of judicial discretion (subjective) and can only be applied based solely on an assessment of the individual.

- **Remorse:** This is probably the most subjective sentencing factor. Judges have wide discretion in how remorse is assessed and ultimately in deciding whether it is accepted as a mitigating factor (Ashworth and Kelly 2021; Field and Tata 2023). Identifying genuine remorse is purely a personal assessment of whether the individual being sentenced is remorseful for the crime committed.
- **Good character:** The Court of Appeal (see *R v Howells* 1999) and the sentencing guidelines expanded explanation offer some guidance on how to define a 'good character' offender (see 'Racially Determined Factors?' section). The guidance, however, is somewhat vague and judges are essentially left with significant discretion in deciding what acts demonstrate good character. The assessment is of the individual and their past actions.
- **Determination or demonstration of steps taken to address addiction/offending behaviour (hereafter referred to as the ability to rehabilitate):** When assessing this factor, judges must decide what acts are sufficient to demonstrate steps taken to address addiction/offending behaviour. Judges also retain significant discretion in deciding whether to accept a person's commitment to address their addiction/offending behaviour as sufficient for the factor to be applied (Sentencing Council 2021). The assessment a judge must make is whether the offender can and will likely address the root causes of their offending and as a consequence, avoid committing further offences.
- **Mental disorders/learning difficulties:** When sentencing a person with a mental disorder/learning difficulty, judges are required to follow the 'mental disorders, developmental disorders, or neurological impairments' sentencing guideline (Sentencing Council 2020). While the guideline is detailed and sets out criteria judges should consider, mental disorder is a complex factor that can present in many forms and degrees. The guideline leaves a considerable degree of discretion to judges when it comes to deciding whether a person's sentence should be mitigated due to the presence of a mental disorder/learning difficulty. We deemed the factor to have met the criteria of 'an assessment of the individual' because it can apply even where the mental disorder/learning difficulty is not linked to the offence. In those circumstances, the Court of Appeal (see *R v PS* 2020) stated a judge should assess the individual's mental health at the time of sentence and determine whether the individual will experience a sentence more severely due to the mental disorder/learning difficulty.
- **Age/lack of maturity:** This factor becomes subjective when sentencing a person in their late teen or early 20s. Judges have to assess a person's maturity. It can apply independent of the offence committed, and solely on the basis that the person's age/lack of maturity will give rise to additional challenges and cause a sentence to be experienced more severely (Sentencing Council 2021).

Table 1. Sentencing factors for assault and drug offences classified according to whether they are subjectively defined and involving a judicial assessment of the individual

| Sentencing factors | Subjective | Assessment of individual |
|---|------------|--------------------------|
| Remorse | ✓ | ✓ |
| Good character/exemplary conduct | ✓ | ✓ |
| Determination/demonstration to address addiction/behaviour | ✓ | ✓ |
| Age/lack of maturity | ✓ | ✓ |
| Mental disorder/learning disability | ✓ | ✓ |
| Injury/fear of injury which is serious in context of the offence | ✓ | X |
| Injury/fear of injury which is less serious in context of the offence | ✓ | X |
| Intention to cause more serious harm | ✓ | X |
| Deliberately causes more harm than necessary | ✓ | X |
| Greater degree of provocation | ✓ | X |
| Mental disorder/learning disability linked to the offence | ✓ | X |
| Involvement due to pressure/intimidation/coercion | ✓ | X |
| Mistaken belief regarding type of drug | ✓ | X |
| Offender's vulnerability exploited | ✓ | X |
| Serious medical conditions | X | ✓ |
| Sole/primary carer for dependents | X | ✓ |
| Offender addicted to same drug | X | ✓ |
| Offender using cannabis to help with diagnosed condition | X | ✓ |
| Victim particularly vulnerable | X | X |
| Sustained or repeated assault on same person | X | X |
| Race/religion | X | X |
| Disability | X | X |
| Sexual orientation | X | X |
| Transgender identity | X | X |
| Significant degree of premeditation | X | X |
| Threatened/actual use of weapon/equivalent | X | X |
| Targeting of vulnerable victim(s) | X | X |
| Leading role in group/gang | X | X |
| Offence motivated by hostility to age or sex | X | X |
| Subordinate role in group/gang | X | X |
| Lack of premeditation | X | X |
| Excessive self-defence | X | X |
| Previous convictions taken-into-account | X | X |
| Offence committed on bail | X | X |
| Location | X | X |
| Timing | X | X |

Table 1. Continued

| Sentencing factors | Subjective | Assessment of individual |
|---|------------|--------------------------|
| On-going effect on victim | X | X |
| Offence against those in public sector | X | X |
| Gratuitous degradation | X | X |
| Victim compelled to leave home | X | X |
| Failure to comply with current court orders | X | X |
| On licence | X | X |
| Attempt to conceal/dispose of evidence | X | X |
| Failure to respond to warnings/concerns | X | X |
| Offender was under the influence of alcohol/drugs | X | X |
| Abuse of power/trust | X | X |
| Exploiting contact arrangements | X | X |
| Previous violence/threats | X | X |
| Established evidence of community impact | X | X |
| Steps taken to prevent reporting/assisting prosecution | X | X |
| Single blow | X | X |
| Presence of others | X | X |
| Lapse of time not fault of offender | X | X |
| Permitted under 18-year-old to deliver etc. | X | X |
| 18 years or over supplies in the vicinity of school etc. | X | X |
| Sophisticated nature of concealment/attempts to avoid detection | X | X |
| Attempt to conceal/dispose of evidence | X | X |
| Exposure of others to more than usual danger | X | X |
| Presence of weapon | X | X |
| High-purity or high-potential yield | X | X |
| Targeting premises of vulnerable | X | X |
| On-going/large scale evidenced by specialist equipment | X | X |
| Presence of others, especially children and/or non-users | X | X |
| Use of premises with unlawful access to utility supply | X | X |
| Level of profit element | X | X |
| Premises adapted to facilitate drug activity | X | X |
| Location of premises | X | X |
| Length of time premises used | X | X |
| Charged as importation of very small amount | X | X |
| Nature of supply | X | X |
| Possession of drug in school/licensed premises | X | X |
| Possession of drug in prison | X | X |

Table 1. Continued

| Sentencing factors | Subjective | Assessment of individual |
|--|------------|--------------------------|
| Volume of activity permitted | X | X |
| Lack of sophistication as to nature of concealment | X | X |
| Isolated incident | X | X |
| Low purity | X | X |

In assessing the above factors, a judge will often have a pre-sentence report from a probation officer and/or an expert report from a medical practitioner to assist them. However, these reports are only advisory and the ultimate decision of whether the factors are accepted and taken-into-account rests with the sentencing judge. None of the other 70 factors were deemed to satisfy both criteria (subjective and involving a high degree of discretion) and were therefore not selected.

DISTRIBUTION OF SENTENCING FACTORS ACROSS ETHNIC GROUPS

We proceed to explore the distribution of sentencing factors across ethnic groups. This analysis has been possible thanks to a unique dataset operated by the Sentencing Council for England and Wales, which combines survey and administrative sentencing data, and was made available through a freedom of information request.

The survey data comes from the Sentencing Council's Crown Court Sentencing Survey, which collects information on the sentence imposed and the sentencing factors taken-into-account by the judge. It achieved annual response rates ranging from 58 per cent to 64 per cent (Sentencing Council 2015). The unprecedented detail afforded by the Crown Court Sentencing Survey has revolutionized sentencing research in England and Wales over the last decade (see e.g. Dhimi 2022 or Roberts and Bradford 2015). Unfortunately, offender's ethnicity, a key variable to be able to explore sentencing disparities, has been absent from all sentencing datasets commissioned by the Council. This is why the sentencing survey had to be complemented with administrative data from the Court Proceedings Database, a census of all criminal proceedings processed in England and Wales, which captures offenders' ethnicity amongst a few other case characteristics and sentence details.

The two datasets were matched using their common case identifier when this was available, along with other variables such as the sentence date and the offender's name and date of birth. The only available report documenting the quality of this matching process refers to the first annual data release, from 2011. For this first batch, the algorithm used managed to match 89 per cent of the survey cases (Sentencing Council 2011); the remaining 11 per cent were dropped. The final dataset made available by the Sentencing Council covered the period from 1 January 2013 to 31 March 2015, is restricted to principal offences for cases of assault and drugs, and includes adult offenders only. The data we received covers the frequency of each sentencing factor was ticked by judges filling the Crown Court Sentencing Survey, broken down by ethnic group.

The ethnicity variable used is the offender's ethnicity as perceived by the police officer dealing with the case. This is preferred to self-identified ethnicity data, as a police officer's perception of ethnicity is a more accurate measure of judicial perceptions of ethnicity. The ethnicity categories used in the data are White, Black, Asian and Other. Both the dataset obtained from

the Sentencing Council, and the R code used in our analysis, are available as part of this article's [supplementary materials](#).

To test whether the difference in prevalence of any of the selected factors is statistically significant we use t-tests. A significance level of 0.01—instead of the typical 0.05—is used to minimize the risk of type-I errors, which are particularly concerning when conducting multiple tests. We also consider the direction and extent of the group differences. Where this group difference is not only statistically significant, but also bigger than two percentage points (i.e. substantially significant in absolute terms), and bigger than 10 per cent (i.e. substantially significant in relative terms), we take it as evidence of a substantive disparity.

Table 2 shows there is evidence of substantive disparities between the White group and at least one ethnic minority group for four out of the five selected factors. 'Mental disorder/learning difficulty' is the only exception.

Table 2. Significant disparities in the prevalence of sentencing factors across ethnic groups. Compares the White group to ethnic minority groups (Black, Asian and Other). A higher prevalence of a mitigating factor amongst the White group compared to an ethnic minority group is recorded as favouring the White group and vice versa. Results refer to adult offenders sentenced in the Crown Court from 2013 to 2015

| | Sample size | Prevalence | Statistically significant (t-test p-value < 0.01) | Absolute difference (difference in prevalence > 2 percentage points) | Relative difference (difference in prevalence > 10%) | Substantively significant (absolute and relative difference that is also statistically significant) | Favours (ethnic group) |
|--------------------------------|-------------|---------------|---|--|--|---|------------------------|
| Assault offences | | | | | | | |
| Remorse | | | | | | | |
| White | 20,650 | 34.3% (7,084) | | | | | |
| Black | 2,126 | 28.6% (608) | ✓ | ✓ | ✓ | ✓ | Whites |
| Asian | 1,459 | 30.9% (451) | ✓ | ✓ | | | - |
| Other | 753 | 31.9% (240) | ✓ | ✓ | | | - |
| Good character | | | | | | | |
| White | 20,650 | 14.4% (2,977) | | | | | |
| Black | 2,126 | 12.4% (264) | ✓ | | ✓ | | - |
| Asian | 1,459 | 21.7% (316) | ✓ | ✓ | ✓ | ✓ | Asians |
| Other | 753 | 20.5% (154) | ✓ | ✓ | ✓ | ✓ | Others |
| Ability to rehabilitate | | | | | | | |
| White | 20,650 | 9.5% (1,952) | | | | | |
| Black | 2,126 | 5.8% (124) | ✓ | ✓ | ✓ | ✓ | Whites |
| Asian | 1,459 | 3.6% (53) | ✓ | ✓ | ✓ | ✓ | Whites |
| Other | 753 | 5.4% (41) | ✓ | ✓ | ✓ | ✓ | Whites |
| Mental disorder | | | | | | | |
| White | 20,650 | 3.9% (812) | | | | | |
| Black | 2,126 | 3.5% (75) | ✓ | | ✓ | | - |
| Asian | 1,459 | 2.9% (43) | ✓ | | ✓ | | - |

Table 2. Continued

| | Sample size | Prevalence | Statistically significant (t-test p-value < 0.01) | Absolute difference (difference in prevalence > 2 percentage points) | Relative difference (difference in prevalence > 10%) | Substantively significant (absolute and relative difference that is also statistically significant) | Favours (ethnic group) |
|-------------------------|-------------|--------------|---|--|--|---|------------------------|
| Other | 753 | 2.8% (21) | ✓ | | ✓ | | - |
| Age/lack of maturity | | | | | | | |
| White | 20,650 | 7.2% (1,495) | | | | | |
| Black | 2,126 | 8.1% (173) | ✓ | | ✓ | | - |
| Asian | 1,459 | 10.0% (146) | ✓ | ✓ | ✓ | ✓ | Asians |
| Other | 753 | 10.6% (80) | ✓ | ✓ | ✓ | ✓ | Others |
| Drug offences | | | | | | | |
| Remorse | | | | | | | |
| White | 13,797 | 28% (3,812) | | | | | |
| Black | 2,893 | 19% (544) | ✓ | ✓ | ✓ | ✓ | Whites |
| Asian | 1,749 | 21% (361) | ✓ | ✓ | ✓ | ✓ | Whites |
| Other | 861 | 19% (161) | ✓ | ✓ | ✓ | ✓ | Whites |
| Good character | | | | | | | |
| White | 13,797 | 16% (2,146) | | | | | |
| Black | 2,893 | 11% (314) | ✓ | ✓ | ✓ | ✓ | Whites |
| Asian | 1,749 | 15% (261) | | | | | - |
| Other | 861 | 18% (155) | ✓ | ✓ | ✓ | ✓ | Others |
| Ability to rehabilitate | | | | | | | |
| White | 13,797 | 15% (2,071) | | | | | |
| Black | 2,893 | 9% (249) | ✓ | ✓ | ✓ | ✓ | Whites |
| Asian | 1,749 | 8% (166) | ✓ | ✓ | ✓ | ✓ | Whites |
| Other | 861 | 7% (64) | ✓ | ✓ | ✓ | ✓ | Whites |
| Mental disorder | | | | | | | |
| White | 13,797 | 2% (306) | | | | | |
| Black | 2,893 | 1% (43) | ✓ | | ✓ | | - |
| Asian | 1,749 | 1% (16) | ✓ | | ✓ | | - |
| Other | 861 | 2% (14) | ✓ | | ✓ | | - |
| Age/lack of maturity | | | | | | | |
| White | 13,797 | 7% (982) | | | | | |
| Black | 2,893 | 13% (367) | ✓ | ✓ | ✓ | ✓ | Blacks |
| Asian | 1,749 | 8% (146) | ✓ | | ✓ | | - |
| Other | 861 | 9% (76) | ✓ | | ✓ | | - |

Most, but not all, of the disparities identified as substantive, favour the White group and disadvantage an ethnic minority group. ‘Age/lack of maturity’ was an exception. This factor was, for example, present in 13 per cent of drug cases in the Black group, but only 7 per cent in the White group. For ‘good character’ we find substantive disparities that both favour and disadvantage the White group. It is more present in the White group (16%) than the Black group (11%) for drug offences. However, it was more present in the Asian (22%) and the Other (20%) group than the White group (14%) for assault offences.

For ‘remorse’ and ‘ability to rehabilitate’ all the disparities identified favour the White group and disadvantage an ethnic minority group. For ‘remorse’, there is evidence of substantive disparity in favour of the White group against the Black group for assault offences (34% in White group and 29% in Black group) and against Black, Asian and Other for drug offences (28% in White group, 19% in Black group, 21% in Asian group and 19% in Other group). For ‘ability to rehabilitate’, there is evidence of substantive disparity in favour of the White group against all other ethnic minority groups for both assault offences (9% in White group, 6% in Black group, 4% in Asian group and 5% in Other group) and drug offences (15% in White group, 9% in Black, 9% in Asian group and 7% in Other group).

In addition to analysing the distribution of selected factors, we also conducted the same analysis on all other sentencing factors listed but not selected in [Table 1](#), which we expected to be less prone to become racially determined. We can see that the ethnic distribution is far more balanced for these factors deemed as not highly discretionary nor involving an assessment of the offender. Specifically, out of 70 factors that were not selected, 27 (39% of the total) show a substantive disparity between the White group and at least one ethnic minority group (listed in [Table 3](#)), but only 16 of those (23% of the total) favour the White group.

The difference in ethnic disparities in the use of selected and non-selected factors is therefore quite clear. Whereas, we find that 60 per cent of selected factors show evidence of disparities favouring White offenders, that is only the case for 23 per cent of non-selected factors. That difference in ethnic disparities across groups of factors seems too large to be explained by mere chance, and supports our general hypothesis that selected factors are at a high risk of being racially determined.

Table 3. Other sentencing factors showing substantive disparities between the White group and an ethnic minority group. A higher prevalence of an aggravating factor amongst the White group compared to an ethnic minority group is recorded as favouring the ethnic minority group. A higher prevalence of a mitigating factor amongst the White group compared to an ethnic minority group is recorded as favouring the White group and vice versa

| Factors where a substantive ethnic disparity is identified | In favour of |
|--|---------------------------|
| Assault offences | |
| Injury/fear of injury which is serious in context of the offence (Step One) | Asian (compared to White) |
| Significant degree of premeditation (Step One) | White (compared to Asian) |
| Targeting of vulnerable victim(s) (Step One) | White (compared to Asian) |
| Leading role in group or gang (Step One) | White (compared to Asian) |
| Sustained or repeated assault on the same person (Step One) | Other (compared to White) |
| Injury/fear of injury which is less serious in the context of the offence (Step One) | Other (compared to White) |

Table 3. Continued

| Factors where a substantive ethnic disparity is identified | In favour of |
|--|---|
| Previous convictions taken-into-account | Asian and Other (compared to White) |
| On-going effect on victim | Black (compared to White) |
| Presence of others | White (compared to Black) |
| Offender was under the influence of alcohol/drugs | Black, Asian and Other (compared to White) |
| Timing | Asian and Other (compared to White) |
| Failure to comply with current court orders | Asian (compared to White) |
| Location | Other (compared to White) |
| Single blow | White (compared to Black and Asian) |
| Drug offences | |
| Previous convictions taken-into-account | White (compared to Black) and Other (compared to White) |
| Attempt to conceal/dispose of evidence | White (compared to Black) |
| High-purity or high-potential yield | Black (compared to White) and White (compared to Asian and Other) |
| On licence | White (compared to Black) |
| Large scale evidenced by specialist equipment | Black (compared to White) and White (compared to Asian and Other) |
| Use of premises with unlawful access to utility supply | Black (compared to White) and White (compared to Other) |
| Level of profit element | Black (compared to White) |
| Premises adapted to facilitate drug activity | Black (compared to White) |
| Lack of sophistication as to nature of concealment | White (compared to Black, Asian and Other) |
| Serious medical conditions | White (compared to Black and Asian) |
| Sole/primary carer for dependents | White (compared to Black and Asian) |
| Offender addicted to same drug | White (compared to Black, Asian and Other) |
| Offence committed on bail | White (compared to Asian) |
| Offenders' vulnerability exploited | Other (compared to White) |

RACIALLY DETERMINED FACTORS?

Having found empirical evidence showing three of the high discretion and individual assessment factors clearly favouring the White group, we now proceed to consider how these factors operate in practice. We use Court of Appeal and Sentencing Guideline guidance, as well as past research exploring how these factors are applied, to help us determine whether they should be classified as racially determined factors and as such a likely source of unjustified ethnic disparities in sentencing outcomes.

In the introduction, we defined 'racially determined' factors as any legal factor where an offender's ethnicity could affect whether judges see the factor as constitutive of the case to be sentenced. We noted this could occur in two ways: through direct judicial discrimination or

more indirectly due to the criteria used by judges when assessing the factor. Below, when considering whether a factor should be classified as racially determined, we focus primarily on the latter. The reason for this is while it can be shown that certain factors are more susceptible to direct judicial discrimination, existing literature and data limit our ability to reach evidenced conclusions as to whether direct judicial discrimination is in fact occurring and to get a sense of the extent to which it is impacting the use of the factors. We are therefore necessitated to widen our analysis to consider whether, and how, any of the factors identified as being unevenly distributed across ethnic groups could operate to disadvantage ethnic minority groups even in the absence of direct racial discrimination on the part of the judiciary.

Remorse

Remorse is one of the most commonly used sentencing factors. The data we obtained from the Crown Court Sentencing Survey shows remorse to be the most used mitigating factor for assault and drug offences, cited in 33 per cent and 25 per cent of cases respectively. However, these rates vary substantially across ethnic groups. For drug offences, remorse was cited in 28 per cent of cases in the White group but only in 19 per cent in the Black group. The effect of remorse on sentence severity has also been well documented in the literature. For example, [Pina-Sánchez et al. \(2018\)](#) estimate the odds of receiving a custodial sentence are more than halved when the offender is deemed remorseful.

Remorse is a highly subjective factor. Judges have wide discretion in how it is assessed and in deciding whether to accept it as a mitigating factor in any given case. International research on how judges assess remorse has highlighted an offender's demeanour and performance in court are central to the assessment. [Weisman \(2009\)](#) reviewed 178 Canadian cases in which remorse was a matter of dispute. The author suggested that public enactments of remorse are '*moral performances*' and that '*the offender's "body" is unequivocally central to the judiciary's assessment of remorse*' (2009: 49). [Johansen's \(2019\)](#) study in Danish courtrooms consisting of field notes from 80 criminal cases and interviews with 20 presiding judges emphasized the important role behaviour and appearance plays in judges' assessments of emotions such as remorse. [Rossmann's \(2015\)](#) interviewed 18 Judges from New South Wales, who indicated that they often use 'visual clues' from a person's performance when assessing remorse. Various judges referred to offender's demeanour and the judge's capacity to read the external physical signs when assessing the genuineness of remorse. This research also highlighted that in some cases remorse assessment can operate in experiential terms, as a feeling. 'Something gets felt by judges at the level of embodied affect that then enables them to declare: "This person is remorseful"' (2015: 171).

If, as the literature suggests, an offender's appearance, demeanour and performance in court is central to the assessment of remorse, then this raises concerns when the assessment is cross-racial or cross-cultural. [Bennett \(2016: Sec. 5\)](#) argues: 'different cultures may have different rules about who can display remorse, and how, and indeed what appropriate remorse looks like when it is displayed. We need to be open to the possibility that what may look like a lack of remorse to one observer may look different to someone attuned to the norms of the culture from which the person being observed comes.'

This is supported by [Johansen's study \(2019: 250\)](#), which concluded that 'Judges' assessments of emotions are mediated through their own cultural understandings, and what counts as "appropriate" emotion is dependent on how the defendant is culturally and systemically situated'. For example, judges appeared to place significant weight on the defendant looking the judge/legal actor in the eye, however, some defendants, particularly those from ethnic minority backgrounds, did not do so but instead looked down. [Johansen \(2019\)](#) suggests that this was done as a sign of respect and is linked to specific cultural expectations and upbringing.

Challenges with cross-racial/cultural assessment are also evident in [Rosmanith's \(2015\)](#) study where many judges acknowledged cultural differences make it especially hard to read how other people are feeling and risk a person's actions or demeanour being misinterpreted. A study by [Veiga et al. \(2023\)](#) involving interviews with criminal barristers in England and Wales noted similar concerns.

As of April 2022, just 5 per cent of all judges in post in England and Wales were from Asian backgrounds, 1 per cent were from Black backgrounds, 2 per cent were from mixed ethnic backgrounds and 1 per cent were from other ethnic backgrounds ([Ministry of Justice 2022](#)). The highly subjective nature of remorse, the concerns raised about cross-racial assessments of remorse and the high likelihood of ethnic minority offenders being sentenced by White judges, provide a strong basis for identifying remorse as a racially determined factor.

A study by [Proeve and Tanvir \(2022\)](#) which involved the coding of 262 sentencing remarks from the higher courts in South Australia using content analysis, to examine the frequency in which judges mentioned various pieces of evidence for remorse, found a strong link between guilty pleas and remorse being applied as a mitigating factor. One can reasonably assume a similar link in England and Wales. This would indicate that remorse may also be indirectly racially determined through guilty pleas, as data from England and Wales consistently shows lower rates of guilty pleas amongst ethnic minorities compared to Whites ([Lymperopoulou 2022](#)).

When we add the evidence that remorse is unevenly distributed across ethnic groups in favour of the White group and it has a significant impact on sentencing outcomes, one can reasonably flag remorse as a likely source of ethnic disparities in sentencing outcomes.

Good character

Good character is another of the most commonly raised mitigating factors. In the data we obtained, good character was cited as a mitigating factor in 15 per cent of both assault and drug cases, though its prevalence varied across ethnic groups. For drug offences, it was cited as a mitigating factor in 16 per cent of cases in the White group but only 11 per cent in the Black group. Good character has also been shown to have a significant mitigating impact on sentencing outcomes. The [Sentencing Council \(2015\)](#) found that in the Crown Court offenders of domestic burglary deemed of good character were estimated to receive a custody rate of 27 per cent, compared to the average of 77 per cent.

Good character is an elusive and ill-defined concept ([Belton 2018](#)). It is often used to connote a mere absence of previous conviction ([Hungerford-Welsh 2019](#)). However, in *R v Howells'* (1999) the Court of Appeal stated: 'a measure of leniency will ordinarily be extended to offenders of previous good character, the more so if there is evidence of good character (such as a solid employment record or faithful discharge of family duties) as opposed to a mere absence of previous convictions'. Here, the Court of Appeal defined good character in a way that covers more than just a lack of previous convictions, highlighting examples of employment and performance of family duties as evidence of good character. [Ashworth and Kelly \(2021\)](#), discuss good character primarily in the context of one-off good deeds referencing cases such as [Reid \(1982\)](#) and [Wenman \(2015\)](#) where sentences were reduced due to acts of bravery unrelated to the offence being sentenced. The latest extended explanation attached to the factor in sentencing guidelines ([Sentencing Council 2021](#)) states: 'This factor may apply whether or not the offender has previous convictions. Evidence that an offender has demonstrated positive good character through, for example, charitable works may reduce the sentence'. In sum, when assessing good character, the focus is primarily on whether the offender has demonstrated good character through positive acts. What counts as a positive act sufficient to demonstrate good character can be wide and varied, and for a judge to determine.

Belton's review of judges' sentencing reasons relating to good character (Belton 2017 cited in; Belton 2018: 50) and his study involving interviews with six judges in England and Wales (Belton 2018: 50) found: 'the everyday "bread and butter" of good character is character testimonials from family, friends, employers, community leaders and so on. These testimonials deal with a broad range of character-related issues including public service but also matters such as trustworthiness and reliability as a worker or partner, caring responsibilities and status within the community.'

Saccomano (2019) argues white cultural values are deeply embedded in many character-related issues considered and assessed as part of the process of weighing 'character'.² She points to issues such as offender's educational attainment, employment record/status and family stability. A wide range of reports in the UK show lower levels of employment, education attainment and family stability amongst ethnic minorities (Equality and Human Rights Commission 2016; Centre for Social Justice 2020; Social Metrics Commission 2020). One could also point to issues such as public service or charitable work, which have clear links with a person's financial security. A person who is financially secure is far better positioned to engage in public service or charity work than a person living in poverty, whose primary focus will be on ensuring themselves and their family have the basics needed to survive. In the UK, people from ethnic minorities are twice as likely to live in poverty compared to white people (Edmiston 2022).

The subjective nature of 'good character' assessment combined with the argument many character-related issues often considered as part of the process of assessment stem from the dominant cultural values and have a higher likelihood of being present in white British offenders, provides an evidentiary basis for identifying good character as a racially determined factor. Add the uneven ethnic distribution in favour of White offenders, together with the significant mitigating impact it has on sentencing outcomes, and one can reasonably flag good character as a likely source of ethnic disparities in sentencing outcomes.

Ability to rehabilitate

Ability to rehabilitate is another commonly raised mitigating factor. In the data we obtained it was cited in 8 per cent of assault cases and 13 per cent of drug cases, but as before these rates vary substantially across ethnic groups. This mitigating factor was identified in 15 per cent of drug offenders that are White but only in 9 per cent in the Black and Asian groups. Both sentencers and lawyers have pinpointed it as a highly influential factor (Chen *et al.* 2023) and this is corroborated by quantitative studies using the Crown Court Sentencing Survey. For example, Lightowlers and Pina-Sánchez (2017) show a four-fold reduction in the odds of receiving a custodial sentence amongst assault offenders who were deemed to have this mitigating factor.

The guidance for judges contained in sentencing guidelines (Sentencing Council 2021: no pagination) states: 'Where offending is driven by or closely associated with drug or alcohol abuse (e.g. stealing to feed a habit, or committing acts of disorder or violence whilst drunk) a commitment to address the underlying issue may justify a reduction in sentence. This will be particularly relevant where the court is considering whether to impose a sentence that focuses on rehabilitation. Similarly, a commitment to address other underlying issues that may influence the offender's behaviour may justify the imposition of a sentence that focuses on rehabilitation.'

The guidance suggests that a commitment to address addiction/offending behaviour is sufficient for this mitigating factor to be applied. This gives judges wide discretion when considering whether to accept the factor. However, the Court of Appeal in *R v Howells* (1999) previously indicated that where steps have been taken to demonstrate this commitment, courts will be more inclined to accept it and give it greater weight. So, while this factor can be applied based on

2 Writing about the United States but the point is also relevant to England and Wales.

a person's commitment alone, if evidence can be provided to support it, then the likelihood of it being accepted will increase. The judges interviewed as part of [Belton's study \(2018\)](#) appeared very much to approach the assessment of the factor in line with the guidance set out in [R v Howells \(1999\)](#).

The most impactful step a person can take would be to begin to address their risk factors/criminogenic needs. Where a person's offending is associated with drug or alcohol abuse this would be to begin, and ideally be doing well in, addiction treatment. In [Belton's study \(2018\)](#), this appeared to be the key issue judges focused on when assessing this factor.

The way this factor can become racially determined is due to the additional barriers for ethnic minorities compared to white British in accessing drug or alcohol treatment. These barriers have been highlighted in a number of studies as well as by those working in addiction treatment in England and Wales. [Ismail and Williams \(2012: 19\)](#) when studying drug use amongst Black and Minority Ethnic (BME) groups in Bristol noted: 'there were many barriers to access drug services by the BME communities. These were divided into real barriers (such as waiting time, lack of information and advice about illicit drugs and lack of trust in the service providers) and perceived barriers (stigma surrounding access to drug service and fear that disclosing drug use would negatively affect immigration status)'.

These additional barriers for ethnic minorities were also outlined in a series of reports, each of which focused on a specific ethnic minority group, published by the National Treatment Agency for Substance Misuse (see [Fountain 2009](#)). Many of these same barriers also exist for alcohol treatment ([Gleeson et al. 2019](#)). Sohan Sahota, the managing director of the drug and alcohol recovery support service BAC-IN, notes in particular, language barriers, stigma and cultural differences, mistrust of mainstream services and experiences of racial prejudice can all prevent ethnic minorities from engaging with treatment services ([Alcohol Health Alliance 2020](#)). Statistics of those being treated for addiction in England reflect these concerns, with 90 per cent of all people in treatment for addiction recorded as white, highlighting an underrepresentation of ethnic minorities in treatment services nationally ([Public Health England 2016](#)).

The strong emphasis judges place on whether a person has access to or has begun treatment in order to demonstrate their commitment to addressing their addiction/offending behaviour, combined with the additional barriers ethnic minorities face in terms of access to treatment, means this factor can indirectly become racially determined. The uneven distribution in the use of this factor between the White group and all ethnic other minority groups in favour of the White group, along with the significant impact it has on sentencing outcomes provides grounds to flag it as a likely source of ethnic disparities in sentencing outcomes.

DISCUSSION

Research on ethnic disparities in sentencing has traditionally concentrated on the final sentence imposed. This narrow focus has helped document with ever-increasing precision the presence and extent of worrying ethnic disparities in sentencing outcomes. However, by predominantly focusing on outcomes, other less visible but highly consequential judicial decisions received less research attention. This has resulted in a knowledge gap as to the sources of identified ethnic disparities in sentencing outcomes.

Judges do not simply decide the final sentence to impose based on the facts of the case presented to them. Judges play a vital role in the construction of a case. It is the judge who decides whether sentencing factors should be considered constitutive of the case to be sentenced and these decisions will have a direct impact on the sentence imposed. Our study addresses the existing knowledge gap by focusing on these other consequential judicial decisions made as part

of the sentencing process. Our findings point to three sentencing factors being racially determined, and likely sources of unjustified ethnic disparities in sentencing outcomes.

We hypothesized that sentencing factors involving a high degree of judicial discretion and an assessment of the individual have a high risk of being racially determined and therefore, a potential source of ethnic disparities in sentencing outcomes. Our findings support this hypothesis and show that out of the five sentencing factors at high risk of being racially determined, three of them—remorse, good character and ability to rehabilitate—were used more favourably for the White group. When we contextualized the use of these factors, we found further evidence that supported our hypothesis.

A corollary of our findings is that remorse, good character and ability to rehabilitate should explain some observed ethnic disparities in sentencing outcomes identified in previous studies where these factors were not controlled for (Hopkins 2015; Hopkins *et al.* 2016; Lammy 2017). Another important implication from our findings is that the true extent of ethnic disparities reported in studies where these factors have been controlled for (e.g. Isaac 2020) is likely underestimated. In essence, by controlling for racially determined case characteristics researchers are controlling away some of the disparities they seek to estimate.

Identifying racially determined factors is therefore key for explaining past research findings and enhancing the accuracy of future studies. Additionally, identifying factors as sources of ethnic disparities and explaining how they can operate as such, is equally vital for the design of effective reforms addressing the problem of ethnic disparities in sentencing outcomes.

The Lammy Review (2017) put forward the principle of ‘explain or reform’ for apparent disparities between ethnic groups within the criminal justice system. We have identified a substantive disparity in the use of remorse, good character and ability to rehabilitate and provided an evidence-based explanation as to how each can operate as a source of ethnic disparity in sentencing outcomes. While the data used in our analysis goes back to 2015, sentencing practice relating to the assessment of remorse, good character and ability to rehabilitate has remained largely unchanged. Therefore, unless the disparities in the use of these factors can be explained in another way, we argue the discussion must move to consider what can be done to address them.

Policy options

A major challenge with addressing ethnic disparities in sentencing outcomes is that even when sources of disparities are identified, the root causes of those disparities can be wide and varied. This is evident from our explanation as to how remorse, good character and ability to rehabilitate can operate as sources of ethnic disparities in sentencing. As such, there is no single policy option capable of addressing disparities stemming from all three factors. For each, there will be different considerations and the suitability of policy options will vary between factors. It is necessary, therefore, not only to consider different policy options but also their suitability for each factor.

The most straightforward option would be to amend the existing explanation attached to factors in sentencing guidelines. This would be cost-effective and would not risk conflicting with core principles of sentencing. Such an approach has already been used by the Sentencing Council for other factors thought to be potentially contributing to ethnic disparities in sentencing. For example, a new expanded explanation was recently introduced for mental disorder/learning difficulty, which in part states that there is ‘a range of evidence that people from ethnic minority backgrounds may be more likely to experience stigma attached to being labelled as having a mental health concern, may be more likely to have experienced difficulty in accessing mental health services and in acknowledging a disorder and seeking help’ (Sentencing Council 2021: no pagination). Following a consultation with guideline users, the Sentencing Council

has indicated their intention to make changes to the expanded explanations for a number of factors including remorse, good character and ability to rehabilitate, in order to try address issues of equality in sentencing ([Sentencing Council 2023](#)).

In our view, amending the expanded explanation is an approach that would be particularly suited to addressing ethnic disparities stemming from good character, less so for remorse and most likely not suitable for ability to rehabilitate. For good character, an amendment could be made to include additional examples of 'good character' that do not disadvantage individuals from different cultural and socio-economic backgrounds. These could be broad and include character qualities such as integrity, trustworthiness and kindness to others.

This same approach could also be used for remorse. The explanation could be amended to specifically highlight the risks of cross-racial assessments of remorse. Currently, it highlights the danger of an offender's demeanour being misleading but does not discuss this in the context of ethnicity or research on the risks of cross-racial assessments. However, the effectiveness of this approach is based on the premise that highlighting the risks of cross-racial assessments of remorse is sufficient to eliminate those risks. Absent any research we are aware of to support this position, there remains considerable doubt as to whether this approach alone would be enough to address ethnic disparities stemming from remorse.

Amending the expanded explanation would likely not be suitable for addressing ethnic disparities stemming from the ability to rehabilitate. While an amendment could highlight the additional challenges for ethnic minority groups in accessing treatment, due to the important role of rehabilitation as a purpose/aim of sentencing ([Sentencing Act 2020](#): Section 57), it is much more difficult to see how simply making judges aware of these additional challenges would impact how the factor is used. If a judge does not believe a person can/will access treatment, and as a result has a high risk of reoffending, even if they are aware of the additional challenges, it is unlikely the mitigating factor will be applied. It is also noteworthy that judges are not compelled to follow the guidance contained in the expanded explanations.

Due to the low cost, the low risk of any unintended negative consequences, and the relative ease at which amendments could be introduced, there is an argument for amending the expanded explanations for each factor in the manner outlined above. This could be done as a first step while also considering additional approaches for remorse and ability to rehabilitate. If amending expanded explanations is the approach used, then it is important this is done alongside initiatives to raise awareness amongst the judiciary. [Chen et al. \(2023\)](#) found that many judges were not aware of the content of expanded explanations and recommended changing the format of the display on the webpage to make them more easily accessible and to also increase their effectiveness through 'lived experience' education for judges. The Sentencing Council accepted these recommendations and have already made some changes to its website and online guidelines to make them more accessible and user-friendly.

An alternative or additional approach that should be explored for addressing ethnic disparities stemming from remorse would be to alter how the factor is assessed. Instead of judges assessing whether a person is remorseful, remorse could simply be accepted/presumed once asserted and only rejected if there is clear evidence to the contrary, for example, inappropriate or intimidating behaviour towards the victim, or a record of repeatedly committing similar offences. If remorse is rejected, judges would be required to state the reasons for rejecting the assertion of remorse.

The most challenging factor to address, but arguably the most important, is ability to rehabilitate. Our analysis of the literature suggests disparities flowing through this factor stem primarily from additional barriers for some ethnic minority groups in accessing addiction treatment. Addressing this factor as a purely sentencing issue may not therefore be the most effective approach. If the search for solutions is expanded out to the broader criminal justice system,

then the National Probation Service stands out as the most suitable agency to tackle disparities stemming from this factor.

The National Probation Service could commission treatment programmes specifically for ethnic minorities to ensure appropriate programmes are available for ethnic minority groups, ideally with staff from similar ethnic backgrounds, to reduce mistrust and the reluctance to engage. A review of race equality in probation highlighted that the Nation Probation Service commission few services specifically for ethnic minority service users (HM Inspectorate of Probations 2021). At the pre-sentence report writing stage, probation officers should also be aware of and discuss with service users the barriers to treatment, and if treatment programmes specifically for ethnic minority service users were available, to make them aware of this. The HM Inspectorate of Probations review (2021: 29) found that the quality of pre-sentence reports on BAME individuals were insufficient in 21 of the 51 reports inspected, with not enough consideration of the service user's diversity. The Inspectorate (2021: 12) has recommended the development of a national race equality strategy for probation service delivery, supplemented by strategic needs assessments in each probation region, to ensure that ethnic minority service users are not disadvantaged and receive culturally appropriate support. Eliminating disparities in the ability to rehabilitate would ultimately require broader societal reforms aimed at breaking down real and perceived barriers to treatment for ethnic minority groups. However, implementing an equality strategy for the Probation Service would be a significant step in the right direction and would go a long way towards reducing disparities stemming from this factor.

Limitations

While this article makes significant contributions to literature, it has some limitations. Firstly, the empirical part of our analysis relies on simple bivariate statistics comparing the relative prevalence of sentencing factors across ethnic groups. To assess the internal validity of our findings it would be key that future research seeks to replicate our analysis using multivariate methods, so ethnic disparities in the prevalence of sentencing factors can be explored while controlling for potential confounders like offender's age or gender. Such analysis could be made possible if the Sentencing Council can find a way to make their individual-level data available through secure data-sharing platforms, like the ONS Secure Research Service. Making such data available could also enable researchers to test the external validity of our findings by considering other high-volume offence groups that were captured by the Crown Court Sentencing Survey and more recent datasets commissioned by the Sentencing Council focusing on the magistrates' court.

Secondly, we were confined in our analysis to using broad aggregated ethnic categories. This can hide differences between constituent groups. For example, using the aggregated White group meant we were unable to identify and analyse potential disparities disadvantaging White minority groups such as Gypsy, Roma and Irish Travellers. Using the aggregated Black group risks hiding differences between groups such as Black Caribbean and Black African. This impacts the specificity of our findings and resulting discussions.

Thirdly, while the Crown Court Sentencing Survey data recorded if a factor was taken-into-account, it did not record the reasons why. There are significant barriers for academic researchers in collecting this data but the Sentencing Council is well-positioned to conduct a bespoke study to fill this knowledge gap. Doing so would allow for some exploration of whether discrimination on the part of judges is also contributing to disparities in the use of sentencing factors. Due to the lack of information currently available, we were not able to explore and make conclusions on this issue.

Finally, the data we obtained did not allow for analysis of how sentencing factors interact with each other. It is possible that the racially determined factors identified in this study might interact to accumulate disadvantage for some ethnic minority groups.

CONCLUSION

The absence of understanding of the underlying factors contributing to ethnic disparities in sentencing outcomes has been a major obstacle to the crafting of effective policies to rectify them. Without a clear grasp of the root causes, policy-makers are essentially operating in the dark and their ability to develop targeted, evidence-based responses significantly hindered.

We focused on one part of the sentencing process: the judicial construction of a case. We have highlighted how ethnic disparities in sentencing are not only apparent in terms of outcomes, but they can also be observed in the application of certain case characteristics. Sentencing factors suspected to be racially determined, due to their discretionary judicial assessment of the offender, indeed tend to be so. These factors are remorse, good character and ability to rehabilitate. We argue that much of the observed disparities in sentence outcomes could be derived from the differential application of these sentencing factors. Furthermore, having identified these factors as racially determined and likely sources of ethnic disparities in sentencing outcomes, we also put forward targeted policy solutions.

Based on our analysis, we suggest that the most effective approach to address disparities stemming from good character is to amend the expanded explanation in sentencing guidelines to include more inclusive examples of good character. For remorse, the way in which the factor is assessed should be altered, to introduce a presumption of remorse once asserted and only rejected with clear evidence to the contrary. To effectively reduce disparities stemming from ability to rehabilitate, reforms should be targeted at the delivery of probation services, in particular at the pre-sentence assessment and the commissioning of services and treatments specifically for ethnic minority groups.

It is imperative proactive steps are now taken to alleviate ethnic disparities in sentencing outcomes. Addressing disparities stemming from remorse, good character and ability to rehabilitate would be a significant step towards achieving this objective.

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SUPPLEMENTARY MATERIAL

Supplementary material is available at *British Journal of Criminology* online. The data underpinning this article has also been deposited in Brunel University London's data repository, Brunelfgshare (DOI: 10.17633/rd.brunel.26057374).

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