

Stereotyping and unconscious racial bias: stumbling blocks for parties, witnesses and aspirant lawyers alike. How should the law and the profession respond?

It was reported in September that Alexandra Wilson was asked if she was the defendant three times in one morning at court – she was actually the defence barrister.¹ This must have made Alexandra want to scream, and is revealing of two important preconceptions about race and the justice system: the first is that lawyers aren't black; the second is that defendants are.

The first preconception is just plain wrong. Those from non-white backgrounds become barristers in almost exact proportion to their share of the general population.² Black barristers are underrepresented by 0.5%; this needs to be resolved, but there's reason to think it soon will be. Law firms are even more diverse: in 2017, 21% of solicitors were BAME, compared to around 14% of the working-age population.³ The numbers were far less encouraging a generation ago – and it's clear that attitudes have yet to entirely catch-up – but optimism is justified.

The statistics surrounding the second preconception – that a black person in a courtroom must be a defendant – are more worrying. 10% of defendants are black, compared to around 3% of the general population. But for certain groups, this is the tip of the iceberg. As of last year, 51% of men in Young Offender Institutions (for those aged 15 to 21) were BAME.⁴

When talking about race, there is a temptation to talk generally, about issues affecting a very large number of people. General discussions are important: the Black Lives Matter movement broadened its initial focus on anti-black police brutality in the US to raise awareness of wide-ranging systemic inequalities. But specific policies change lives too, and in our desire to focus on the macro we risk failing to target the most clear-cut instances of discrimination – which are often the most easily remedied.

One major step in the right direction would be to change the way drug possession is dealt with. In 2017, the Lammy Review found that black boys are 10 times more likely than white boys to be arrested for drug offences.⁵ That's not because black boys are more likely to actually commit a drug offence – a report by the charity Release found that black people were 10.5% *less* likely to use drugs than white people.⁶ Something is going badly wrong, and it is doing so at every stage of the process: black people are six times more likely to be stopped and searched for drugs offences, 56% more likely to be charged if arrested for cocaine possession and 240% more likely to be given a custodial sentence for a drug offence.⁷

¹ <https://www.theguardian.com/law/2020/sep/24/investigation-launched-after-black-barrister-mistaken-for-defendant-three-times-in-a-day>

² <https://www.barstandardsboard.org.uk/uploads/assets/912f7278-48fc-46df-893503eb729598b8/Diversity-at-the-Bar-2019.pdf>, p.3

³ <https://www.sra.org.uk/sra/equality-diversity/archive/law-firms-2017/>

⁴ <https://www.theguardian.com/society/2019/jan/29/more-than-half-young-people-jail-are-of-bme-background>

⁵ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643001/lammy-review-final-report.pdf ('The Lammy Report'), p.19

⁶ <https://www.release.org.uk/publications/numbers-black-and-white-ethnic-disparities-policing-and-prosecution-drug-offences>

⁷ Ibid; The Lammy Report, p.33

The problem is getting worse: the proportion of black defendants in drug prosecutions increased by 5% between 2014 and 2018.⁸ It's not surprising that, by the time they get to court, many black defendants don't trust the system: one of the most striking inequalities identified by the Lammy Review was that black defendants are considerably less likely to enter a guilty plea, resulting in longer custodial sentences on conviction.⁹

One way of eliminating racial bias in the enforcement of drug offences would be to eliminate those offences, and follow the example of jurisdictions like Switzerland, the Netherlands and – recently – Oregon in taking a compassionate and healthcare-focussed approach to drug use. The criminal law is never the appropriate mechanism by which to deal with the problem, and the fact that the rules are so disproportionately enforced against non-white users strengthens the argument.

But for those of a less radical inclination, there remains a great deal that could be done to ensure that the current laws are fairly applied. The police must revise their stop and search policies and training to stop disproportionately targeting black men, and judges and magistrates need to extend the same degree of compassion to black defendants as they show to white ones – another finding of the Lammy Review was that BAME children in custody are less likely to be flagged as having mental health concerns, learning difficulties, substance abuse issues and challenging family relationships.¹⁰ These are the risk-factors for coming into conflict with the law, and also the opportunities for intervention and support – the current system gives up on black defendants far too quickly.

Another helpful step would be to recruit more black judges and magistrates. The underrepresentation of BAME people in the judiciary is the thread that links together the two preconceptions with which this essay began – black people remain less likely to become judges, and the disproportionately white judiciary seems disproportionately inclined to send black defendants to prison.

As of 2019, 8% of court judges were BAME – only 1% were black.¹¹ There's reason for optimism; judges tend to be older, so the statistics won't yet reflect increased BAME participation in the legal profession over the last decade. But there are also indications that the judicial appointments process disadvantages non-white candidates – BAME applicants are markedly less likely to be successful than their white competitors.¹² Juries are designed to be representative, and are no more likely to convict a black defendant than a white one¹³ – but judges, who decide the sentencing, are less diverse and, it seems, more prejudiced.¹⁴ This is likely to be an under-discussed problem in civil proceedings, where judges alone preside over trials. Lord Reed was right to hope, in his first interview since becoming the President of the Supreme Court this year, that a BAME judge will join the bench during his tenure¹⁵ – a more proactive approach needs to be taken in the lower courts too.

We should keep talking about the ways in which racism is systemic, but we also need to engage with the ways in which it is specific: it is in the detail that the most practicable solutions are likely to lie.

⁸https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/849200/statistics-on-race-and-the-cjs-2018.pdf, p.60

⁹ The Lammy Report, p.26

¹⁰ Ibid, p.47

¹¹ <https://www.judiciary.uk/wp-content/uploads/2019/07/Judicial-Diversity-Statistics-2019.pdf>, p.6

¹²https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/918529/diversity-of-the-judiciary-2020-statistics-web.pdf, pp.21-23

¹³ The Lammy Review, pp.31-32

¹⁴ Ibid, pp.33-35

¹⁵ <https://www.bbc.co.uk/news/uk-54410466>

Even 'the law and the profession' is arguably too broad a place to start – let's take the most obvious problems first: we need to stop arresting black drug users and start hiring black judges.

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