Sentencing Members of Minority Groups

Problems and Prospects for Improvement in Four Countries

Julian V. Roberts, Gabrielle Watson, and Rhys Hester

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ABSTRACT

Members of racial, ethnic, and Indigenous minorities have long accounted for disproportionate percentages of prison admissions in Western nations and of prison populations. The minorities affected vary between countries. Discriminatory or differential treatment by criminal justice officials from policing through to parole is part of the problem. Much media and professional attention focuses on sentencing, where the decision-making is most public. An emerging body of research identifies sentencing as a cause—or, at the very least, an amplifier—of minority overincarceration. Solutions aiming to reduce it have been implemented, with varying but modest degrees of success, in the United States, England and Wales, Canada, and Aotearoa New Zealand. Progress toward reducing minority overincarceration has been slow. Most US sentencing commissions have failed to determine the extent to which their guidelines contribute to the problem. The Sentencing Council of England and Wales has taken the limited step of warning judges about racial disparities, without suggesting remedial steps to be taken. Courts in Canada and Aotearoa New Zealand have taken more activist approaches, mitigating sentences when offenders adduce evidence of discrimination or abuse by criminal justice officials.

Racial, ethnic, and Indigenous minorities have long accounted for a disproportionate percentage of prison admissions in Western nations (Tonry

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1997; Kurlychek and Johnson 2019).[1] The minorities affected vary, as does the magnitude of the problem. The explanations are complex and interrelated. The historical experiences of ethnic, racial, and Indigenous minorities play a role, particularly in postcolonial societies (Cuneen 2014; Saghbini, Bressan, and Paquin-Marseille 2021). Socioeconomic disadvantage and exposure to risk factors for offending such as unemployment, alcohol, and drug abuse are proximate causes of overrepresentation (Jeffries and Bond 2012). Discriminatory treatment by criminal justice officials also contributes. Much media and professional attention focuses on sentencing, where the consequences for defendants are most significant and decision-making is most public. A large body of research identifies sentencing as a cause—or, at the very least, an amplifier—of minority overincarceration.

Sentencing can exacerbate racial, ethnic, and Indigenous differences arising at earlier stages of the process. Overt discrimination may result in minority offenders being more likely to receive prison sentences, and for longer terms. Indirect discrimination also contributes (Spohn 2000; Veiga, Pina-Sánchez, and Lewis 2022). Elements of sentencing law, sentencing guidelines, and professional practice can have differential effects on minority offenders. Examples include guilty plea sentence discounts, criminal history enhancements, and the application of aspects of mitigation such as remorse. The challenge to legislators and sentencing commissions has been to devise solutions that reduce or eliminate sentencing differentials without undermining fundamental sentencing principles such as equity and proportionality.

Terms we use in this essay—race, ethnicity, minority ethnic, and marginalized—are imperfect. There has been variability in how these categories are understood and applied in criminal justice scholarship. For example, it is unclear what groups are included within the British term "minority ethnic." The term "marginalized" is too general, although it has historically been associated with punitive outcomes. New terms may allow for greater analytical granularity.

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[1] The scholarly literature mainly discusses Western countries, but differential outcomes for minorities have been found in many other jurisdictions, including India and China (e.g., Hou and Truex 2022).

Two theoretical accounts—disparate treatment and differential impact—offer valuable insights but do not capture the full picture. According to the disparate treatment perspective, racial and ethnic disparities result from discriminatory decisions by practitioners in individual cases. Minority defendants are often treated more harshly, even after accounting for legal factors such as prior convictions and offense seriousness. This perspective is too quick to align disparate treatment with bias. The differential impact perspective, by contrast, highlights laws and policies that, although applied neutrally to all racial and ethnic groups, are constructed in ways that make members of minority groups especially vulnerable to their effects (Murakawa and Beckett 2010). Taken together, the disparate treatment and differential impact accounts are of limited application to jurisdictions with Indigenous populations since they do not explain their overrepresentation at sentencing and disregard colonial and postcolonial legacies.

Accounting for the exact cause, or combination of causes, of overrepresentation is a complex task. The explanations vary, especially as these populations become larger and more heterogeneous. We caution against an overly reductionist account that seeks to explain minority overrepresentation only in terms of matters originating outside of the justice system, such as socioeconomic disadvantage or exposure to risk factors for offending. Sentencing is too context sensitive to be explained by a single theoretical account. The most plausible account of minority overrepresentation would be pluralist in nature, reflecting both direct (institutional) and proximate (socioeconomic) causes. There are tensions between the accounts on offer. They are not strictly distinct or irreconcilable, and it is neither necessary nor desirable to force a choice between them.

Although ethnic, racial, and Indigenous overincarceration is a common phenomenon, the solutions proposed or implemented at sentencing have been jurisdiction specific. We provide a cross-jurisdictional examination of developments in four countries and of the—at best modestly successful—solutions that have been tried.[2] We address three

[2] There have been previous comparative analyses. Cuneen (2014) explores colonial processes and their legacies in four White settler societies (Australia, Canada, Aotearoa New Zealand, and the United States). Jeffries and Bond (2012) examine explanations for sentencing discrepancies, drawing on statistics from the United States, Canada, and Australia. Marchetti and Downie (2014) and Bartels, Gorman, and Qunice (2020) discuss Canada,

key questions. First, do sentencing outcomes differ for racial, ethnic, and Indigenous minority defendants? Second, to what extent are marginalized communities overrepresented in prison statistics? Third, what kinds of remedial steps have legislatures, sentencing commissions, and courts taken?

A number of conclusions emerge:

Minority defendants (particularly Indigenous and First Nations peoples) are overrepresented in the prison populations of all four countries. The persistence of high rates of minority imprisonment suggests that the primary drivers lie outside the jurisdiction of the sentencing court. The principal causes are found earlier in the criminal process and in the socioeconomic conditions to which marginalized and racialized minorities are subject.

Data deficiencies limit our ability to determine to what degree minority overincarceration is attributable to sentencing. Imprisonment statistics are often uncorrected for offenders' criminal histories or other legally relevant factors. Nevertheless, the evidence suggests that direct and indirect discrimination at sentencing contributes to racial and ethnic disproportionality.

Discretionary and structured sentencing regimes contain features that disadvantage minority defendants and create sentencing and imprisonment disparities. The differences vary considerably according to offense, minority background, and characteristics of the individual offender. Indigenous and Black communities fare worst.

Legislators and sentencing commissions have been slow to address the problem. Canada and Aotearoa New Zealand have enacted special provisions for the sentencing of Indigenous offenders, but this alone has proved insufficient.

Sentencing commissions carry a special responsibility to ensure that their guidelines do not exacerbate existing differences between majority and minority defendants. Most US commissions have abdicated their responsibility in this respect. US sentencing commissions and courts have generally adopted a "color-blind" approach to sentencing of members of minority group. Judges and other policy makers in the other three countries have attempted to address the problem.

The Sentencing Council of England and Wales alerts judges to sentencing differentials involving minorities but offers no guidance regarding the sentencing of these groups.

Australia, and Aotearoa New Zealand. Anthony (2010) reviews sentencing in Australia and Aotearoa New Zealand. Finally, Bagaric et al. (2021) propose a "roadmap" to reduce the overincarceration of African Americans and Indigenous Australians.

The Canadian Parliament has legislated particular consideration be given to sentencing Indigenous offenders. In addition, courts in Canada sentence Indigenous offenders with the benefit of specialized reports, often prepared by Indigenous legal officers. Similar consideration is now being extended to Black offenders with a history of racial abuse or discrimination.

Legislation in Aotearoa New Zealand has codified special consideration for Māori and other disadvantaged defendants. Courts now recognize that defendants from marginalized communities have legitimate claims to mitigation arising from racial abuse or discrimination that may have contributed to their offending or affected their level of culpability. Despite these (and other) remedial initiatives, racial, ethnic, and Indigenous overincarceration persists.

Correcting elements of sentencing law, policy, and practice that exacerbate racial disproportionality is possible, although it will require bold action from legislatures, governments, sentencing commissions, and courts. Judges are unlikely to adjust their sentences without appropriate guidance or authority from appellate courts or commissions. They, in turn, are unlikely to act without encouragement from the legislature.

This essay is organized as follows. Section I documents the disproportionality problem and responses to it in the United States, England and Wales, Canada, and Aotearoa New Zealand. The first two jurisdictions operate formal sentencing guidelines. The latter are representative of the discretionary approach found in most common law countries. The United States is the home of the sentencing guidelines movement; reduction in racial disparities at sentencing (and in prison populations) was one of the justifications for its introduction. The Sentencing Council of England and Wales has recently reviewed its guidelines to understand whether and how they contribute to racial differences in sentencing. Canada and Aotearoa New Zealand have sizable Indigenous populations and have grappled with minority overincarceration for decades. Legislatures and the courts have taken the initiative in these countries. Section II explores other potential remedies.

I. Disparities and Responses

We begin by considering imprisonment and sentencing trends in the United States, highlighting Minnesota as an example. We then discuss the other three jurisdictions in succession.

A. The United States

Racial disparities in imprisonment remain high but have fallen by about a third in recent decades. Black imprisonment rates are nearly five times those for Whites, but there is enormous variation between states. The overall US ratio masks the differences; in some states the Black-White disparity ratio is over 12. Sentencing research consistently shows that there are small but statistically significant disparities in in/out decisions but that racial differences in sentence length are minimal.

We discuss two responses to disparities: sentencing guidelines and racial impact statements. For decades sentencing guidelines were the primary means to address racial disparities. They seem to achieve this to a considerable extent, but the role of the sentencing phase in overall racial disparity may have been comparatively minor. Guidelines have, however, assigned great weight to prior convictions at sentencing, and this has exacerbated disparities. Commissions could address this issue but to date have done little. Racial impact statements illuminate predictable racially disparate effects of alternative policy choices, in the hope that policy makers will use the resulting information to reduce or ameliorate them.

1. *Imprisonment and Sentencing Trends.* The United States is among the most punitive nations in the Western world and exhibits pronounced racial disproportionality (Tonry 1995; Petersilia 2011; Travis, Western, and Redburn 2014). Whites make up about 64 percent of the US population but 30 percent of the prison population. Black people constitute 12 percent of the general population but 33 percent of prisoners (Gramlich 2019). Traditionally, Black disparities have attracted the most attention, but there are also long-standing Native American disparities (Franklin 2013; Ulmer and Bradley 2017, 2019) and sizable disparities affecting the Hispanic population.[3]

Table 1 shows Black-White prison disproportionality ratios in 2020 for the top and bottom 10 states, plus the US aggregate ratio.[4] Expressed

[3] Native Americans, "among the most disadvantaged groups in the US" (Ulmer and Bradley 2017, p. 752), experience large disparities. Examining them is challenging, though, because of a complex web of tribal/state/federal jurisdictional issues. Marc Mauer (2011, p. 88S) has observed that "criminal justice data on other racial groups, including Native Americans and Asians/Pacific Islanders, is generally very scarce. . . . [But] available data documents that Native Americans are incarcerated at more than twice the rate of Whites, while Asian Americans/Pacific Islanders have the lowest incarceration rate of any racial/ethnic group."

[4] These ratios are based on state and federal prison populations and do not include jail inmates (see, e.g., Sabol and Johnson 2022). Jail inmates have in recent decades constituted about one-third of total prisoners; including them would increase the total US imprisonment

TABLE 1
Selected US State Disproportionality Ratios, 2020

10 Worst Black-White Ratios		10 Best Black-White Ratios	
New Jersey	12.5	West Virginia*	3.8
Vermont	12.3	Missouri	3.6
Wisconsin	11.9	Arkansas	3.5
Minnesota	9.9	Texas	3.5
Connecticut	9.4	Tennessee	3.4
Iowa	9.3	Kentucky	2.9
California	9.2	Alabama	2.8
Nebraska	8.9	Georgia	2.8
Maine	8.8	Mississippi	2.6
Rhode Island	8.5	Hawaii	2.4

SOURCE.—Nellis (2021).

NOTE.—Prison rates are per 100,000 in the population. US total disproportionality ratio = 4.8.

* Tied with Louisiana and South Carolina

in rates per 100,000 population, Black rates were five times higher. In several states the disproportionality was much higher, with Black-White ratios of around 12 in New Jersey, Vermont, and Wisconsin. Minnesota, a state we discuss in some detail below, was fourth worst at 9.9. At the other extreme, five states had Black-White ratios under 3 (Kentucky, Alabama, Georgia, Mississippi, and Hawaii). In every state, however, imprisonment rates were higher for Blacks than for Whites.

a. Time Trends in Prison Disproportionality. Black overrepresentation in imprisonment fell significantly between 2000 and 2020. Following significant growth from 1973 through the first decade of the 2000s (Travis, Western, and Redburn 2014), the US prison population peaked in 2009 with 1,553,000 individuals in state and federal prisons (Bureau of Justice Statistics 2017); by 2021, that had fallen to 1,204,300 (Bureau of Justice Statistics 2022). Including jail inmates in the calculation would increase that rate by about half. Despite the steep fall, the US imprisonment rate continues to be an outlier by Western standards. Figure 1 plots the Black, White, and Hispanic rates per 100,000 same-group population for imprisonment in federal and state facilities from 2010 through 2020, to illustrate both the declining incarceration trend and the decline in disproportionality.

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rate to 500–525 per 100,000. For the purposes of international comparison, the total rate must be used.

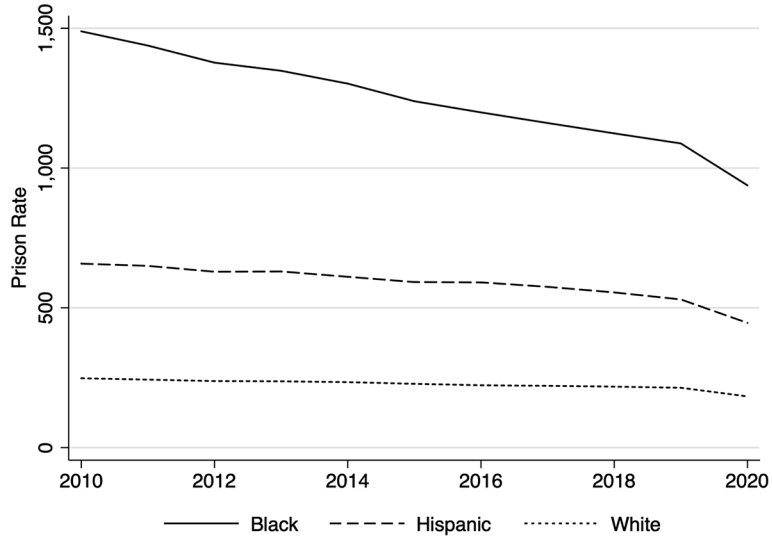

FIG. 1.—State and federal imprisonment rates per 100,000 resident population, by race and ethnicity, 2010–20. Authors' analysis of Bureau of Justice Statistics (2021).

We highlight Minnesota as an illustrative case. Its proportionality ratio of 9.9 is fourth worst, but it has fallen. During the 1980s and 1990s the ratio was around 20, peaking at almost 23 in 1994 (Frase 2009, p. 219), and so has dropped by more than half. Frase demonstrates that the pronounced Black-White ratio was driven by a particularly low White imprisonment rate. Minnesota's Black imprisonment rates of 2,870 in 1999 and 2,824 in 2014, thirty-fifth and thirtieth highest among the 50 states, were in the bottom half both years. Yet in both years Minnesota's Black-White ratios were the highest in the country (Enders, Pecorino, and Souto 2019, p. 375).

b. Sentencing Contributions to Disproportionality. Studies dating back decades examine sentencing disparities (for reviews, see Spohn 2000; Mitchell 2005; Franklin 2018). Modest disparities are found for some punishment decisions and none for others. In a widely cited assessment, Eric Baumer (2013, p. 242) concluded: "The consistent finding from recent overviews on studies of race and sentencing in samples of convicted defendants is that there are often relatively small but statistically significant direct race differences in the probability of imprisonment to the disadvantage of blacks (compared to whites), and comparatively smaller and

statistically nonsignificant direct race differences in prison sentence lengths between these groups." However, as Baumer and others note, generalizing from the findings of meta-analyses or systematic reviews can mask sizable race effects (e.g., Mitchell 2005; King and Light 2019). These may be affected by the sample, the jurisdiction, and the methodology used and by the type of crime and interactions with age, gender, and socioeconomic status. There may be decision-making pockets in which race effects are pronounced (see Kutateladze et al. 2014; Spohn 2015; Kurlychek and Johnson 2019). Nonetheless, sentencing phase disparities do not explain the pronounced overall levels of imprisonment disproportionality.

Racial disparities in imprisonment appear to be declining. King and Light (2019) examined trends in several jurisdictions, including under the Minnesota guidelines from 1982 through 2013. Controlling for the guidelines' presumptive sentences, the in/out disparity affecting Blacks was 25 percent in 1984; just a few years later it had dipped to zero. Throughout the period examined, Blacks sometimes were slightly more likely than Whites to be imprisoned (typically by less than 5 percent more), but at other times Whites were more likely than Blacks (by up to 8 percent more). King and Light (2019) similarly found declining disparities under the federal guidelines. Mitchell, Yan, and Mora (2023) reached similar conclusions about racial disparity trends in sentencing in Florida.

These findings point to the importance of distinguishing between the decisions of individuals, such as prosecutors and judges, and of institutions such as legislatures, sentencing commissions, and judicial administrators. Black people are overrepresented in prison populations by a substantial margin, but empirical studies suggest that sentencing decisions play a comparatively small causal role. The primary causes are located upstream and include prosecutorial charging decisions, police arrest decisions, sentencing laws and policies, and racial differences in criminal justice system involvement (Kutateladze et al. 2014; Pfaff 2017). However, two caveats are important.

First, in both the regression analyses that typify quantitative sentencing studies and the adjusted analysis provided by King and Light (2019), offense severity and prior record are modeled as legitimate control variables. This assumes that it is proper to impose progressively harsher punishments on defendants convicted of more serious crimes and on defendants with more extensive criminal records. Although few would challenge the association between punishment and offense severity, there are serious questions concerning prior criminal records (Hester et al. 2018; Frase and

Roberts 2019). Second, because most studies analyze pooled outcomes for thousands of individuals, significant pockets of disparity may be overlooked. Much more research is needed that attends to specific offenses, defendant characteristics, and contextual settings (Mitchell, Yan, and Mora 2023). Interactions of age, sex, race, and socioeconomic hardship may especially disadvantage young Black men. Race operates in some places indirectly, interactively, and cumulatively in ways inconsistent with the general conclusion that there is comparatively little racial disparity in sentencing (Murakawa 2019).

c. Explanations for Disproportionality. Scholars tend to agree that there is little evidence of overt racism against Black people by prosecutors and judges.[5] Differences in arrest explain a significant degree of prison disproportionality (see Blumstein 1982; Tonry and Melewski 2008; Beck and Blumstein 2018). Group differences in arrest, however, do not necessarily reflect group differences in offending. Arrest differences exist for serious violent crimes but much less for the drug crimes that long drove state and federal prison populations. In any case, the proportion of racial disparities in imprisonment that can be explained by arrest differentials has declined over time (Tonry and Melewski 2008; Spohn 2015).

Other causal explanations target criminal justice laws and policies. Sentencing policies for violent and especially drug crimes result in imprisonment disparities that cannot be explained by group differences in arrest (Spohn 2017). The relationship between drug-related crime involvement and imprisonment is the weakest. Black people are no more likely to use or sell drugs than Whites but are much more likely to be arrested and imprisoned for drug crimes (Tonry and Melewski 2008).

Much of the drop in racial disparities in imprisonment is attributable to recent changes in drug law enforcement and convictions. Sabol and Johnson (2022), in an analysis of imprisonment disparity decline from 2000 to 2020, found that the greatest reductions resulted from declining imprisonment rates for drug convictions for Blacks. The drug

[5] See, e.g., Tonry and Melewski (2008, p. 21): "On the basis of personal interactions over decades with judges in many American jurisdictions, we do not believe that invidious racial bias and gross stereotypes are likely substantially to affect sentencing decisions" (see also King and Light 2019, pp. 404–5). Implicit bias by practitioners no doubt sometimes influences decisions, and scholars in criminology have developed theories such as "focal concerns" and causal attributions that incorporate this type of bias (Spohn 2015). However, since sentencing does not seem to be a primary cause of racial disproportionality, these considerations cannot explain why racial disparities in imprisonment are so high.

imprisonment disparity dropped by 75 percent and accounted for around half the overall decrease. Enders, Pecorino, and Souto (2019) found that the greatest increases in Black-White disparity occurred between 1978 and 1999 when the Black incarceration rate rose from 1,080 to 3,500 per 100,000, a period that coincided with the "get tough on crime" movement and the war on drugs. They noted that the overall decline in disparities coincided with the waning of the crack epidemic. Spohn (2015, p. 72) concluded that "the war on drugs and the belief that incarceration is the appropriate penalty for drug offenses are major causes" of US prison disparity.

A higher-level cultural or institutional approach questions how Americans could create or countenance a criminal justice system that permits such striking racial disproportionality (e.g., Wacquant 2002; Alexander 2010; Bonilla-Silva 2021). Despite the progress associated with the US civil rights movement of the 1960s, wide race gaps persist in education, employment, income and wealth, home ownership, and criminal justice system involvement (Parker, Horowitz, and Mahl 2016; King and Light 2019). Most Americans disavow past discrimination (Bobo et al. 2012), and disparities even in those socioeconomic domains have improved in recent decades. But justice-related disparities continue to be pronounced.

Wacquant (2002) and Alexander (2010) argue that mass incarceration and its racial disproportionalities constituted a form of White racial control over Blacks, replacing oppressive Jim Crow policies and the system of slavery that preceded them. Wilkerson (2020) similarly argues that America embodies a caste system that places Black people at its bottom and uses various instruments, including the criminal justice system, to keep them there. Bonilla-Silva (2021) emphasizes an American racial ideology of color blindness in which most Whites embrace the ideal of equality and reject treating people differently on the basis of race. However, that encompasses the belief that Whites should not be treated differently by, for example, affirmative action education and hiring programs. The color blindness ideology allows no place for policies that aim to overcome the effects of America's long and continuing history of racial discrimination.

2. *Legislative and Judicial Responses to Disparities.* Two primary initiatives have been adopted in some US jurisdictions to address racial disparities: sentencing guidelines and racial impact statements. The net effect of guidelines seems to be beneficial despite one serious problem: they overemphasize the defendants' criminal histories in ways that disadvantage

members of minority groups. Racial impact statements are promising, but their long-term benefits remain unproven.

a. Sentencing Guidelines. Concerns about racial disparities were key to the adoption of guidelines, but most states, including some of the largest such as California, New York, and Texas, do not have them.[6] Their effects on racial disparities are unclear. Early studies from Minnesota suggested that guidelines reduced unwarranted disparities in sentencing, although perhaps little existed there before the guidelines (Miethe and Moore 1985; Miethe 1987). Frase (2005), in a comprehensive summary, concluded that judicial noncompliance with guidelines had not consistently favored any racial group (see also Frase 1990, 1992). Overall, the consensus appears to be that guidelines reduce or prevent disparities or at least do not make them worse (Tonry 1996, 2016; Pfaff 2006; Frase 2012). Even assuming that guidelines have reduced disparities in sentences, they have played at best a limited role in reducing imprisonment disparities. That is because of how guidelines handle criminal history.

Most guidelines are embodied in two-dimensional grids in which one dimension reflects prior convictions and other facets of criminal histories (Hester and Hartman 2017; Hester 2021). Guidelines' handling of criminal history makes a huge difference, especially for minority offenders of whom more—partly for reasons of police bias—have extensive criminal records than do Whites. For many people sentenced to imprisonment, criminal history has more influence on the lengths of their sentences than the offenses of which they were convicted.

Forty to 60 percent of racial disparities in imprisonment in guidelines jurisdictions is attributable to criminal history (Frase 2009; Frase et al. 2015). This is troubling because giving criminal history so much weight is difficult to justify under mainstream punishment rationales (Hester et al. 2018). On average in guidelines states, criminal history increases prison sentences sixfold and at the extreme more than tenfold (Frase et al. 2015). Concerns about injustices associated with prior record policies have been voiced for decades (Roberts 1997). A sizable body of research documenting fundamental prior record problems has accumulated more recently (e.g., Hester et al. 2018; King 2019).

Two sentencing commissions have reconsidered their approaches to criminal history. The Pennsylvania Commission on Sentencing undertook

[6] By 2018, 22 jurisdictions had or once had adopted guidelines (Frase 2019).

a comprehensive review of its guidelines beginning in 2014 (PCS 2016). In 2023, the commission proposed major changes, especially concerning criminal history (PCS 2023). Criminal history categories would be reduced from eight to five, policies for "lapse" of prior convictions would be expanded, and the maximum additional amount of prison time attributable to a prior record would be substantially reduced. Academics have proposed that prior record considerations should never more than double the sentence length that would be warranted by the current offense (Tonry 2016, pp. 243–44; Frase and Roberts 2019). Before 2015, Pennsylvania had a multiplier slightly higher on average than 6 (Frase et al. 2015). Under the new proposed changes, the multiplier is less than 2.

The Minnesota Sentencing Commission's efforts at even modest change failed. The time was not right. The murder of George Floyd by Minneapolis police in 2020 triggered nationwide (and international) protests about police use of force and racial bias, and Minneapolis had recently experienced a sharp increase in gun violence. The Minnesota commission proposed a minor criminal history change, eliminating a provision that increased sentences for individuals on probation, parole, or pre-trial release when the current offense was committed. In the face of strong opposition, the commission declined to adopt the change (MSGC 2023, p. 5). It was a culpable failure.[7] Minnesota's commission, to the ongoing detriment of Black defendants, remains committed to its color-blind approach.

b. Racial Impact Statements. Demographic or racial impact statements are another initiative that aims to reduce racial disparities in imprisonment. The *Model Penal Code: Sentencing* recommended their adoption (American Law Institute 2017, sec. 8.07). The idea is that impact projection analyses be conducted for any proposed criminal justice legislation or policy change that might affect racial, ethnic, and gender disparities in imprisonment. Minnesota's commission began doing this in 2007. Nine other states (Iowa, Colorado, Connecticut, Florida, Oregon, Maine, Maryland, New Jersey, and Virginia) have enacted racial impact statement laws or mechanisms; legislation has been proposed in another nine (Porter 2021). Whether racial impact statements can reduce prison disproportionality is unclear.

[7] The Minnesota commission has commissioned an external neutrality review of its guidelines to explore disparities in the state, with a view to better understanding the role of the guidelines, although to date no amendments have been made in response (see Uggen and Schwendeman 2022).

To summarize, the US record concerning amelioration of racial disparities is at best mixed. Racial disparities in imprisonment have declined since 2000, but this appears to result more from changes in prosecution patterns than in sentencing policies. Racial disparities in sentencing appear to have declined. About half of the states, partly aiming to reduce disparities, adopted guidelines, but a larger number, including the most populous, did not. Of the states with sentencing commissions, few have taken meaningful action, such as changing their approaches to criminal history, to further address disparities.

B. England and Wales

Evidence of differential sentencing in England and Wales has been accumulating slowly since 1992. In official reports, the term "ethnic minority" refers to all people not in the "White" category. Minority offenders from various communities have for decades experienced higher custody rates and longer prison sentences than Whites. In 2019, approximately 16 percent of the general population and 27 percent of the prison population had an ethnic minority background (House of Commons 2020).

1. *Current Trends.* The percentage of Black people in prison is much higher than in the general population (13 vs. 4 percent; House of Commons 2020). Over 30 years ago, Roger Hood (1992) found significant racial sentencing differentials, and more recent research controlling for more variables has confirmed these differences. Governmental and independent reports have documented disproportionality in the sentencing process and in the criminal justice system more generally (e.g., Lammy 2017; Commission on Race and Ethnic Disparities 2021; Monteith et al. 2022).

People convicted of serious crimes (called indictable offenses) and receiving sentences of custody appear in the superior trial court (the Crown Court). In 2022 custody rates were highest for "Chinese or other" (37 percent), followed by Asian (36 percent), Black (35 percent), mixed (34 percent), and White offenders (33 percent). Table 2 summarizes custody rate trends for indictable offenses from 2009 to 2022. Over this period, "Chinese and other" attracted the highest custody rate (37 percent), 8 percent higher than for Whites. All visible minority groups had higher levels of imprisonment than the White group. Unlike in the United States, racial differences in imprisonment rates do not appear to have diminished in recent years.

TABLE 2
Custody Rates by Ethnic Profile, England and Wales, 2009–22 (%)

	White	Black	Asian	Mixed	Chinese/Other
2022	33	35	36	34	37
2021	33	31	31	33	35
2020	35	33	34	35	36
2019	33	34	35	33	36
2018	33	35	37	34	37
2017	33	33	36	32	35
2016	31	31	35	32	33
2015	29	31	34	28	35
2014	27	30	32	28	36
2013	26	29	31	28	38
2012	26	31	32	28	40
2011	25	30	31	27	38
2010	23	28	29	23	39
2009	22	29	29	23	40
2009–22 average	29	31	33	30	37

NOTE.—Data are from the Ministry of Justice (2023). Adult offenders sentenced for all offenses in the Crown Court, excluding offenders for whom ethnicity is not stated or not available; percentages rounded.

Table 3 shows that Asians and Blacks had the longest average custodial sentence lengths (ACSLs; 25.4 and 25.7 months), both more than the average for Whites (17.9 months). The ACSL for Whites has been consistently lower than for all other ethnic profiles, and the gaps between ACSLs have increased over time. These comparisons are uncorrected for a range of factors including crime seriousness and the offender's criminal history. When the effects of additional legally relevant variables are controlled for, sentence length differences between Black people and Whites diminish or are evident only for certain subgroups of a minority category (e.g., defendants of Black Caribbean origin; see Lymperopoulou 2023).

Analyses that control for offender and offense-related factors confirm these ethnicity-based sentencing differences. Hopkins, Uhrig, and Colahan (2017) found that offenders who self-reported as Asian or Black had a higher likelihood of imprisonment than did Whites. This difference was "statistically significant and medium sized" (p. 5).[8] Uhrig found that Black

[8] Black and minority ethnic (BAME) defendants were less likely to plead guilty and therefore less likely to benefit from plea-based sentence reductions. However, the discrepancies remained statistically significant even after controlling for plea and other legally relevant variables.

TABLE 3
Average Custodial Sentence Length (in Months) by Ethnic Category, 2009–20

	White	Black	Asian	Mixed	Chinese/Other
2022	21.4	28.1	35.6	28.8	27.0
2021	23.8	32.4	29.5	25.7	24.8
2020	19.7	26.9	28.7	24.4	24.5
2019	19.5	27.8	28.3	24.5	23.2
2018	18.4	28.1	29.1	22.2	23.2
2017	18.3	25.6	27.1	22.0	21.0
2016	17.9	24.0	24.8	20.7	23.2
2015	17.7	25.2	24.9	20.0	21.4
2014	17.0	24.7	24.9	19.8	19.2
2013	16.9	24.3	22.8	19.4	18.6
2012	15.9	23.4	22.4	19.7	17.2
2011	15.6	22.8	22.0	17.8	17.0
2010	14.9	21.4	19.9	17.3	16.6
2009	14.6	20.2	19.5	16.1	16.7
2009–22 average	17.9	25.4	25.7	21.3	21.0

NOTE.—Data are from the Ministry of Justice (2023). Adult offenders sentenced for all offenses in the Crown Court, excluding offenders for whom ethnicity is not stated or not available.

men were "about 12 percent more likely than White men to receive a custodial sentence" (2016, p. 19). Isaac (2020) employed a database in which sentencers themselves identified the principal factors they had considered at sentencing (the Crown Court Sentencing Survey). The analysis was able to control for all mitigating and aggravating factors cited by the judge. For the drug offenses studied, Black offenders had 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 offenses" (Isaac 2020, p. 1). The odds of a Black offender receiving an immediate custodial sentence were 40 percent higher than for a White offender. More recent research on other offenses found no consistent or strong evidence of disparities for minority ethnic groups (Chen et al. 2023). This inconsistent pattern of findings suggests that any bias does not operate in a simple or straightforward way but interacts with factors such as the offense of conviction.

Finally, practitioners' perceptions align with the findings from statistical research. Veiga, Pina-Sánchez, and Lewis (2022, p. 13), finding that all the barristers they interviewed believed indirect discrimination is a

problem in English sentencing, concluded that "the evidence of discrimination in sentencing is undeniable." Monteith et al. (2022, p. 6) report that over half of their respondents had witnessed judges acting in a "racially biased way towards a defendant."

2. *Legislative and Judicial Responses.* We focus on the Sentencing Council that issues guidelines for courts at sentencing. Courts are required to follow these guidelines unless it would be contrary to the interests of justice to do so. Several elements of sentencing in England and Wales contribute to the overrepresentation of Black people in prison statistics. Hood (1992, pp. 181–82) found that BAME defendants were more likely to be detained pre-trial, more likely to be convicted following a contested trial, and more likely to be sentenced without benefit of a comprehensive pre-sentence report (PSR). More recent research confirms these patterns (House of Commons 2020). Bail, plea, and the PSR are all within the ambit of the sentencing process. We noted that under US grid-based guidelines, criminal history enhancements substantially contribute to racial disparities. Prior convictions do not contribute to minority overincarceration in England and Wales because of their more modest role at sentencing.[9]

There has been little progress in addressing racial disparities in the use of imprisonment. At sentencing, courts must follow any sentencing guidelines that are relevant to the offender's case unless "it would be contrary to the interests of justice to do so" (Sentencing Act 2020, sec. 59[1]). The Sentencing Council has recently taken modest remedial steps to address racial disproportionality. The council has a "public sector equality duty" (set out in sec. 149 of the Equality Act 2010) that requires public authorities to have "due regard" to the need to eliminate discrimination, harassment, victimization, and any other conduct prohibited under the 2010 act. The council also has a duty to monitor the operation and effect of its guidelines and to draw conclusions about the effect of the guidelines on "the promotion of consistency" and "the promotion of public confidence" (Coroners and Justice Act 2009, secs. 128 [1][c] and [d]). Understanding any unintended effects of the guidelines on racial and ethnic minority

[9] The Sentencing Act 2020 requires courts to aggravate sentences only if the prior convictions are sufficiently recent and related to the current conviction. As a result, courts disregard many prior offenses because they are too old or unrelated to the current crime (Roberts and Pina-Sánchez 2014).

defendants clearly falls within this duty. So, how has the council discharged this duty?

The council has inserted references in its guidelines to differential sentencing outcomes. For example, the firearms offenses guideline provides the following warning: "Sentencers should be aware that there is evidence of a disparity in sentence outcomes for this offence which indicates that a higher proportion of Black and Other ethnicity offenders receive an immediate custodial sentence than White and Asian offenders. . . . There may be many reasons for these differences, but to apply the guidelines fairly, sentencers may find useful information and guidance at the Equal Treatment Bench Book [ETBB]" (Sentencing Council of England and Wales 2021, p. 3).[10]

The ETBB acknowledges two key research findings: the overrepresentation of BAME people at various stages of the criminal process and the lower levels of confidence and trust in criminal justice found in BAME communities (Judicial College 2022, chap. 8). The ETBB is informative but fails to indicate how sentencers can ensure fairness in applying the guidelines. Instead, it implies that sentencers should stand back and consider whether an offender's ethnicity has directly or indirectly influenced the sentence imposed. The council's direction is clearly not intended as an automatic or categorical reduction in sentence to reflect BAME overrepresentation in criminal justice system statistics. But there remains the question of how exactly a sentencer should proceed.

The council has also warned courts about consideration of key mitigating factors, including remorse. In its guidance explaining remorse, the council notes that "remorse can present itself in many different ways. A simple assertion of the fact may be insufficient, and the offender's demeanour in court could be misleading, due to nervousness, a lack of understanding of the system, a belief that they have been or will be discriminated against, peer pressure to behave in a certain way because of others present, a lack of maturity etc. If a PSR has been prepared it may provide valuable assistance in this regard" (Sentencing Council of England and Wales 2023). This warning spells out some of the difficulties in assessing remorsefulness, particularly in relation to young Black offenders. The

[10] This document is used by courts with the goal of ensuring that "all those in and using a court leave it conscious of having appeared before a fair-minded tribunal" (Judicial College 2022, p. 2).

council continues: "Different cultures display and view remorse differently. For example, young black men involved in gang/street culture are often taught that public displays of emotion show weakness, making it difficult to display it in a legal setting." This leads the council to conclude that the judiciary needs to develop cultural understanding of the different ways remorse can present itself.

Most recently the council has published research examining the impact of its guidelines and advice on sentencing of minority offenders (Chen et al. 2023). This work resembles the "racial impact" analyses discussed above (Mauer 2009). Several recommendations were offered, most involving collection of additional information rather than anything remedial (Chen et al. 2023, pp. 65–68).

The courts in England and Wales have not actively engaged with whether sentencers should consider racial discrimination as a potential mitigating factor when sentencing minority offenders who have experienced it. To summarize, although the sentencing regime in England and Wales cannot be said to adopt the color-blind approach found in the United States, nor has it developed any remedial strategies beyond making courts aware of sentencing differentials based on the defendant's ethnicity.

C. Canada

First Nations peoples are and long have been the principal community affected by overincarceration in Canada. Indigenous Canadians experience high levels of social and economic disadvantage and, as a result, higher levels of involvement with the criminal justice system (Royal Commission on Aboriginal Peoples 1996). First Nations peoples in Canada are very diverse and do not constitute a single monocultural group, but all suffer from high levels of unemployment, social exclusion, and other social ills.

Indigenous overincarceration was officially identified as a problem in Canada 40 years ago in a seminal government document regarding sentencing (Government of Canada 1984). Courts, in contrast, have long grappled with whether the conventional approach to sentencing is suitable for Indigenous offenders.[11] Subsequent commissions of

[11] For an early example of a court addressing the sentencing of an Indigenous offender, see *R v. Fireman*, [1971] 3 ONCA 380.

inquiry (e.g., Royal Commission on Aboriginal Peoples 1996) and the Ipperwash Inquiry in 2007 addressed the subject and proposed solutions (Linden 2007). In 2015, the Truth and Reconciliation Commission of Canada (2015) further documented the problem, while suggesting relatively limited solutions (see Rudin [2022] for a summary of relevant commissions and inquiries).[12] Despite this succession of official reports (and much academic commentary), remedial reforms to date have been modest.

1. *Sentencing Trends.* Indigenous peoples have long accounted for a disproportionate number of admissions to Canada's prisons (Roberts and Reid 2017; Rudin 2022). The Indigenous prison admission ratio—the population-based proportion of Indigenous admissions compared to the proportion of non-Indigenous admissions—was 5.68 across Canada over the period 2000–2001 to 2020–21. Thus, Indigenous people were almost six times more likely to be admitted to prison than non-Indigenous Canadians. The overrepresentation was worst in the most recent year (a ratio of 8.72).[13]

Table 4 summarizes annual admission trends over a generation for provincial prisons.[14] In 2020–21, Indigenous people accounted for a much higher percentage (35 percent) than their proportion in the general population (approximately 5 percent).[15] Despite legislative and judicial efforts to the contrary, the Indigenous admissions percentage has been increasing in recent years, constituting 15 percent of admissions in 2000–2001 but 35 percent in 2020–21. Figure 2 illustrates trends since 1978 and reveals both the persistence of the problem and increasing levels of Indigenous incarceration. A recent government report concluded that, compared with White offenders, Indigenous offenders were over a 10-year

[12] The Truth and Reconciliation Commission of Canada (2015, p. 3) called for enhanced cultural competency training for lawyers and for federal, provincial, and territorial governments to "commit to eliminating the overrepresentation of Indigenous people in custody over the next decade."

[13] The problem is not uniformly distributed: great variation exists among provincial and territorial jurisdictions. In 2016, e.g., the Indigenous rate ratio was 3.32 in Newfoundland and Labrador. In Saskatchewan, Indigenous people were over 16 times more likely to be admitted to prison than non-Indigenous people.

[14] We focus on provincial and territorial populations since approximately 95 percent of prison sentences in Canada are under 2 years in length and served in provincial or territorial prisons.

[15] In 2016, 4.9 percent of the total Canadian population self-classified as Indigenous.

TABLE 4

Admissions to Provincial and Territorial Custody, Canada, 2000–2001 to 2020–21

	Non-Indigenous Admissions to Custody	Indigenous Admissions to Custody	Indigenous Admissions as Percentage of All Admissions
2000–2001	55,161	9,603	15
2001–2	56,831	10,787	16
2002–3	57,196	11,433	17
2003–4	54,278	10,920	17
2004–5	51,438	11,170	18
2005–6	61,119	18,291	23
2006–7	61,722	18,597	23
2007–8	62,310	18,413	23
2008–9	62,534	20,375	25
2009–10	61,051	21,789	26
2010–11	60,435	23,380	28
2011–12	60,638	24,161	28
2012–13	48,902	16,826	26
2013–14	47,563	16,843	26
2014–15	45,737	16,309	26
2015–16	45,571	16,921	27
2016–17	58,478	25,505	30
2017–18	56,095	24,179	30
2018–19	50,630	21,263	30
2019–20	45,411	19,131	30
2020–21	22,999	12,267	35

NOTE.—Adapted from Roberts and Reid (2017) and updated.

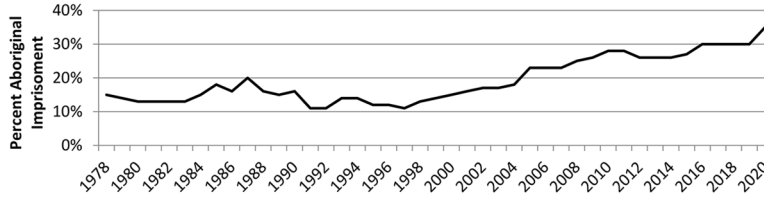

FIG. 2.—Indigenous sentenced admissions as a percentage of all provincial and territorial sentenced admissions, Canada (1978–79 to 2020–21). Data are unavailable for New Brunswick, Nunavut, and Northwest Territories (2000–2001); Alberta (2000–2001 to 2004–5, 2012–13 to 2015–16); and Prince Edward Island (2004–5 to 2007–8). Sources: Roberts and Melchers (2003) and Adult Correctional Services Survey (2023).

period, on average, 30 percent more likely to receive a custodial sentence (Saghbini, Bressan, and Paquin-Marseille 2021). This effect emerged regardless of the gender or age of the offender or the category of offense. The overrepresentation is even greater for Indigenous youth who represented half of all male youth admissions and almost two-thirds of female admissions (Statistics Canada 2022).

Offenders from other racialized communities are also more likely than Whites to be incarcerated and for longer terms. Black Canadians have long experienced disproportionate attention from the police and harsher treatment by the courts and correctional services (e.g., Commission on Systemic Racism in the Ontario Criminal Justice System 1995; Roberts and Doob 1997; Tanovich 2006; Ontario Human Rights Commission 2018). Black Canadians experience higher custody rates, although imprisonment statistics for them are far less reliable than for Indigenous people.[16] Except concerning Indigenous people, data on race in the justice system are collected and reported by only a small minority of police services (Owusu-Bempah and Millar 2022). Statistics Canada records whether a person admitted to prison is Indigenous, but not for any other ethnic group.[17] The Correctional Investigator publishes limited data from the federal prison system and in 2022 reported that Black people constitute 9 percent of the federal prison population but only 3 percent of the general population.[18] These numbers are unchanged since the previous review in 2013 (Correctional Investigator of Canada 2022).

2. *The Legislative and Judicial Response.* A legislative attempt to reduce the use of incarceration for Indigenous offenders was made in 1996 when Parliament codified special consideration as part of Bill C-41 (Murdocca 2013; Cole and Roberts 2020). Section 718 2(e) of the Criminal Code as a consequence provides that "a court that imposes a sentence shall also take into consideration the following principles: … (e) all available sanctions

[16] Roberts and Doob (1997) documented higher imprisonment rates for Black offenders in Canada's most populous province (Ontario). The absence of systematic data on the ethnicity of defendants has impeded more recent attempts to replicate this study.

[17] The collection of ethnicity data in the justice system has been much debated in Canada, at least since a trial collection was conducted in 1992. In 2022, neither federal nor provincial agencies collected this information, a position that has been criticized by academics (e.g., Owusu-Bempah and Millar 2022).

[18] The report also concluded that Black prisoners suffer from "discrimination and disadvantage" throughout the correctional system (Correctional Investigator of Canada 2022, p. 1).

other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community, should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders."

This provision has spawned several Supreme Court decisions. In *R v. Gladue* [1999] 1 SCR 688, for example, the court took the view that a different methodology, one more likely to result in a noncustodial option, was appropriate when sentencing an Indigenous offender (Roach and Rudin 2020; Rudin 2022, chap. 5). In *R v. Ipeelee* [2012] 13 SCR 433, the court observed that section 718.2(e) "calls upon judges to use a different method of analysis in determining a fit sentence for Indigenous offenders" (para. 435). The court concluded that the sentencing process "was an appropriate forum for addressing Indigenous over-representation in Canada's prisons" (para. 70). Both *Gladue* and *Ipeelee* have influenced sentencing in individual cases, and also beyond sentencing, although they have been unable to "stem the tide of [Indigenous] over-representation" (Roach and Rudin 2020, p. 248).

Bill C-41 also created the conditional sentence of imprisonment (CSI): a novel community-based form of custody for Canada (Roberts 2004). Although not explicitly designed to remedy Indigenous overincarceration, Indigenous defendants in particular were expected to benefit. CSI would provide a means by which the Indigenous reference (sec. 718.2[e]) discussed above could be implemented and thereby reduce Indigenous admissions to custody (Roberts and Cole 2020). However, this additional reform has had only limited impact on the use of imprisonment for Indigenous offenders (Reid 2017). Finally, in 2023, the federal government announced a major funding initiative to address overrepresentation of Indigenous, Black, and racialized people in the criminal justice system. The Indigenous Community Corrections Initiative will expand alternatives to custody and support reintegration among Indigenous offenders. This nationwide program is evidence of a renewed commitment to addressing the problem.

3. *Specialized Courts and Reports.* Canada has introduced other remedial reforms meant to reduce Indigenous overincarceration.[19] Several

[19] As early as 1992, sentencing "circles" emerged as a potential means of accommodating Indigenous cultural considerations. If the judge convened a circle, the court heard from Indigenous community representatives and devised a sanction consistent with the community's values. Although the number of such circles eventually declined, Rudin notes that a "second wave" with more modest ambitions has arrived (2022, pp. 306–15).

provinces have created specialist "Indigenous" courts that are operated by practitioners with direct links to, and specialized knowledge of, Indigenous communities.[20] These courts are part of the existing criminal justice system. Rudin summarizes the key distinction between these and conventional criminal courts in this way: "These courts are not Indigenous courts in the sense that they dispense Indigenous justice or that they operate according to Indigenous law. . . . What makes them Indigenous courts is the particular orientation that they take to resolving cases" (2022, p. 318).

The most common and visible initiative consists of specialized reports relating to offenders' personal circumstances and background. With respect to Indigenous offenders, "Gladue" reports (named after the Supreme Court judgment) document the offender's Indigenous background and circumstances. These reports are prepared by specialist probation officers and provide a range of information about the offender's personal circumstances and community as well as resources available to support community sanctions. Experience with these statements has been positive. Academics and practitioners see them as a necessary means to implement the Supreme Court judgments. Sentencing an Indigenous offender without considering a Gladue report constitutes reversible error. Despite this, their use varies across the country (Rudin 2022). One explanation is that, unlike PSRs or victim impact statements, there is no statutory basis for Gladue reports. Government funding to support them has been patchy at best, and some provinces refuse to provide the necessary funding (Roach and Rudin 2020).

Most recently, the federal government has implemented a related initiative for Black defendants. Courts may request a specialized race-based PSR that documents the defendant's social circumstances. These reports—known as Impact of Race and Culture Assessments (IRCAs) or Cultural Impact Assessment Reports—provide information on anti-Black racism and how this may have affected the offender in relation to the offense (Dugas 2020). In *R v. Anderson* [2021] NSCA 62 at paragraph 118, the Nova Scotia Court of Appeal held that judges "should carefully consider the systematic and background factors detailed in an IRCA. It may amount to an error in law for a sentencing judge to ignore or fail to inquire

[20] Rudin writes that "the term 'Indigenous courts' is a broad catch-all for initiatives that have developed to better address the needs of Aboriginal people" (2022, p. 318).

into these factors." It is too soon to know how effective these reports will be in reducing race-based disproportionality in prison admissions and populations or in promoting greater confidence in the fairness of sentencing.

The trial and appellate courts have begun actively to address sentencing differentials involving defendants from marginalized communities. Most recently, the sentencing of Black defendants has attracted greater scrutiny. The courts of appeal in Ontario and Nova Scotia have issued important judgments.

In *R v. Morris* [2021] ONCA 680, the Ontario Court of Appeal heard a Crown appeal against sentences imposed on a Black offender convicted of two firearms offenses. The trial court had imposed a significantly mitigated sentence in recognition of the offender's history and personal circumstances (15 months' imprisonment followed by 18 months' probation). The offender had been the victim of overt and institutional racism, including incidents involving police officers. Counsel for the defendant argued that the Indigenous sentencing provision should extend to minority groups such as Black Ontarians who had experienced similar, if not similar levels of, mistreatment by state agents. The Court of Appeal declined to extend the consideration created for Indigenous offenders to Black defendants. However, it recognized the parallels and stressed the importance of the defendant's background as a consideration at sentencing. The court acknowledged that social context evidence was relevant to the determination of sentence. Specifically, the court observed that overt and institutional racism to which the offender had been subject was relevant to the purposes and principles of sentencing.

The judgment in *Morris* made several points with general application. First, the "institutional biases and systematic inadequacies faced by Mr Morris" could lead a court to craft a sentence that would "enhance the offender's rehabilitation by addressing, in a direct and positive way, the negative impact of systemic racism" (para. 105). Consideration of the offender's history therefore could influence the weight the court placed on rehabilitation rather than deterrence.[21] (In general, firearms offenses attract severe deterrent sentences in Canada.) The

[21] "The social context evidence can provide a basis upon which a trial judge concludes that the fundamental purpose of sentencing … is better served by a sentence which, while recognizing the seriousness of the offense, gives less weight to the specific deterrence of the offender and greater weight to the rehabilitation of the offender through a sentence that addresses the societal disadvantages caused to the offender by factors such as systemic racism" (para. 79).

second avenue of mitigation relates to the culpability branch of a proportionate sentence. Section 718.1 of the Criminal Code provides that a sentence "must be proportionate to the gravity of the offence and the offender's degree of responsibility." The court found that "the social context evidence may offer an explanation for the commission of the offence which mitigates the offender's personal responsibility and culpability for the offence" (para. 99).[22] In *R v. Tynes* [2022] ONCA 866 para. 95, and also in subsequent judgments, the court has recognized that "the content in the IRCA, as it relates to the appellant's moral culpability, could reasonably be expected to have affected the result."

Third, the court required proof of a connection between the racism experienced by the offender and the criminal conduct: the "connection does not need to be causal, but there must be 'some' connection in place" (para. 28). Defense counsel should adduce evidence linking the offender's background and history to the offending, and courts should be generous in the admission of such evidence. Without it, any reduction in sentence would constitute a categorical discount inappropriately based on the offender's ethnicity. Nonetheless, in *Morris* and in subsequent decisions such as *R v. Mercier* [2023] ONCA 98 at para. 19, the court made it clear that "an Indigenous offender does not bear the burden of establishing a *causal* link between systemic and background factors and the offence" (emphasis added). This is consistent with the position taken earlier by the Supreme Court in *Ipeelee*. The court concluded that IRCAs provide a means to support claims at sentencing of diminished culpability due to various forms of institutional and societal racism.[23] These appellate decisions and other subsequent ones highlight mitigation relevant to imposition of a proportionate sanction in cases involving minority defendants with a history of discrimination or state neglect that diminishes their level of culpability. Any resulting mitigation results in a sentence that in theory is

[22] Similarly, in *R v. Anderson* [2021] NSCA 62, the court held that "the moral culpability of an African Nova Scotian offender has to be assessed in the context of historic factors and systemic racism. The offender's background and social context may have an effect on moral blameworthiness." The court affirmed that IRCAs offer "insights not otherwise available about the social determinants that disproportionately impact African Nova Scotian/African Canadian individuals and communities" (para. 106).

[23] The state is arguably complicit in permitting the social adversity that contributed to the offending. If so, liability for the offense should be "shared" between the offender and the state, with implications for the state's standing to impose what would otherwise be a fully proportionate punishment (Lee 2020).

proportionate to the seriousness of the offense rather than a court-imposed attempt to correct ethnicity-based sentencing differentials.

Canada has thus made some, limited, progress in reducing sentencing differentials affecting marginalized communities. We draw three conclusions. First, important causes of minority overrepresentation in prison lie beyond the reach of the courts or the legislature. The accumulated effects of institutional and societal racism, and the impoverished social conditions of Indigenous communities, require a comprehensive state response and not simply reforms to sentencing. Second, there is nonetheless a role for courts to attempt to ensure that sentencing does not amplify minority-majority differences arising at earlier stages of the criminal process or create fresh disadvantage for minorities. Courts are beginning to recognize links between racism and offenders' levels of culpability. Culturally sensitive reports at sentencing are a useful innovation. Conventional PSRs may, however, be insufficient to provide the information needed when sentencing an Indigenous defendant. Third, although Indigenous communities are clearly worst affected, other minorities have experienced similar social disadvantage and discrimination. Black defendants, for example, have suffered from racial abuse, discrimination, and differential treatment by criminal justice professionals. Recent sentencing decisions in Canada suggest growing awareness of the need to recognize the effects of these experiences at sentencing.

D. Aotearoa New Zealand

As in Canada and other settler societies including Australia, the problem of ethnic, racial, and Indigenous overincarceration is not new in Aotearoa New Zealand. Over three decades ago, the prominent Māori scholar Moana Jackson observed that a sentence imposed on a Māori offender was "perceived to be the final systemic act in a series of culturally insensitive and biased steps" (quoted in Hess 2011, p. 179). Only modest advances have since been made, and imprisonment continues to be shaped by "ethnic toxicity" (McIntosh and Workman 2017, p. 725). The word "guilty" does not even appear in the Māori vocabulary (Jackson 2018), yet their overrepresentation in prisons is striking.

1. *Punishment Trends.* Māori make up approximately 15 percent of Aotearoa New Zealand's population but over half of the prison population and almost half of those serving community-based sentences. The Māori imprisonment rate is seven times the general population rate. Pacific Islanders account for 13 percent of the prison population and

TABLE 5
Prison Profile, New Zealand, 2001–20 (%)

	European	Māori	Pacific Islanders
2001	37	53	11
2002	36	52	12
2003	37	52	11
2004	37	52	11
2005	38	51	11
2006	37	52	11
2007	36	52	11
2008	36	52	12
2009	36	52	12
2010	35	53	12
2011	35	53	12
2012	35	53	12
2013	35	53	12
2014	34	53	12
2015	35	53	12
2016	34	54	12
2017	34	54	12
2018	33	55	12
2019	33	55	12
2020	33	55	12

NOTE.—Adapted from Statistics New Zealand (2023); excludes other and ethnicity-not-recorded cases; percentages may not sum to 100% because of rounding.

10 percent of the community caseload. Less than 30 percent of the prison population were European-descended people who also accounted for 31 percent of community-based sentences (New Zealand Department of Corrections 2022).

The percentage of Māori and Pacific Islander prisoners was stable over the period 2001–20 (table 5). One-fifth of Māori men and one-tenth of Pacific Islanders born in 1981 were imprisoned by age 35, compared to only 4 percent of New Zealanders descended from European or other groups (New Zealand Ministry of Justice 2021).[24] A major statistical study published by the Ministry of Justice found that Māori and

[24] High rates of Māori imprisonment have generational effects. Ball et al. (2016) estimated that almost half of Māori children will, at some point, have a parent serving a sentence in prison or the community.

Pacific Islander offenders were more likely than their European counterparts to receive sentences of detention and community service and less likely to receive financial penalties (Triggs 1999). The public perception nonetheless is that a Māori offender, if convicted of the same crime as a European, receives fair and equal treatment (Norris and Lipsey 2019).

2. *A Colonial Legacy.* Māori peoples have been deeply affected by the legacy of colonialism. Colonial-era policies significantly weakened Māori communities, triggering rapid social, cultural, and economic changes that had far-reaching effects (Jackson 1987). No other community was deprived of its autonomy, cohesion, and economic resilience to quite the same extent. Today, the Māori are largely landless, struggling to preserve their language and culture, and coping with postcolonial trauma that is manifested in high rates of offending and incarceration. The dominance of Western law and legal processes has had detrimental effects. Sustained denial and attempted eradication of aboriginal law were parts of the "civilizing" process designed to bring the "superior" political and legal institutions of the West to the native peoples. The view that Indigenous law was merely customary was used to invalidate it. Colonialists recognized Indigenous law when it was in their interests to do so but defined it in a way that rejected the broader sovereignty from which Indigenous law derived (Jackson 1994, p. 123). The New Zealand Law Commission (2001, p. 18) noted that legal positivism, "as the dominant jurisprudential tendency in the English legal system," reinforced the view that law is inherently linked to the institutions of the modern political state. By implication, then, the laws of Indigenous peoples were subordinate.

Māori peoples experience significant socioeconomic disadvantage. In 2018, approximately one-quarter of Māori lived in the most deprived areas; only 7 percent of non-Māori residents lived in such communities (New Zealand Ministry of Justice 2021, p. 26). Māori have, historically, been poorly served by government policy, resulting in high levels of exposure to risk factors for offending such as unemployment, alcohol abuse, and drug abuse. Despite the efforts of public sector agencies to address their needs in recent decades, clear disparities remain (Latu and Lucas 2008). When measures of social and economic disadvantage are considered, Māori ethnicity recedes as the primary explanation for their overrepresentation in criminal justice (New Zealand Department of Corrections 2007). The problem of Māori overrepresentation at

sentencing and in prisons is complex and multiply determined, likely a consequence of both ethnicity and socioeconomic disadvantage. The New Zealand Department of Corrections (2007) recognizes both possibilities, conceding that Māori overrepresentation may not be a "Māori" problem at all.[25]

3. *Judicial Discretion.* Sentencing in Aotearoa New Zealand is highly discretionary. Courts sentence without reference to guidelines. As in Canada, any guidance regarding sentencing of offenders from marginalized communities comes from the appellate courts. In 2006, the Law Commission recommended the creation of a sentencing council to issue guidelines, but it was never implemented, and, in 2017, the relevant statute was repealed following a change of government. The 2002 Sentencing Act asserts the legislature's jurisdiction over the purposes and principles of sentencing, although it largely codified well-established principles. Previously, sentencing practice had been the sole province of the judiciary (Young and Browning 2008), and there were "few constraints upon, or guidance as to, the exercise of judicial discretion" (New Zealand Law Commission 2008, para. 29). Guideline judgments provide syntheses of previous sentences for discrete offense categories, providing a source of precedent for judges (Young and Browning 2008; Young and King 2013).

Taken together, the 2002 Sentencing Act and guideline judgments have had minimal impact on discretionary decision-making in the courts. The Sentencing Act refers to "the general desirability of consistency," yet there remains a clear discrepancy between that aspiration and the daily practice of the courts (Young and Browning 2008). Guideline judgments are reactive in nature and thus offer limited guidance to trial courts. The Court of Appeal lacks the mandate and expertise necessary to develop sentencing policy or sufficient resources to investigate the cost effectiveness of different sentencing options and their effects on the prison population.

Sentencing disparity has been defended in the name of individualized justice (Young and Browning 2008). Any account of racial, ethnic,

[25] Pacific Islanders are also overrepresented in criminal justice statistics, albeit not to the same extent. Their history of settlement in Aotearoa New Zealand, their family and community dynamics, and the fluidity of movement between their island states make them a distinct social group.

and Indigenous overrepresentation at sentencing must acknowledge the pervasive role that discretion plays, constrained only by the Sentencing Act 2002 and guideline judgments. The discretionary powers of the courts can be an important mechanism for judges in determining how principles should be prioritized to ensure that justice is best achieved in a particular case. Sentencing, however, is an inherently imprecise task, the risks posed by judicial bias or subjectivity are great, and the adverse implications for Māori and Pacific Islander peoples are substantial, especially when only limited guidance is available. Empirical research conducted for the New Zealand Law Commission (2008, p. 20) found that some courts are "systematically more severe than others, at least in relation to the percentage of convicted offenders who are imprisoned." The study, based on a national comparison of court districts, demonstrated substantial variations in the use of imprisonment that were unlikely to be explained by differences in offense and offender variables alone.

4. *Legislative and Judicial Responses.* How much progress has been made in reducing sentencing differentials for Indigenous minorities? The Sentencing Act 2002 reaffirms previous legislation that recognizes the relevance of contextual information on offenders at sentencing. Section 8 enumerates key mitigating factors and states that a court "must take into account the offender's personal, family, whanau, community, and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose."

Section 27 provides:

(1) If an offender appears before a court for sentencing, the offender may request the court to hear any person or persons called by the offender to speak on—
   (a) the personal, family, whanau, community, and cultural background of the offender:
   (b) the way in which that background may have related to the commission of the offence:
   (c) any processes that have been tried to resolve, or that are available to resolve, issues relating to the offence, involving the offender and his or her family, whanau, or community and the victim or victims of the offence:
   (d) how support from the family, whanau, or community may be available to help prevent further offending by the offender:

(e) how the offender's background, or family, whanau, or community support may be relevant in respect of possible sentences.

(2) The court must hear a person or persons called by the offender under this section on any of the matters specified in subsection (1) unless the court is satisfied that there is some special reason that makes this unnecessary or inappropriate.

(3) If the court declines to hear a person called by the offender under this section, the court must give reasons for doing so.

Section 27 thus authorizes reports on the offender's cultural background and is a welcome reworking of its predecessor (sec. 16 of the Criminal Justice Act 1985; Roberts 2003). Emerging at the same time as the Gladue reports in Canada, they play an important role in the sentencing of Indigenous offenders. Bartels, Gorman, and Qunice (2020, p. 25), reviewing section 27's origins, confirm that it was "deliberately framed to apply to all defendants, to avoid any claim of racial bias."

5. *Cultural Background Reports.* The section 27 cultural background report reflects a recognition of cultural context and promotes an approach to sentencing that reflects the unique circumstances of Indigenous defendants. The report may include details on childhood, whakapapa or genealogy, education, employment history, socioeconomic position, character, ways in which the defendant's background relates to the offense, and the role of whānau and community in preventing recidivism. Unlike the Gladue reports in Canada, the section 27 report typically includes a request for a sentence reduction. The magnitude of the reduction is ultimately discretionary. It tends to range from 10 to 15 percent (Oakley 2020), although the New Zealand High Court recently observed, in *Solicitor-General v. Heta* [2018] NZHC 2453, that theoretically there is no ceiling on the discount available.

6. *Response of the Courts.* The judicial response has been largely sympathetic. Information about postcolonial trauma and disruption of cultural identity has been used to justify sentence reductions of up to 40 percent to reflect an Indigenous offender's diminished culpability (see, e.g., *Solicitor-General v. Heta*). While Oakley (2020) concludes that these reports have served a welcome educative function for the judiciary and a means by which to advise sentencers of non-Māori background on Indigenous matters, *R v. Berkland* [2022] NZSC 143, a decision discussed in detail below, appears to undo previous progress by proposing a revised, narrowly restrictive approach.

In the landmark decision of *R v. Keil* [2017] NZCA 563, the court recognized the significance of a Māori defendant's cultural and family background. Following a section 27 report, the court observed (para. 54), for the first time, that "judges in all courts of this country are acutely conscious of the overrepresentation of young Māori in our prisons" and acknowledged that the defendant had "acted out of character in exceptional circumstances by a degree of cultural provocation." However, the court observed that while "cultural norms" might help explain violent offending, it could not be condoned. In *Keil*, the court deemed that the discount of 20 percent was sufficient in light of the information provided in the section 27 report.[26] Bartels, Gorman, and Quince (2020, p. 25) suggest that this decision calls into question the relevance of section 27 in cases of the most serious offending.

Most recently, in *Berkland*, the Supreme Court reflected on the role and value of section 27 cultural background reports when sentencing drug offenses. Citing *Solicitor-General v. Heta* [2018] NZHC 2453, the court endorsed the proposition that ingrained, systemic poverty resulting from loss of land, language, culture, rangatiratanga, mana, and dignity has driven disproportionate rates of offending and incarceration in the Māori community. The court acknowledged that these matters may have affected the defendant's choices, resulting in diminished legal and moral culpability. It also insisted, however, that any mitigating effects of historical deprivation must be based on "explanatory facts, not ethnic assumptions" (para. 110).

What should be the required nexus between a defendant's offending and section 27 background factors for the purposes of mitigation? The court outlined a framework for assessing section 27 background information. It recognized that there will always be connections between an offender's background and the choice to offend, but the nature and strength of those connections may vary. Indeed, various descriptions of this nexus, such as "operative cause" or "proximate cause," had been used in earlier case law. The court in *Berkland*, however, proposed a high standard of "causative contribution" instead, meaning that the offender's

[26] The court noted the tension at sentencing when having regard to a defendant's cultural context: "cultural norms cannot excuse that conduct *for some groups* but not for others. While those norms may help to explain, they can never justify offending of such severity as occurred here" (para. 58).

background may have a mitigating effect only if it makes a causal contribution to the offending.

The emphasis on a causal link is different from the position of courts in Canada, at least as it appears from recent appellate decisions. The criteria for invoking background factors appear to be less strict in Canada, which is likely to benefit minority offenders. It remains to be seen whether *R v. Berkland* has taken a wrong turn in proposing a stricter test. The high "causal connection" standard may be insurmountable in many cases. The emphasis on causation requires judges to find a direct relationship between offending and socioeconomic disadvantage, when the complexity of contextual and other contributing factors may make that approach unrealistic. The *Berkland* standard comes dangerously close to the Australian approach in *Bugmy v. The Queen* [2012] NSWCCA 223, in which the court severely limited the relevance of Indigenous disadvantage in the presence of a high criminal history score (Charlton 2021).

7. *Indigenous Courts and Self-Determination.* The lack of progress in reducing high rates of Indigenous imprisonment has generated calls for more radical reform. Over the last two decades, there has been pressure from Māori and other communities for the establishment of a parallel Māori justice system to adjudicate matters including criminal law and justice. The impetus is the Māori desire for self-determination: to use structures, philosophies, and processes that are essentially Māori in managing all matters Māori. Given that the Māori share of the general population is more than five times larger than the Aboriginal Australian or Native American shares of theirs, Māori, in terms of numbers alone, are better placed to press for change than Indigenous peoples elsewhere in the Anglosphere.

If Indigenous courts are to succeed on a national scale, the relationship between Māori peoples and the state will require significant renegotiation and redefinition. Māori have reasserted their rights under The Treaty of Waitangi and are making considerable progress in seeking justice and greater control over their own affairs. If the state is committed to accommodating Indigenous law, there remain serious questions about how this is to be accomplished, how best to balance goals such as respect for Indigenous traditions, protection of the rights of Indigenous people, legal clarity and simplicity, and peaceful and cooperative coexistence with wider society (Levy 2000).

One option would be to expand hybrid sentencing initiatives (Blagg and Anthony 2019) in which Māori customary law is applied within the criminal law apparatus of the wider state. Tauri and Morris (1997) analyzed the views of more than 50 Māori elders on how Māori communities dealt with offenders in the recent past and how Māori justice practices might operate in the modern context. They concluded that Māori justice has the potential not only to provide solutions to the overrepresentation of Māori in prisons but also to reform existing criminal justice practice.

Te Kooti Rangatahi is a marae-based (traditional setting) youth court that integrates Māori culture into the judicial process with the twin aims of reconnecting young people to their culture and involving the wider community. Te Kooti Matariki is an Indigenous court for adults, which employs tikanga but within a mainstream court. Meanwhile, Te Whare Whakapiki Wairua, the alcohol and other drug treatment court, was established in Auckland and Waitākere as a pilot in November 2012. These pilot courts were made permanent in 2019, and a third court was established in Waikato in 2021. Although the composition, operation, and reach of these courts may differ, the objective remains the same: to follow international best practice principles in pursuit of cultural sensitivity (Singh and Greaves 2020; Toki 2020).

At first glance, the "accommodation" approach is progressive, but it may be criticized as a weak or merely superficial attempt at reform. It may be viewed as an inexpensive and politically expedient strategy that allows the government to be seen to be addressing Māori overrepresentation, without significantly altering state control of the justice system. This may be vulnerable to the charge that Māori philosophies and practices are being co-opted. A related concern may be that the strategy would continue a colonial-style process by furthering judicial disempowerment of the Māori community (Tauri 2005).

A bolder option would be to commit fully to a program of institutional redesign: to recognize Indigenous rights by setting up a separate criminal court for Indigenous peoples (within a parallel Māori justice system). This would be consistent with the recommendations of Jackson (1987), whose research on Māori experiences of crime control represented the first—and most significant—empirical work of its kind to be pursued in Aotearoa New Zealand. Jackson and many of his participants proposed that, since the mainstream justice system actively sought to criminalize Māori, the state should provide them with a "meaningful measure of

jurisdictional autonomy" via a parallel system of justice (Cunneen and Tauri 2019, p. 366).

In this model, the Indigenous legal tradition would not be treated as subordinate to the common law. Legal decisions would be reached in accordance with customary law, however limiting that law might appear to the common law lawyer. Ideally, Indigenous criminal law and sentencing policy would be respected in a way analogous to the respect accorded to the laws of foreign states (Levy 2000). Such a model would be consistent with Jackson's (1995, p. 34) call for reform that does not simply "graft" Māori processes onto "a system that retains the authority to determine the extent, applicability, and validity of those processes." Finally, there is a strong instrumental case for a parallel system: an Indigenous court may have potential to address overrepresentation of Indigenous peoples in courts and prisons where mainstream criminal justice has failed (Toki 2020).

Burt (2011) advocates creation of Indigenous courts for Māori women. There are strong grounds for doing this. In addition to their being disproportionately imprisoned (63 percent of all women in prison), Māori women are disproportionately segregated (75–78 percent in some segregation units) and significantly overrepresented in long-term segregation. Most women incarcerated in Aotearoa New Zealand's prisons have had prior exposure to trauma and abuse and have multiple and complex needs. For some, earlier abuse may have been in state institutions, continuing a cycle of intergenerational trauma (Shalev 2021). In Burt's proposal, the court would incorporate the principles of the Treaty of Waitangi to increase trust and empower the Māori community to participate in the sentencing of their own women.

Prison population trends in Canada and Aotearoa New Zealand are remarkably similar. Both jurisdictions have introduced statutory reforms and other innovative, culturally sensitive practices intended to reduce high rates of Indigenous imprisonment. Yet the proportion of Indigenous prison admissions has remained stable over the past 20 years in both countries. Current measures are well intentioned but ineffective. Both countries must find other ways to administer justice that better reflect culturally appropriate practices and restore Indigenous trust in criminal justice agencies. Although both have adopted remedial reforms, as Bartels, Gorman, and Quince (2020) observe, there is still a long way to go to ensure that the life circumstances of Indigenous and other marginalized populations are adequately considered at sentencing.

II. Remedial Options: Legislatures, Sentencing Commissions, and Courts

Our final task is to propose alternative ways ahead.[27] Reitz (1998) and more recently Mitchell (2020) note the need for sentencing initiatives at the institutional (macro), the organizational (meso), and the individual (micro) levels. With a sense of modest realism, we focus on the remedial options available to legislatures, guidelines authorities, and courts.[28] These initiatives may prove insufficient. If this is so, there is an argument to consider alternatives to the current court systems in Western nations for Indigenous groups. Indigenous justice systems and courts could apply Indigenous law and reflect Indigenous cultures in a way that is impossible within conventional Western legal systems.

A. Legislatures

Democratically elected legislatures bear responsibility for framing efforts to reduce racial and ethnic disproportionality. Legislatures are unlikely, however, to direct courts to adopt a different methodology or extend special consideration for Black or other minorities, although this has happened in Canada and New Zealand concerning Indigenous offenders. With respect to Indigenous (often in Canada called First Nations) peoples, the most radical solution would be to create a separate sentencing regime. This solution was recommended in Canada by a royal commission that observed that "an Aboriginal statement of purposes and principles would likely read quite differently" (Royal Commission on Aboriginal Peoples 1996, p. 240). Devising a separate sentencing code would permit a *de nouveau*, comprehensive approach that would return to first principles and, ideally, be conceived and developed in consultation with Indigenous peoples.[29] At present, courts must apply sentencing

[27] Bagaric et al. (2021) provide a road map for reducing minority overincarceration in the United States and Australia. Their solutions include releasing all prisoners who have served three-quarters of their sentences, reducing the weight assigned to previous convictions, and introducing a 25 percent blanket reduction in prison sentences for minority offenders. The first two proposals are general strategies that would particularly benefit minority groups. The third implies a categorical reduction that flies in the face of individualized sentencing and runs counter to current US Supreme Court jurisprudence.

[28] We focus here on the principal strategies, but the list is far from exhaustive. We do not discuss common remedial strategies such as the diversification of the courts and sentencing commissions.

[29] Rudin (2022, pp. 68–69) argues that "the *sui generis* nature of Indigenous cultural practices and beliefs is not really understood in the dominant legal system, which continues to

objectives and principles created without regard for the special circumstances of Indigenous communities. This could work even in the United States despite constitutional constraints prohibiting use of racial or class categories, since the United States has sometimes treated Native Americans as a separate political community rather than only as a racial or ethnic subgroup.

A sentencing code for Indigenous offenders may reflect a very different set of objectives, principles, and dispositions. Proportionality is the fundamental principle of sentencing in settler societies, but is it equally applicable to Indigenous peoples?[30] Might the emphasis on proportionality prevent courts from giving sufficient weight to provisions recognizing their special status? Balfour, for example, argues that "judges remain tied to … punishment proportionate to the seriousness of the offense" with the consequence that sentencing reforms such as Canada's section 718.2(e) have been rendered ineffective (2013, p. 98; Murdocca 2013, pp. 58–60). Where Indigenous offenders are concerned, the principle of proportionality may be limited, and it would be unwise for courts to assume that it must always assume a central role in laying down standards for legitimate state conduct (Lacey 2016). Similarly, the range of sentencing options currently deployed by courts may not reflect the penal objectives of Indigenous communities.

A more modest remedy would strengthen the current wording of the statutory sentencing provisions relating to Indigenous populations. The relatively mild Canadian injunction is for courts to "pay particular attention" to the circumstances of Indigenous offenders. It could be drafted more robustly, as more ambitious language in recent judicial decisions demonstrates.

Finally, legislatures could consider sentencing reforms that do not explicitly target Indigenous offenders but would benefit them. Legislation could direct courts to suspend terms of custody under a particular threshold, for example, 6 months. Most custodial sentences in Western jurisdictions are of 6 months' duration or less, and evidence from several jurisdictions suggests that minority defendants are more likely to receive

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confer legitimacy on those practices only to the extent that analogies with current Western practices can be found." There is a clear case, then, for a separate sentencing regime for Indigenous peoples.

[30] Proportionality is a near-universal principle in sentencing, but whether it is embraced by any specific community or culture, Indigenous or other, is an empirical question.

short prison sentences (e.g., Saghbini, Bressan, and Paquin-Marseille 2021, p. 28). The potential of such a reform to achieve a significant reduction in total admissions to custody (particularly Indigenous admissions) is therefore significant. Requiring courts to meet specific criteria before they impose a term of custody would also help reduce Indigenous imprisonment rates.[31]

B. Sentencing Commissions and Sentencing Law

Courts in a growing number of countries apply guidelines issued by a sentencing commission or council (Freiberg and Roberts 2023). Commissions bear a responsibility to ensure that their guidelines do not create or exacerbate minority sentencing differentials. Sentencing guidelines represent an additional means by which to address minority overrepresentation. In guidelines jurisdictions, a separate guideline for Indigenous offenders may be a more effective way to reduce the use of custody. Such a guideline might highlight factors and considerations of particular relevance for Indigenous defendants and identify sentencing options that are most culturally appropriate.

At the very least, sentencing commissions must ensure that their guidelines do not cause or exacerbate sentencing differentials. Impact analyses should identify guidelines features that affect minorities differentially, in order to assure the guidelines are neutral with respect to race, gender, and other characteristics. Guidelines authorities in England and Minnesota have conducted neutrality reviews (see Sec. I), although they have not resulted in significant changes to the guidelines. Commissions must also look beyond their own guidelines. Tonry (1995) long ago proposed that all new sentencing laws or policies be accompanied by racial and ethnic impact projections. Sentencing commissions are ideally placed to provide these analyses. This proposal has now been adopted in at least 10 US states (Porter 2021).

We have already noted the compelling evidence that criminal history enhancements under many US guidelines contribute to racial disproportionality. Constraining the use of previous convictions as an aggravating circumstance—as Pennsylvania's sentencing commission has proposed—would

[31] The Youth Criminal Justice Act in Canada provides a useful model. This legislation lays down criteria that must be met for a term of imprisonment. The act achieved a significant decline in the use of custody in youth courts (Bala, Carrington, and Roberts 2009).

reduce the use of imprisonment. Since Indigenous offenders tend to have more extensive criminal histories (e.g., Bagaric 2022), this would differentially benefit them. Scaling back the imprisonment rate generally has been advocated as a way to reduce high rates of minority incarceration. Tonry, for example, pointed out that returning US imprisonment rates to 1980 levels, even if disproportionality ratios remained the same, would mean "700,000 fewer Black Americans behind bars" (2011, p. 150). Mauer (2009) warns, however, that even if racial impact analyses predict that racial or ethnic groups would be disproportionately affected by an existing or proposed policy, public safety concerns may block remedial action. Prior record enhancements in guidelines and a steep recidivist premium at sentencing illustrate the power of those concerns.

Plea-based sentence reductions are another element of sentencing law that differentially affect minorities in some jurisdictions. Research in several jurisdictions has demonstrated that Black defendants are less likely to plead guilty and therefore more likely to receive longer prison sentences. In this respect, guilty plea discounts contribute to the racial disproportionality in prison populations. Constraining plea-based reductions could assist in reducing sentence differentials, just as constraining prior record enhancements could. There are, however, clear practical and ethical benefits associated with retaining plea-based reductions that argue against abolishing or greatly restricting them. At the very least, commissions should determine what the likely effects of constrained plea-based reductions would be for racial disproportionality. One strategy might limit the power of a guilty plea to reduce the length of a prison sentence. At present, a guilty plea can often be the difference between a custodial and a community-based sentence. Removing the possibility of avoiding imprisonment by entering a guilty plea could reduce Black-White imprisonment rate differentials.

1. *Application of Sentencing Factors: Recognizing Discrimination and State Neglect as Sentencing Factors.* Diverse marginalized communities share a common factor: social deprivation. Over the years, scholars have advocated adoption of a specific mitigating factor or policy to recognize this (e.g., Tonry 1995; Veiga, Pina-Sánchez, and Lewis 2022, p. 11). Most guidelines outside the United States provide lists of mitigating factors for courts to consider. For these jurisdictions, for example, in England and Wales, "social adversity" could be added to the list.

Adding a social deprivation sentencing factor would be a simple step for sentencing commissions to take. Evidentiary questions, however,

would have to be addressed. Must the defense establish adversity to some legal threshold and, if so, which (a balance of probabilities, like most mitigating factors)? Sentencing procedures vary significantly. How much adversity justifies a mitigated sentence? Must the degree of deprivation be exceptional? If it meets a specified threshold, how much should that influence the sentence—might it change a custodial to a noncustodial sentence or only the quantum of punishment? In jurisdictions without guidelines, appeal courts would have to offer guidance on these issues. Otherwise, the social adversity factor would be unlikely to exert a meaningful impact on sentencing outcomes; individual sentencers may well view it in very different ways.

Commissions should ensure that existing factors, whether mitigating or aggravating, are applied equally. Research on perceptions of defendants, for example, suggests that Black offenders receive less mitigation for remorse. Judicial perceptions of the offender's demeanor may vary according to the defendant's ethnicity. The Sentencing Council of England and Wales (2021, pp. 26–27) guidance notes that "different cultures display and view remorse differently. For example, young Black men involved in gang/street culture are often taught that public displays of emotion show weakness, making it difficult to display it in a legal setting." The council concluded that "the judiciary will need to develop cultural understanding of the different ways remorse presents itself in various cultures." Courts must have a comprehensive understanding of offenders' backgrounds and the contributions that race, ethnicity, and Indigeneity may have made to their offending.

2. *A Judicial "Nudge" or Awareness Education.* The English sentencing guidelines alert courts to research showing that Black offenders are more likely to be sentenced to custody for certain crimes. There are two reasons to be skeptical about this. First, it is unclear what a court should do with such information. Second, it implies that courts should focus on offenses with a particularly high degree of overrepresentation, with a view to correcting imbalance between White and marginalized offenders. Courts should, however, be sensitive to potential claims for mitigation from defendants for all offenses. Even so, there is clear merit in alerting sentencers to the problem. As Franklin and Henry (2020, p. 26) note, writing of awareness education for judges, "correcting racial disparities requires basic knowledge about where such disparities exist."

Sensitizing judges to troubling aspects of sentencing of which they were unaware can make a positive impact on judicial practice. Aharoni

et al. (2022) found that alerting judges to the disadvantages of prison sentences in relation to the cost and effects on reoffending led to shorter sentences.[32] Guidelines should encourage sentencers to take special care when sentencing Black offenders of offenses for which overrepresentation is conspicuous.

C. Courts

Trial judges must ensure that minority offenders receive the same degree of individualized consideration at sentencing as White offenders. Sentencers from more privileged backgrounds may lack knowledge of the personal circumstances and histories of minority offenders and be less likely to recognize and address important sources of mitigation. On the critical issue of diminished culpability arising from racial discrimination and other adverse treatment by state agents, courts must develop a clear jurisprudence on the extent to which these circumstances should result in sentence mitigation. Without such guidance, individual sentencers will deal with the issue in very different ways, and disparity will be the inevitable result.

At the level of individual sentencing decisions, the question is not whether a defendant belongs to an affected group but to what degree he or she has been a victim of circumstances that justify sentence mitigation. Ethnicity should not confer automatic mitigation but open the door for consideration in the individual case. Guidance will also be necessary regarding the evidentiary burden the defendant must meet. Requiring establishment of a direct causal chain between, for example, as in New Zealand, racial abuse or overpolicing and the commission of the offense seems unreasonable; some lesser standard should apply. There will also be limits on the extent to which this source of mitigation will affect sentences. Mitigation is always bounded. Racial, ethnic, or other forms of adversity associated with defendants from marginalized communities should be situated within a broader framework of diminished culpability mitigation.

In this essay we have explored divergent responses in four countries to the overrepresentation of members of racial, ethnic, and Indigenous

[32] The study involved a group of Minnesota judges who sentenced an aggravated robbery. After they received information about the adverse consequences of imprisonment, they imposed sentences 16 percent shorter than did members of a control group that did not receive the information.

minorities among prisoners. Despite some modest remedial initiatives, differential sentencing practices persist in all four countries, as does overrepresentation. The authorities responsible for state punishment—legislatures, commissions, and courts—cannot alone remedy racial, ethnic, and Indigenous overincarceration, but it is incumbent upon them to take bolder action. One conclusion seems clear: a "color-blind" approach denies minority offenders of appropriate consideration of race-related factors that may diminish their culpability. Minority defendants are doubly disadvantaged—by society in general and by the criminal justice system—when the relevance of race and ethnicity is ignored.

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