



RACIAL BIAS AND THE BENCH

**A response to the Judicial Diversity
and Inclusion Strategy (2020-2025)**

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Foreword by Leslie Thomas KC

“I did not see myself as a racist because I was taught to recognize racism only in individual acts of meanness by members of my group, never in invisible systems conferring unsought racial dominance on my group from birth.”

Peggy McIntosh¹



This is an important study.

I am humbled to be asked to write the foreword. In writing this foreword, I join the chorus of voices who, for many years, have been trying to get these urgent issues on the political and social agenda. Before things will change for the better hard data needs to be gathered. Anecdotal experience tells us that there is a significant problem with the judiciary, but sadly that is never enough to persuade those who are sceptical. But I am convinced that when the hard data is in, and has been ‘crunched’, what we have suspected for years will be laid bare for

all to see. We have come to an inflection point. The time for empty words is over. What is needed is a genuine will to change what is to what can be and the vision of how to get to where we need to be.

As I said in a Gresham lecture², judges are some of the most powerful actors in our society, and decisions they take can often be life changing for individuals, communities, and society. At some point in your life, a judge may decide whether you go to prison. A judge may decide whether you lose your home, lose your state benefits, lose custody of your

children. A good judge can transform lives for the better. A bad judge can ruin lives irreparably. However, we also need to remember that the judiciary is an institution. All institutions have ingrained patterns and behaviours. Often but not always unconscious. As an institution the judiciary can be racist.

The concept of institutional racism was coined in 1967 by Turé and Hamilton when they said:

Racism is both overt and covert. It takes two, closely related forms: individual whites acting against individual blacks, and acts by the total white community against the black community. We call these individual racism and institutional racism. The first consists of overt acts by individuals, which cause death, injury or the violent destruction of property. This type can be recorded by television cameras; it can frequently be observed in the process of commission. The second type is less overt, far more subtle, less identifiable in terms of specific individuals committing the acts. But it is no less destructive of human life. The second type originates in the operation of established and respected forces in the society, and thus receives far less public condemnation than the first type.³

Judicial racism is as much about history as it is about law. As Colin Bobb-Semple⁴ writes in *Race, Jail v Bail*, ‘Throughout the British plantation system, it was customary for the planters to become magistrates. They were the people responsible for constant whipping and other forms of torture of enslaved Africans, in addition to performing their roles as justices. After emancipation, the planters continued to act as magistrates and dispensed justice, sometimes very harshly.’

1. P. McIntosh (1990) ‘White Privilege: Unpacking the Invisible Knapsack’, *Independent School*, pp. 31–36. [Reprint available here](#).

2. L. Thomas KC (2021), ‘Judicial Racism & The Lammy Review’, lecture transcript, Gresham College. Lecture [transcript](#).

3. K. Turé and C. Hamilton (1967) *Black Power: The politics of liberation*. Random House.

4. C. Bobb-Semple (2012) *Race, jail v bail*. CreateSpace Publishing.

Foreword

by Leslie Thomas KC

As Bobb-Semple highlights, the entrenched racism of the British establishment did not disappear post emancipation.

Judicial racism in the criminal courts is pronounced when looking at sentencing practices. The *Lammy Review* comprehensively lays bare this truth, reporting the results of a 2016 Ministry of Justice review of Crown Court sentencing for three groups of offences – offences involving acquisitive violence, sexual offences and drugs offences. Confirming what many in affected communities had long since suspected, this review found that “[u]nder similar criminal circumstances the odds of imprisonment for offenders from self-reported Black, Asian, and Chinese or other backgrounds were higher than for offenders from self-reported White backgrounds.” Starkly, it also found that “[w]ithin drug offences, the odds of receiving a prison sentence were around 240% higher for BAME offenders, compared to White offenders.”

The systemic inequality and biases in the legal profession are reflected in the make-up of our judiciary. Nationally, only 1% of judges are Black, while 5% are Asian and 2% are mixed ethnicity and 1% were individuals with ethnicity other than Asian, black, mixed or white.⁵ And there is a big difference: between the junior and senior judiciary. While the junior judiciary is slowly diversifying – I stress slowly – the senior judiciary is not, and remains overwhelmingly white, and overwhelmingly from privileged backgrounds. In fact, there are currently no Black judges in the High Court, Court of Appeal or Supreme Court. Not one.

As Judge Peter Herbert stated: “The judiciary is probably one of the last bastions of the British establishment”, adding further that, “racism is alive and well and living in Tower Hamlets, in Westminster and, yes, sometimes in the judiciary.”

When we stop and look at the hard data presented in this work, society can no longer pretend. Judges can no longer hide and those that seek to preserve the status quo cannot plead ignorance. We cannot ignore what is coming. As what was once considered to be activism now becomes mainstream, those who choose to ignore the obvious injustices do so at their peril. As has been said so many times before, they will find themselves on the wrong side of history.

Change is coming and that is for the good of all.

Professor Leslie Thomas KC

5. Ministry of justice in England and Wales (2022) ‘Diversity of the judiciary: Legal professions, new appointments and current post-holders.’ [Available at:](#)

Executive Summary

Although the judiciary of England and Wales wields enormous power over individuals, it's operations are alarmingly under-scrutinised. One crucial area that has remained largely beyond examination is judicial racial bias.⁶

Addressing this neglect, this report explores and evaluates racial bias as well as antiracism⁷ among judicial office holders ('judges'). Drawing on the findings of a new survey of 373 legal professionals as well as existing research, it evaluates the racial fairness of judges and racial guidance and diversity initiatives. This report situates itself within and builds on excellent work by those who seek to racially reform and remake our justice system.⁸ We hope that by drawing together that body of expertise and these new findings we can begin to turn the tide on racism in the system.

What the report finds—combining its quantitative and qualitative data supported by the work of others—amounts to evidence of institutional racism in the justice system presided over by judges.

Key findings

Racial bias plays a significant role in the justice system. 95% of the legal-professional survey respondents said that racial bias plays some role in the processes and/or outcomes of the justice system, with 63% saying it plays a significant role, and 29% saying it plays a 'fundamental role'.

Numerous survey comments offered examples of discriminatory practices by judges, with many respondents regarding judicial racial bias as commonplace. Over half (56%) of the survey respondents stated they have witnessed one or more judges acting in a racially biased way towards a defendant. Over half (52%) had witnessed one or more judges acting in a racially biased way in their judicial rulings, summing up, sentencing, bail, comments and/or directions.

Racial discrimination by judges was most frequently directed towards Asian and Black people, with people from Black communities—from lawyers, to witnesses, to defendants—cited by survey-respondents as by far the most common targets of judicial discrimination. The most frequently mentioned sub group was young Black male defendants.

Some survey respondents had seen judges act in antiracist ways. For example, 26% said they had witnessed one or more judges act with antiracism towards a defendant.

Race training is neither compulsory nor provided on a regular basis to the judiciary (nor to other legal professionals). Only 49% of the survey respondents who have worked as judges had received any race training in the preceding three years. Of all the respondents who had received race training, 53% stated that it was useful.

The appointment of judges seems to depend very much on Ethnicity.

The Government's 2022 statistics state that the conversion rate from application to judicial appointment for Asian and Black candidates was estimated to be 37% and 75% lower respectively than for successful white candidates. When intersectionality is taken into account the discrepancy is even more stark: Ethnic minority⁹ female solicitors are the least likely to be appointed as a judge.

The Judicial Diversity and Inclusion Strategy makes no reference to racial bias or racism. Despite the figures above, the Strategy states that judicial appointments are currently made 'on merit following a fair and open competition from the widest range of eligible candidates.' This is in denial about exclusionary structures and attitudes that shape decision-making and largely ignores over 50 years of proposals by JUSTICE for structural changes.

The Equal Treatment Bench Book, given to all judges on appointment as a key reference point, contains just one chapter (Chapter 8) devoted to race, which includes little acknowledgement of anti-Black racism. This is despite the serious disproportionalities in representation and treatment of Black people in the justice system.

There is an almost wholesale scholarly neglect of the topic of racism in the English and Welsh judiciary. In contrast to other jurisdictions (including the US), judicial racial bias and racism seem to be 'off limits' for researchers.

Since 2020, there has been only one published Judicial Conduct Investigations Office decision in which racism was found against a judge (a magistrate). The lack of correlation between the single upheld complaint and our survey results (and previous reports of racism) indicates that the complaints system isn't working properly.

6. There is a lack of legal scholarship directly on judges, race and racism in England and Wales. For exceptions, see for instance M. Banton (2010) 'Judicial training in ethnic minority issues in England and Wales', *Journal of Ethnic & Migration Studies* 24.3: pp. 561-72; and Thomas KC, 'Judicial Racism and *The Lammy Review*'. For wider scholarship on racism, ethnicity and the law that examines the judiciary in relation to other and/or broader issues, see for instance L. Bridges (2001) 'Race, law and the state', *Race & Class* 43: 61-76; L. Bridges (2017) '*The Lammy Review*: Will It Change Outcomes in the Criminal Justice System?' *Race & Class* 59: 80-90; C. Thomas (2017) 'Ethnicity and the Fairness of Jury Trials in England and Wales 2006-2014', *Criminal Law Review* 11: 860-76; Semple, *Race, Jail v Bail*; I. Solanke (2017) *Discrimination as Stigma: A theory of anti-discrimination law* (Bloomsbury); W. Shankley and P. Williams (2020) 'Minority Ethnic Groups, Policing and the Criminal Justice System in Britain', in *Ethnicity, Race and Equality: The State of the Nation*, eds B. Byrne et al., Policy Press, pp. 51-72.

7. The definition of 'antiracism' that was used in the survey that we commissioned for this report was 'identifying and actively opposing racism and promoting racial justice.'

8. On race and racism in the courts from policy/practitioner perspectives, see JUSTICE (2017) *Increasing judicial diversity*; The Bar Council (2021) *Race at the Bar: A Snapshot Report*; The Law Society (2020) *Race for inclusion*; The experiences of Black, Asian and minority ethnic solicitors; D. Lammy (2017) *The Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the criminal justice system*; Northern Circuit Race and Diversity Group (2021) *Race working group report*; N. Uhrig (2016) *Black, Asian and Minority Ethnic disproportionality in the Criminal Justice System in England and Wales*; Howard League for Penal Reform (2021) 'Making Black lives matter in the criminal justice system: A guide for antiracist lawyers'. Report for Ministry of Justice; S. Paul et al (2021) *Tackling racial injustice: Children and the youth justice system*. Report for JUSTICE. Many organisations are at the forefront of informing practitioners and driving policy change, including but not limited to Amnesty, JUSTICE, Black Barristers Network, Liberty, Black Equity Organisation, Black Protest Legal Support, Howard League, Joint Enterprise Not Guilty by Association, Judicial Support Network, Society of Black Lawyers, Legal Action Group, Stopwatch, The Society of Asian Lawyers, Youth Justice Legal Centre, Northern Police Monitoring Project and 4 Front.

9. Throughout this report we use the aggregated group term 'ethnic minority' to describe Black, Asian and minority ethnic people collectively, in line with much of the terminology and categorisation in government statistics. For reference, see paragraph 3.1 of [this document](#). We use 'ethnic minority' understanding that no term is perfect.

Recommendations

1 Acknowledge institutional racism in the justice system

The Lord Chief Justice and leadership judges should, like the Bar Council has done¹⁰, publicly acknowledge and recognise that the justice system is institutionally racist. Only by admitting the problem can steps for real progress be made such as redrawing the founding objectives of the Judicial Diversity and Inclusion Strategy.

2 Organise compulsory and ongoing high-quality racial bias and anti-racist training for all judges and key workers in the justice system¹¹

If this is rooted in a recognition of institutional racism combined with the need for structural change then there is a greater possibility of converting understanding into long-lasting action. The training and education should be tailored to particular justice system groups.

3 Overhaul the whole process of judicial appointments

Follow the call of the Law Society president I. Stephanie Boyce who states that the process of judicial appointment should be restructured and the statutory consultation process abolished: 'We know a diverse pool of candidates is applying - not least from among the much more diverse solicitor profession. They're just not making it through the process in the same numbers. It is time for the whole appointments system to be overhauled to deliver a more diverse judiciary.'¹²

4 Create a critical mass of diverse judges reflective of society, rather than occasional and isolated appointments

This will help combat tokenism, isolationism and provide an audible voice for ethnic minority judges. As a 2017 JUSTICE report asserts: 'it is crucial to create a critical mass of women and BAME judges in the near future, rather than the occasional individual who can feel highly isolated, and may look and feel like a token appointment. Appointing such candidates in sufficient numbers must become the norm. Given the very small numbers in question, and the findings of the most recent Judicial Attitude Survey, we fear that the proportion of senior judges from underrepresented groups may even regress.'¹³

5 Publish all judicial research

All reports and research into the judiciary should be made public. At present the Judicial Executive Board has declined to publish a report it commissioned into judicial bullying and racism.¹⁴ The justice system is a public service funded by the tax payer and the public are entitled to know how well it is functioning and be able to hold it to account.

6 Revise the *Equal Treatment Bench Book*

The judge's equalities textbook needs to foreground the importance of combating institutional racism, in particular the neglected area of racism against Black people in the courts. It also needs to start from a recognition that judges, like everyone else, have socially and psychologically ingrained biases that they need to understand and challenge. In addition, increase the number of *Bench Book* editors who are from Black communities, who are experts on racism and/or who are not themselves judges. Cues can be taken from the good practice of the *Bench Book* authors' precursors on the Ethnic Minorities Advisory Commission (EMAC).¹⁵

7 Revamp the process for making complaints and ensure all hearings are recorded and easily accessible

Clear and effective structures for making and dealing with complaints of racism are required so legal professionals and or court users can cite the evidence and make a complaint. That way decisive action can be taken without fear of career repercussions. Disciplinary procedures should be overseen by a nominated individual trained in conscious and unconscious racist behaviour. All complaints should be logged and monitored on a regular basis.

8 Encourage a culture shift towards antiracist practice by judges

Racial literacy and a commitment to antiracism should be considered key competencies for entering and progressing in the judiciary. The expertise of legal professionals including judges who are already delivering antiracist justice should be recognised and supported by Leadership judges to help accelerate change.

9 Adopt a multi-pronged approach that sees each of the above recommendations as interrelated and inadequate in isolation or without the support of the other interventions

10 Institute a robust accountability and implementation strategy to ensure that 'progress' is substantive rather than merely procedural and performative

An independent and diverse committee of lawyers, legal organisations, academics, legal reform organisations, campaign groups and experts should scrutinise the implementation of the measures above. The committee would receive themed reporting on complaints of racism from internal and external complaints procedures and associated action plans. As a safety valve the Home Affairs Justice Committee should produce a report every 5 years after publicly hearing evidence from leadership judges, court users, legal organisations and academics.

10. The Bar Council (2021) *Race at the Bar*, p. 12. See also the Bar Standards Board's [BSB] own [antiracist statement](#) and request for Chambers to issue antiracist statements; and in the US the public resolution passed by the Conference of Chief Justices/Conference of State Court Administrators [link](#).

11. This includes advocates, individuals working in discipline or recruitment and court staff.

12. I. S. Boyce quoted in M. Fouzder (2022) 'Controversial judicial selection tool to be dropped in some circumstances', *Law Society Gazette*.

13. JUSTICE (2020) *Increasing judicial diversity*, para. 3.16.

14. C. Bakshi and J. Ames (2022) 'Secret report tells of bullying and racism by judges', *Times*.

15. EMAC comprised of six Black members, six Asian members and five white members, mostly from outside the judiciary. They set about training judges on race relations via a series of residential seminars attended by most judges that took place between 1993 and 1996 and the preparation of a handbook.

Introduction

Both globally and nationally, 2020 was a year of unprecedented antiracist mobilisations as huge numbers took to the streets to insist Black Lives Matter.

Protesters demanded a reckoning with the racism that underpins policing and the justice system specifically, and society and its institutions more broadly. The urgency of the demands for inspection and action were punctuated by the unfolding of the Covid-19 pandemic which, in a range of ways, lay bare the racialised and class-based inequalities that undergird society.¹⁶

Against this backdrop, in November of 2020, Lord Burnett of Maldon, the Lord Chief Justice, launched the Judicial Diversity and Inclusion Strategy (2020-25). The 5-year Strategy set out 'the ambition, aim and objectives for the judiciary'¹⁷ with regard to increasing the ethnic and professional diversity of the judiciary and the retention and progression of judicial office holders from ethnic minority backgrounds.

Whilst the Strategy has initiated some potentially positive work with leadership judges, outreach activities and suggestions for judicial training, it suffers from a fundamental flaw: it does not even consider the issue of racism. Indeed, the words 'racial bias' and 'racism' are not even mentioned and the word 'race' appears only once, in a footnote. It is not a problem merely of terminology. It goes to a much deeper problem with the Strategy's starting assumptions about and ambitions for equity and fairness in the judiciary.

Of course, ethnicity is not the only social-identity category that the Strategy has within its sights, and injustices around many axes of social inequality need addressing. But the Strategy and the update do vest ethnicity and intersectionality with particular strategic importance.¹⁸ Hence, the lack of admission of racism and racial bias in the Strategy is particularly concerning.

Racial Bias and the Bench was created in response to the launch of the Strategy and assesses its proposals and early progress in regard to race and ethnicity. It speaks directly to the terms of the Strategy which focuses on equality and diversity among judges and other legal professionals. At the same time, it opens outwards to explore racial justice at the bench much more generally in relation to fair trials, equal protections, and due regard of all courtroom users.

Our survey findings present some promising evidence of legal professionals, including some judges, recognising bias and challenging racism when they see it. Sometimes using the *Equal Treatment Bench Book* and the *Lammy Review*, and likely informed by influential recent manuals like the *Howard League Guide for Antiracist Lawyers*, racially literate legal professionals diligently attempt to mitigate against and face down institutional and interpersonal racism.¹⁹ We can learn from this good practice.

Our survey found that these professionals are white as well as from ethnic minority communities.

However, overwhelmingly, the survey results generated evidence of racial bias by some judges within wider structures of institutional racism. People from ethnic minorities are simply not consistently able to access the same fair-trial rights as white people.

The evidence from our survey respondents combined with other sources demonstrates that the extreme disparities in our legal system and their knock-on effects for the life chances of Black and other ethnic minority people are driven by conscious and unconscious racist choices made in our courtrooms.

The impact is not just on court users but also legal professionals. We believe our evidence uncovers the way that judicial bias undermines the authority of ethnic minority lawyers and their ability to successfully progress their cases, hitting morale, retention and career progression all the way through to judicial appointment.

The survey indicates that judicial bias most heavily impacts upon Asian and Black people - above all, racial discrimination towards Black people predominated in survey observations. Our report explores how pernicious anti-Black racism, despite it being a central focus from Macpherson to Black Lives Matter, is curiously erased and disavowed by some judges and the justice system.

Indeed, in light of new and existing data, we consider the lack of acknowledgement, even denial, of racial barriers in the Strategy to be unsupportable. For instance, when the introduction states that over the last decade 'representation of judges from Black, Asian and other minority ethnic backgrounds has increased', it erases the fact that, as the 2022 judicial diversity statistics confirm, 'the proportion of Black and Other ethnic minority individuals in the judiciary has stayed the same [both 1%] since 2014.'²⁰ There is also no recognition in the Strategy, despite well-evidenced critiques, that judicial appointment processes are structurally unfair, blocking entry to many ethnic minority and non-traditional applicants.²¹ The consequence is that we are left with a Strategy that contains no firm proposals to combat racism in the justice system.

We call for intervention predicated on an acknowledgement of Institutional Racism. We follow the definition provided by Ambalavaner Sivanandan, former director of the Institute of Race Relations:

Institutional racism is that which, covertly or overtly, resides in the policies, procedures, operations and culture of public or private institutions - reinforcing individual prejudices and being reinforced by them in turn.

16. J. Nazroo and L. Bécaries (2021) 'Ethnic inequalities in COVID-19 mortality: A consequence of persistent racism', *Runnymede Trust Briefings*.

17. Courts and Tribunals Judiciary (2020) *Judicial Diversity and Inclusion Strategy 2020 – 2025*, p. 4.

18. The 2020 Strategy document states 'The diversity and inclusion initiatives undertaken by the legal professions, the Judicial Appointments Commission and the judiciary over the last decade are having a positive impact on the representation of women in the judiciary, including at senior levels. However, while the representation of judges from Black, Asian and other minority ethnic backgrounds has increased, progress in this regard is too slow and there is still a long way to go to realise a judiciary that fully reflects the society it serves', p. 5. See also pp. 8 and 9 where statistics in relation to 'Women in the judiciary' and 'Black, Asian and minority ethnic (BAME) judicial office holders' are highlighted. See also p. 6 of the update.

19. Howard League for Penal Reform (2021) *Making Black lives matter*. See also A. Johnson (2020) 'Bringing anti-racism into the courtroom', Legal Action Group.

20. Ministry of Justice in England and Wales (2022) 'Diversity in the judiciary: Official statistics'.

21. JUSTICE, 'Increasing judicial diversity', pp. 24-25, 47, 58-59.

Introduction

Institutional Racism in the justice system must be reckoned with, starting with those at the top. As the Macpherson Report explained, institutional racism

persists because of the failure of the organisation openly and adequately to recognise and address its existence and causes by policy, example and leadership. Without recognition and action to eliminate such racism it can prevail as part of the ethos or culture of the organisation. It is a corrosive disease.²²

Without the impetus for change founded in a real recognition of this corrosive disease, the new plans for training and outreach

initiatives proposed in the Strategy will not be fully effective. Indeed, insidiously, they can make matters worse. The roll-out of weak diversity and inclusion efforts fosters the assumption that the necessary work is being done, creating a tick-box type culture of antibias training and outreach that is not rooted in the recognition of structural injustice requiring deep remediation.²³

The early signs are that the 5-Year Strategy, even within its own narrow parameters, is not working.²⁴ In 2022, the Supreme Court of the United Kingdom, which has never appointed an ethnic minority justice, filled two new vacancies on the Court with retired white male judges.²⁵



Navigating the report

Section 1 is the report's bedrock where you will find details and analysis of our survey findings on racial bias and antiracism.

Section 2 focuses on race training and education for judges. It reviews the Strategy's proposals in this area before turning to history to see what can be learned from previous training Initiatives that might inform new bespoke judicial learning as well as to a review of the *Equal Treatment Bench Book*, calling for revisions.

Section 3 focuses on questions of racial equality and representation in the judicial workplace. It reviews the Strategy's claims about a level playing field for recruitment and contrasts these with government statistics, JUSTICE reports and evidence from our survey respondents.

All sections ultimately lead in the same direction: the Judiciary has to be honest about the problem of racism in the justice system and of empty diversity and inclusion exercises which risk serving as a distraction from the urgent need for significant anti-racist change in the sector.

22. W. Macpherson (1999) *The Stephen Lawrence Inquiry Report*, para. 6.34.

23. S. A. Tate and D. Page (2018) 'Whiteness and institutional racism: Hiding behind (un)conscious bias', *Ethics and Education* 13: pp. 141-155, [pre-print available here](#).

24. *The Law Society* 'Urgent action needed to challenge continuing lack of diversity in judiciary'. Press release; C. Baksi (2022) 'Lack of judge diversity is 'scandalous'' *Times*

25. C. Baksi (2022), 'Supreme Court picks trigger calls for reform over lack of diversity', *Times*.

Methods & approach

This report is the product of the Simon Fellowship²⁶ of Keir Monteith KC in the Faculty of Humanities at The University of Manchester (2021-22), where he, along with the Simon host Professor Eithne Quinn and university researchers led an investigation into racism in the English and Welsh judiciary.

When the lawyer sought answers from academe, he found that very little research had been done directly on the topic; and when an internal Judicial Executive Board report on bullying and racism in the judiciary failed to be published, the sense that the subject needed urgent, open investigation further intensified.²⁷

Along with conducting a research review and staging discussions with experts in race awareness training, lawyers, part time judges, equality & diversity leads, and law students, the research team decided to create a questionnaire to gather its own data.

The team surveyed legal professionals²⁸ over the period of a month in May 2022, distributing the questionnaire to a variety of legal organisations and individuals, as well as hosting it on a website and posting about it on social media. The survey reached a substantial number of respondents across a variety of racial and ethnic groups, jurisdictions, legal roles, and years of experience. It received 408 initial responses and, after early analysis showed that several respondents answered only the preliminary demographic questions, these responses were dropped from the sample reducing the number to 373.

The ethnicity of these survey respondents is broken down as follows:

Table 1			
		Number of responses	% of total
Race	Asian or Asian British	48	12.9%
	Black, Black British, Caribbean or African	48	12.9%
	Mixed or multiple ethnic groups	32	8.5%
	White	214	57.4%
	Other ethnic group	23	6.2%
	Prefer not to say	8	2.1%

The survey comprised of 21 questions on topics related to race training, racial bias and anti-racism in the court system with a particular focus on judges. In addition, there were two open-ended comment questions. One was on the value of any race training

that legal professionals had done. The other question asked for further information on what legal professionals had seen, heard or experienced in relation to racially biased and/or anti-racist approaches with a specific but not exclusive focus on judges.

We included basic definitions of these terms for respondents to use as a guide:

Racial bias: speaking or acting (consciously or unconsciously) in a prejudicial way against a particular group or individual on the basis of race

Anti-racism: identifying and actively opposing racism and promoting racial justice

170 of the respondents offered comments, including 119 who commented on the central question above about their perceptions of racial bias and antiracism. The ethnicity of those who offered observations in response to this question were 13% Asian, 14% Black, 12% mixed, 4% other, 1% prefer-not-to-say and 56% white.

We made the decision to include a large number of comments from legal-professional voices in this report because they collectively amount to rich, thought-provoking, detailed evidence that needs to be heard.

It is important to emphasise that the vast majority of our respondents were not judicial office holders. Surveying judges themselves was not the particular aim. However, 16% of those surveyed did identify as current or former full-time or part-time judges or magistrates.

It is also important to emphasise that all figures reflect the views of the survey respondents only and cannot be inferred to wider legal-professional populations. The intention is to provide a window into lived experiences, opinions and behaviours.

The research team considered ethical questions, including engaging with ethical approval from the home institution (University of Manchester). In the questionnaire design and when processing the data - particularly in selecting relevant quotes from legal professionals - the team took great care to ensure anonymity.

Analysis was either univariate or bivariate in nature, working with mostly counts and percentages across and between variables. This is due to the small sample size and exploratory nature of the project. Inferential statistics fall outside the scope of the analysis as the intention is to provide a brief overview of perceptions and opinions, not infer to wider populations with correlations, causalities, and likelihoods

26. This Simon project grew out of a partnership developed on the Arts & Humanities Research Council project, *Prosecuting Rap: Criminal Justice and UK Black Youth Expressive Culture*. (AH/T000058/1).

27. Baksi and Ames. 'Secret report tells of bullying and racism'. *Times*

28. For a full break down of the professions and jurisdictions of those surveyed see Appendix 1.



Section 1

RACIAL BIAS AND THE BENCH (SURVEY FINDINGS)

Section 1

RACIAL BIAS AND THE BENCH
(SURVEY FINDINGS)

This section considers the numeric and comment-based evidence generated by the survey in relation to the extent of racial bias in the courtroom in general and of judicial racial bias and antiracism specifically. To give further insight into the quantitative findings, it relies extensively on survey comments by legal professionals, organised by theme.

‘Many and repeated examples’:
racial bias in the courtroom

A core question of the survey asked: ‘To what extent do you think racial bias plays a role in the processes and or outcomes of the justice system?’ Answers ranged on a scale from ‘no role’ [1] to ‘fundamental role’ [5]. 95% of all respondents state that racial bias plays some role. 63% of respondents selected four or five, which suggests they believe it plays a very significant role, with 29% saying racial bias plays a ‘fundamental role’. Only 5% of legal professional respondents believe that racial bias plays no role in the processes or outcomes of the justice system. Thus, as Figure 1 shows, values are concentrated on the upper end of the scale.

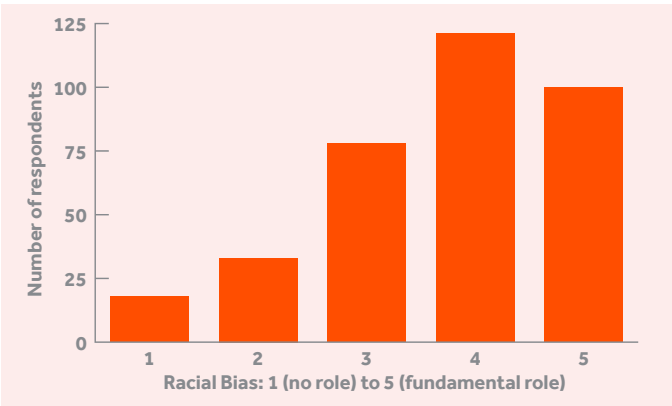


Figure 1 - Perceptions of role of racial bias in the processes and/or outcomes of the justice system

These figures provide a striking indication that many in the profession believe that racial bias weighs substantially on processes, interactions and/or outcomes of the justice system. The widely held belief among survey respondents that racial bias plays a significant role cuts across ethnic group, years of experience, jurisdiction, and role of respondent. The distribution can be broken down by ethnic category. A clear majority of all ethnic groups answer four or five. Asian legal professionals answered four and five at 80% and, similarly, Black respondents at 83%. White respondents answered four or five at 56%. The responses across jurisdictions were relatively consistent, with tribunals standing out with a high concentration of respondents at the upper end of the scale (75% voting four or five). These numeric findings shed light on perspectives about racial power relations of those who work within the legal profession and have first-hand experience of the realities of the system, and can be understood in more detail when we consider the supporting observations of respondents.

The comments made by 119 survey respondents (in answer to the question on racial bias and antiracism) were spread across ethnic groups, as above, with a majority made by white legal professionals. Overall, they provide rich and concerning evidence of *Justice not being done or being seen to be done*.

In terms of perceptions of racial bias in the courtroom, a handful of legal professionals (9 out of 119 responses) reported that they had not witnessed any racial bias in the system. Some of these were thoughtful.

In my Court of Protection practice I cannot think of examples of racial bias being exhibited by the judiciary. That may be my own insensitivity, I accept. However I remain reasonably confident that it would not be common place in that area of practice.

One or two others seemed to downplay any racial bias they had seen:

The amount of judicial bias is in my view very limited but there are still occasions when I have suspected it has taken place. It is also very rare to have obvious bias. It is simply that the Judge is less pleasant and warm.

Several respondents were much more emphatic in rejecting the possibility of racial bias:

The Lammy report which was concerned with racial bias in the system was in my [view] deeply flawed. It failed to take account of higher levels of criminality within different minorities and the type of offences which are prevalent in those groups which can result in more severe sentencing. For instance, in London where I practiced almost every armed street robbery that I encountered involved Afro Caribbean youths using knives. Frauds involving ATM machines were almost always committed by Romanians for some reason. Judges are by definition in our jurisdiction impartial, and of course colour blind.

These comments reproduce racial bias in the very act of rejecting the premise of bias. The consensus view in the literature from social cognition psychology is that ‘bias is a kind of distorting lens that’s a product of both the architecture of our brain and the disparities of our society.’²⁹ In the first comment we see a rejection of the racial bias highlighted by the Lammy Review and an assertive embrace of cognitive shortcuts (‘almost always’) about race and guilt. Racialised criminal generalisations become the explanation for the disparity in the system, foreclosing discussions of racial bias and encouraging racist profiling. This encapsulates a process described by social psychologist Jennifer Eberhardt: ‘Disparities are the raw material from which we construct the narratives that justify the presence of inequality.’³⁰ In the second comment, a similar illiteracy about racial bias is exposed in the suggestion that judges are ‘by definition ... impartial’ and ‘colourblind’ (see below).

29. J. Eberhardt (2019) *Biased: The New Science of Race and Inequality*. Heinemann, p. 6.

30. Eberhardt, *Biased*, 297.

However, the overwhelming majority of comments from the 119 respondents do perceive racial bias in the system overseen by judges. Indeed, many believe bias to be endemic. To sample just a few:

In relation to judges acting in a racially biased way, there have been many and repeated examples.

The criminal justice system is fundamentally racist

I have seen many instances where the pain and suffering of black people at the hands of the state is trivialised by judges.

Certainly a sense that stereotypes about individuals from non-white racial backgrounds is pervasive

Unconscious bias plays a major role in the justice system

Sadly there is racism, discrimination and white supremacy existing in the courts.

Some respondents felt that the racial bias they had seen and, in some cases, experienced was so pervasive that they were at a loss as to where to start. Again, this is just a sample of these kinds of responses:

I would have to write for pages and pages to express the racism I have seen

it is difficult to set out specific instances as they are quite common: a significant minority of tribunal judges treat the evidence of appellants and witnesses from other cultures, countries and backgrounds with scepticism

too many incidents to describe. Main thing is racist sentencing of young Black males

Conditions of 'many and repeated examples' of racial bias fester in part because the judiciary undertakes no robust reporting on its current performance in handling complaints of racism generated either internally or externally. Complaints of racism from court professionals and users may be raised in appeals or to the Judicial Conduct Investigations Office (JCIO) by contacting the relevant advisory committee or Chamber President.³¹ Since 2020, there has been only one published JCIO decision in which racism was found against a judge (a magistrate) using social media.³² The lack of equivalence between this single reported successful complaint and our survey findings of extensive discrimination (supporting other investigations into racism in the justice system) indicates that the complaints system isn't working properly.³³ For the last two years the judiciary has embarked upon a consultation process on judicial discipline. In August 2022 the report responding to the consultation accepted that there was a lack of diversity among those who work in the disciplinary system. In addition, diversity data about complaints is not collected – though it suggests that as soon as practicable it will be.³⁴ In light of the urgent need for more accountability, it is crucial that this data is collected and that concrete actions come out of the consultation process. All our evidence suggests change in this area is desperately needed.

'An air of distrust': judicial demeanour and discrimination

Many respondents suggest that a key way in which judicial racial bias is communicated is non-verbal, through tone of voice, demeanour and body language that suggest a relative lack of respect towards ethnic minority people in court proceedings. The comments below are a small sample of these kinds of responses.

cutting across / interrupting witnesses; condescending and trivializing

disparaging attitude; most of the racism is not overt but a general different attitude towards those who are not white middle class

a great deal of anti-Black racism (scepticism of people's case or evidence, failing to treat Black parties in the same way as 'respectable' white litigants, etc.

I have seen it in tone, facial expressions and demeanour, as well as explicitly ('you people')

an air of distrust

Subtle differences in judicial intervention/questions when speaking to those of different ethnic backgrounds. No smiles, as there had been to the white witnesses. Almost a scowl when speaking to others.

At first glance, some of this may seem less important than judicial decisions, sentencing, and rulings. However, as many respondents explained, it was these 'subtle' cues and manners that set the terms of and legitimated ensuing detrimental decision-making by judges. Judges play a powerful role of modeling normative courtroom attitudes and behaviour; if they adopt a disparaging and distrustful manner towards people of colour then many others in the courtroom will likely pick up on and reproduce that unthinkingly.

Thus, a judicially normalised air of racial bias has serious material consequences. It legitimates the Magistrates' and Tribunal judges' decisions to the detriment of racially minoritised people and tacitly signals to Crown Court juries what to think, with disastrous consequences for people's lives. Respondents offered illuminating examples of such prejudicial processes.

Judges dismissing black man saying that the social workers are racist instead of dealing with the issues. Air of this being impossible and complainant being unreasonable as opposed to something that should be considered.

I represented a client who was a black British youth of no previous convictions. The trial was in the Magistrates' Court. The bench were two old posh white ladies. I knew from the way they looked at him, and looked at the case, as though it was all an unpleasant smell, that they would convict him from the start. We ran a good defence, providing as much information and evidence as we could, the Prosecution barely challenged our position, and the bench convicted on obscure reasoning. It seemed to me to be a decision infused with racial bias.

31. GOV.UK webpage: 'Complain about a judge, magistrate, tribunal member or coroner'. This may well change as a result of the ongoing consultation exercise on judicial discipline.

32. Judicial Conduct Investigations Office (2021) *Statement from the JCIO*, Statement 0721.

33. Baksi and J. Ames: 'Secret report tells of bullying and racism by judges', *Times*, N. Hilborne (2020) 'Black barristers report high levels of discrimination by judiciary', *Legal Futures*; J. Slingo (2021) 'One in three barristers bullied, harassed or discriminated against', *Law Gazette*; N. Rose (2019) 'Bar council urges barristers to call out judicial bullying', *Legal Futures*; S. Alam (2021) "'Racist Judiciary' Culture of Denial", *Eastern Eye*.

34. Ministry of Justice (2022) *Judicial Discipline: Response to Consultation*, Para. 252-54

When the key decision-maker in the room has an 'air of ... the complainant being unreasonable' and 'looked at [the defendant], and looked at the case, as though it was all an unpleasant smell', it insidiously lays the ground for unfair and racist outcomes. In light of the survey comments, along with well-documented racially disproportionate sentencing outcomes,³⁵ it is hard to see how there could be any credible basis for the view of some legal professionals that all judges are paragons of objectivity.

Judicial bias and defendants

In the survey, we wanted to focus on gaining insights into legal professionals' experiences of and views on judicial racial attitudes and practices towards a range of courtroom users and processes. We identified five categories:

- 1. judicial treatment of defendants
- 2. judicial rulings, summing up, sentencing, bail, comments or directions (hereby referred to as 'Rulings')
- 3. judicial treatment of justice system professionals ('Legal Professionals')
- 4. judicial treatment of applicants, respondents, claimants, witnesses, and complainants ('Applicants')
- 5. judicial treatment of friends, family, and supporters ('Family')

Figure 2 outlines the results across the five categories in terms of racial bias.

A higher percentage of legal professionals say they have witnessed judges act with racial bias in their treatment of applicants (44.5%), defendants (55.6%), legal professionals (47.9%), and in their rulings (51.9%) than those who claim not to have witnessed each of these.

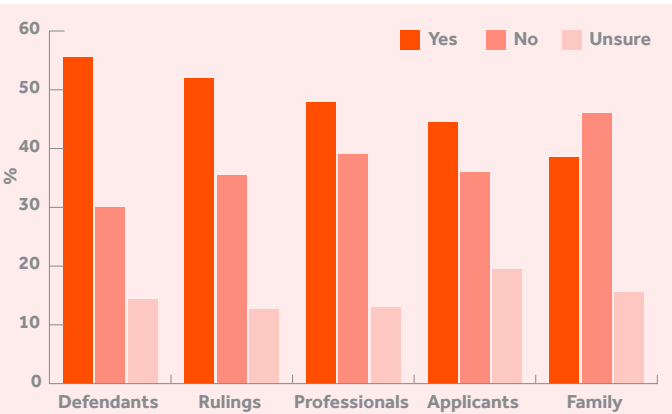


Figure 2 - percentage of respondents who have witnessed judicial racial bias

The two categories with the highest percentage of respondents who have seen judicial racial bias were in relation to Defendants and the (mainly defendant-related) areas of judicial rulings, summing up, sentencing, bail, comments or directions ('Rulings'). These findings are consistent with survey comments, which focus heavily on the treatment of and outcomes for ethnic minority defendants.

There is a great deal of concerning commentary about racial bias and sentencing. We include observations on this troubling but relatively well-established area of judicial discrimination (highlighted in the Lammy Review), while also placing emphasis on other much more poorly understood areas of defendant-related judicial bias to do with rulings, summing up, bail, comments or directions. These included a worrying number of comments about higher pretrial detention rates, with all the negative impacts this has on those charged in terms of housing, employment, education and kinship ties.

Many of the comments quoted above have already introduced aspects of judicial bias in relation to defendants. Here are some more:

dismissing relevant mitigation; obviously biased summing-up
Remanding defendants based on ethnicity and nationality
I have witnessed first hand sentencing disparity between black and white defendants. The black defendant with the least serious offence received an immediate custodial sentence whilst the white defendant received a fine (band e). I have personally represented those defendants one after the other in the same court before the same judge/magistrate

The last comment above illustrates the important point that racial bias extends to preferential treatment for white defendants not just negative treatment of ethnic minority people.

Judicial antiracism and inconsistency

We sought in our survey not just to find out about racial bias but also antiracist practice. Some respondents made very instructive comments about antiracism by judges, which shows what can be done in the courtroom:

Anti-racist: identifying and calling out racist attitudes of police and other witnesses
Comments and result made clear J[udge] was displeased with tone of Prosecution counsel's submissions which may have indicated bias
This judge listened and engaged with my submissions, then passed a sentence which allowed the defendant to remain out of custody and addressed head on issues of structural racism that have contributed to his offending behaviour, allowing this young defendant to feel seen and heard.
I can only recall 1 Judge (a recorder) who I appeared in front of on a couple of occasions who acted in an anti-racist way and he did so by explicitly acknowledging and referring to the race of the defendants during the process. This recorder, who was himself mixed race/heritage, never progressed to be a circuit judge and no longer sits as a judge.

It is very valuable to learn about legal professionals' accounts of how judicial antiracism they have seen operates in practice. A few of the respondents misunderstood the terms of antiracism, and thought it meant 'reverse discrimination' rather than proactive mitigation of racism (something we take up in the next section on training), but others seemed conversant with the term and able to identify it in practice.

Despite the examples of good practice, the majority of legal-professional responses in all five categories of judicial behaviour

35. See Lammy, *Lammy Review*. Pp. 33-35

**55.6% of legal professionals say
they have witnessed one or more
judges act with racial bias in their
treatment of defendants**

BOW STREET
MAGISTRATES COURT

report not having witnessed any instance of antiracism from a judge. On average, around 25% of respondents state they have witnessed judges act with antiracism in each category, as Table 2 opposite shows

There was also more uncertainty within legal professionals' perceptions about judicial antiracist practice compared to racial-bias, indicating that the concept is less known and understood within a context of under-delivery of quality race training. Given systemic racial bias, all judges should be operating in an antiracist way, to face down structural, institutional and interpersonal racism.

A number of comments suggest that there may be a small cohort of judges who try to actively promote racial justice combined with a larger cohort who operate with a lesser or greater degree of bias. This leads to alarming levels of inconsistency in the system. The comments of some respondents illustrate this problem.

I've seen lots of judges behave in what I consider to be a racist way over time. Equally I've seen many who go out of their way to be antiracist

I work in the immigration field and there are some examples of judges with strong race awareness and understanding. However, the overwhelming experience is of racially biased approaches - in the approach to determining whether a person has given 'credible' evidence, whether they are truthful, what they would do or how they would behave.

The judiciary is a mixed bag. There are some excellent, sensitive (and racially sensitive) judges who would never make assumptions about a court participant. There are some (often older) judges who occasionally say things which I find shocking / appalling.

This inconsistency is something that sociologists Becky Clarke and Kathryn Chadwick also highlight in their report on women and joint enterprise prosecutions, pointing to the partiality of judges who, particularly given the notorious looseness of complicity laws, have discretion to be 'condemnatory' or 'sympathetic' in their 'judge's influence'.³⁶

An air of trust: judicial faith in police evidence

Survey evidence indicates that judges tend to privilege police accounts, even in the face of evidence and submissions that cast doubt on or contradict officers' versions of events.

While practicing in the magistrates court, I never once saw a tribunal seriously entertaining the idea that the police might have been acting in a racist manner, or even that racialized defendants had perceived the police to have been acting in a racist way towards them (which is often a critical part of the defendant's case)

the tendency to always believe the police I heard 'why would the police lie' more times than I can count

In mags court ... the prevailing view was that the police were there to protect and there was little understanding of, for example, why someone would see the police and walk away, or not want to engage with them

Category	Yes	No	Unsure	Total
Applicants	21.6%	54.1%	24.3%	100%
Defendants	26.1%	53%	20.9%	100%
Family	19.6%	60.2%	20.2%	100%
Professionals	18.6%	62.8%	18.6%	100%
Rulings	28.9%	52.7%	18.4%	100%

Table 2 – Perceptions about witnessing judges act with antiracism towards different groups

When the [mixed race] young man through his advocate attempted to explain why he had felt the officers had acted in a racist manner, the Judge 'refused' to hear these submissions

In the Magistrates' Court (which I have not practised in for 10 years) I also saw Magistrates/DJs routinely disbelieve young black applicants, particularly in cases where their account differed from the police account, i.e. the default position was that young black person is lying, police officer must be telling the truth/giving an accurate account. It should be stressed that in these cases there was nothing inherently unbelievable or inconsistent with the testimony of the young person. But the possibility that they might be truthful or that the police might have got it wrong was rarely countenanced with an open mind.

In light of the historic and ongoing institutional racism of the police, judicial decisions and demeanour that put great store in police evidence and refuse to countenance challenges to police narratives, are truly alarming. Law scholar Jasmine Gonzales Rose identifies this as 'epistemic racism' in relation to evidence.³⁷ After all, some of the biggest forces in the country (including London) are now in special measures partly because of racism and some police chiefs themselves are, at the time of writing, currently preparing to make a formal apology for 'racism, discrimination and bias' in a new race plan.³⁸

The wide and uncritical judicial belief in police evidence—in contradistinction to the 'air of distrust' adopted towards Black, Brown and other racially minoritised defendants and witnesses detailed above—is a clear example of pervasive bias in the justice system: a strong bias towards police narratives and police evidence over those of ethnic minority people .

36. B. Clarke and K. Chadwick (2020), *Stories of Injustice: The criminalisation of women convicted under Joint Enterprise laws*, pp. 23-25

37. J. Gonzales Rose (2021) 'Race, evidence and epistemic injustice', in *Philosophical Foundations of Evidence Law*, eds C. Dahlman, A. Stein, and G. Tuzet. Oxford University Press. On the history of racism in the police, see A. Elliott-Cooper (2021) *Black Resistance to British Policing*. Manchester University Press.

38. V. Dodd (2022), 'Police chiefs to apologise for "racism, discrimination and bias" in race plan', *Guardian*

'Class is also a factor': intersectionality and judicial bias

The comments included some concerning evidence of intersectional injustice. Intersectionality refers to how different systems of power (e.g., racism, sexism, classism, etc.) interact with each other to produce particularly negative outcomes for those who occupy multiple marginalised identities. As legal scholar Kimberlé Crenshaw, who coined the concept, explains: 'Intersectionality is a lens through which you can see where power comes and collides, where it interlocks and intersects. It's not simply that there's a race problem here, a gender problem here, and a class or LGBTQ problem there. Many times that framework erases what happens to people who are subject to all of these things.'³⁹

There is little understanding of the intersection of race and class appalling sexism / racism in sentencing black female

Judges are routinely ignorant and dismissive of issues pertaining to race often asserting that 'we don't see colour'. In failing to see colour one also fails to see the impact of the poor treatment of some black and brown persons. It also ignores the fact that experiences of racial bias is different for those with black skin as opposed to those with brown skin. Class is also a factor.

I have seen judges (and magistrates) behaving in biased ways with people on a number of occasions. Because of the intersectionality between race, class, and gender, it is difficult to say on what basis bias has been exercised.

When she first developed this critique, Crenshaw's analytic focus was intersectional occlusion of Black women's legal rights. Our survey findings suggest this is still a highly salient critique, with lots of comment on bias targeting Black women (something we return to in Section 3). Inversely, a few respondents offered vivid accounts of how gender, race and class can work as a compounding intersection of privilege and impunity. Take the following entry:

a young white male defendant, a rugby player (so he was tall, big and strong), assaulted his girlfriend (including punching her in the face), and my fellow magistrates wanted to find him not guilty because he was an undergraduate in final year at a prestige university, he was only 20, it would be a stain on his career. Even though he admitted that he had punched her – he said in self defence – she was much smaller than him). On legal advice he was found not guilty, but what was evident from the discussion and comments was how much race and class played a part in how a defendant was viewed. I rarely saw anything like the same consideration for black male defendants.

Racial power works intersectionally with other axes of oppression and privilege in our society that is riven by complex inequalities. We believe consideration of the problem of intersectional discrimination should be integral to judicial recruitment, retention and training programmes. Many different intersectional biases were aired in the survey comments. As many of the above observations already indicate, the most common pertained to intersectional anti-Black racism.

'University studies as... aggravating feature': Anti-Black racism

Many of the survey comments that described bias were generic, not naming the particular group targeted. When a racial group was mentioned, we tallied the citations to gauge the spread. Across the comments, some groups got one mention (Irish; Ukrainian; Polish; Albanian; Vietnamese; 'white men'; Orthodox Jewish). In addition, there were seven mentions that fall under the category of gypsy, traveller and/or Roma. But by far the most comments were about anti-Asian and anti-Black bias. Twenty respondents identified bias targeting Asian and/or Muslim people. In these comments, there was a particular focus on Islamophobia.

I see a great deal of Islamophobia in particular, e.g. tribunals prying as to why Muslim women won't swear on the Quran (which is, obviously, often a very personal biological question), admonishing practising muslims for using prayer aids in court, failing to understand or be sympathetic to Islamic cultural norms etc.

Many of the comments described discrimination directed at both Asian and Black people and, in all, there were fully 53 responses (nearly half of all responses) that explicitly mentioned anti-Black racism. In addition to many comments already quoted on this topic, we offer more indicative ones:

Racial bias is far more commonplace - Judges disbelieve black men who are sole carers for their children, mistake counsel (in robes!) for the client, allow in irrelevant gangs matrix and rap/drill evidence.

Every single case I have had with a Black parent they have been described as 'aggressive.' EVERY case (I have kept a tab).

So many examples where the trajectory from 'strong smell of cannabis' to stop and search to 'assaulting a police officer in the execution of their duty' ended up with a young Black man in court. Accepted, unquestioned.

The last comment vividly captures the trajectory through the system, a pipeline from racist police profiling through to mis-conviction. This flow is something ill-understood in the literature and prevailing explanations of racial disproportionality in the English and Welsh system (which tend to track back to demographics at each discrete legal decision-point rather than consider the predetermining and cumulative flow through the system).⁴⁰ 'Accepted, unquestioned' is the judge's response to the racist profiling by the police. This offers further vivid illustration of the epistemic racism in relation to police evidence developed above. According to survey comments, judges' decisions to simply credentialise and admit, rather than scrutinise and exclude, unreliable police evidence damaged the cases of young Black men in particular.

39. Columbia Law School (2017) 'Kimberlé Crenshaw on Intersectionality, more than two decades on'

40. The Lammy Review favours tracking back to demographics at discrete decision points (the 'Relative Rate Index' method), pp. 12-13. For approaches, contrastively, that explore discriminatory flow through the system, see D. Faigman et al (2012), 'Implicit Bias in the Courtroom', *UCLA Law Review* 59: pp. 1124-87; and for a critique of *The Lammy Review's* 'snap shot' approach, see L. Bridges (2017) 'The Lammy Review' pp. 80-90.

Indeed, seventeen of the comments explicitly identified young Black men and boys as subject to judicial bias (with many more implicitly seeming to do so). Overlapping with the preceding sections, comments that are deeply concerning spoke to judicial decisions that allowed in and valorised 'evidence' from the police about 'gang' subcultures, human-rights violating 'gang' databases and Black youth expressive culture like Drill music that is highly unreliable and racially inflammatory.⁴¹ Judicial decisions that support police accounts of questionable 'gang' evidence, often in the form of rap lyrics or appearing in a rap video, go all the way to the top. The Court of Appeal has reaffirmed prosecution narratives based on such evidence, something that scholars of evidence law find 'astonishing'.⁴² These cases are typically joint enterprise and conspiracy prosecutions in which there is a heavy 'ethnic penalty' - leading to highly contested 'guilt by association' trial outcomes that Court of Appeal judges tend to uphold. Leslie Thomas KC examined appeals at the very pinnacle of the judicial system - the Supreme Court. He provided three recent examples of judicial bias relating to stop and search, immigration and a novel legal argument and asked rhetorically:

Would all these cases have gone the same way if we had a genuinely diverse senior judiciary? Would they have gone the same way if we had Supreme Court justices who had lived experience of racialised stop-and-search? Or Supreme Court justices who had lived experience of the immigration system?⁴³

Less well-established bias pertains to how judges handle mitigation in relation to young Black defendants with prospects. Our respondents offered some compelling evidence.

Young Black male defendants for instance are far less likely to be given a suspended sentence in a case on the cusp of custody than young white defendants in the same position. And a young black male defendant in education – such mitigation never seems to carry as much weight in their cases. If a young white defendant faces losing out on a career opportunity or further education it is more likely to be regarded as a tragedy by judges.

Recently a judge allowed a bad character application on the basis of the defendant giving a false impression. The judge included in his comments that the defendant was wearing a suit and was well spoken in court, which seemed to be part of the judge's reasoning that the defendant was giving a false impression. The defendant was a 17 year old black youth. It's hard to see how wearing a suit and speaking well in court gives a false impression. I felt it was informed by a view the judge had taken of the defendant based on his youth and how the judge felt young black men "normally" act.

Sentencing a black male more punitively than his white peer - instead of viewing his university studies as a strength it was an aggravating feature that he had thrown away the opportunity.

This is alarming. Where, according to one respondent above, a young white defendant facing losing out on further education is likely to be 'regarded as a tragedy by judges', when it is a young Black man's university studies, according to another legal professional, it can actually be 'an aggravating feature.' Young Black people including children, held back in so many ways due to structural racism, apparently aggravate some judges when they disrupt their biased expectations by being educated, well dressed and/or articulate.

On an individual level the judicial contempt for young Black men's education and employment prospects is life determining. On a systemic level, US Law Professor and former prosecutor Paul Butler explains how it plays out to reproduce racial hierarchies. He calls these kinds of predeterminatively racist criminal justice procedures a 'chokehold', suggesting that the overcriminalisation 'reduces competition for jobs by removing ... black men from the labor market' during their 'prime earning years.'⁴⁴ Rather than judges' playing a role in lessening the racist allocation of resources in society, some are compounding it. In a feedback loop (or 'chokehold') this unfairly denies young Black men the very things that help to reduce harm like employment, education, good housing and even citizenship.

'A very hostile place': jurisdiction and bias

The criminal courts, as above, may be riddled with racial bias; but, according to our numeric survey findings, the most bias was reported in Tribunals. This was borne out by many comments that singled out immigration tribunals:

Arguably the whole immigration tribunal system is set up in a racially discriminatory way

[a tribunal] can be a very hostile place

I practice in extradition and immigration. The problems often feel systemic.

the overwhelming experience is of racially biased approaches- in the approach to determining whether a person has given 'credible' evidence, whether they are truthful, what they would do or how they would behave.

the immigration & asylum system 'bakes in' bias against people from the global South from poor countries.

This takes us beyond practices of judicial racist bigotry to be identified and eradicated. Along with 'gang' databases and joint enterprise laws it takes us into the many legally warranted ways in which the system is racially discriminatory. Some respondents

41. See for instance P. Williams and B. Clarke (2016) *Dangerous Associations: Joint Enterprise, Gangs and Racism*, *Report* for Centre for Crime and Justice Studies link; Paul Tackling racial injustice; B. Clarke and P. Williams (2020) '(Re)producing guilt in suspect communities: The centrality of racialisation in joint enterprise prosecutions', *International Journal for Crime, Justice and Social Democracy* 9: Pp. 116-29.

42. T. Ward and S. Fouladvand (2021), 'Bodies of Knowledge and Robes of Expertise: Expert Evidence about Drugs, Gangs and Human Trafficking', *Criminal Law Review* 6: Pp. 442-60. See also A. Owusu-Bempah (2022), 'The Irrelevance of Rap', *Criminal Law Review* 2: Pp. 124-45; E. Quinn, J. White and J. Street, eds (2022) *Prosecuting and Policing Rap*, special issue of *Popular Music* 41.4.

43. L. Thomas, KC. 2021. Judicial Racism and *The Lammy Review*. [transcript](#).

44. P. Butler (2017) *Chokehold: Policing Black men*. New Press. P.76

like several of those above speak to constitutional racism in our immigration and deportation laws that 'feel systemic', beyond judicial authority, leading many to call for a more fundamental transformation of the system.⁴⁵

As already indicated in some of the comments above, Magistrates' courts are also singled out as particularly problematic spaces of unaccountable racial bias—something signalled in the Lammy Review.⁴⁶

Here are more comments, which focus on disturbing racist disparity in sentencing by magistrates:

From my experience prosecuting and defending in the Magistrates' Court, Black and Muslim Defendants are sentenced more harshly - longer prison sentences - and now that Mags can sentence up to 1 year, I fear the justice meted out to Black Defendants will not be the same as for White Defendants.

Approach in sentencing by the Magistrates Court - giving fifth/ sixth chances for rehabilitation programmes to white Defendants, whilst ethnic minority defendants face prison disproportionately in my experience.

Contrary to the deep problems with (immigration) Tribunals and Magistrates' courts, the Crown Court criminal justice system has been characterised by some as a fairer space.⁴⁷ However, comments in our survey, some quoted above, suggest that this may not be the case. New research about bias in juror decision-making in England and Wales casts doubt on this oft-repeated claim that juries are basically fair.⁴⁸

Altogether, these responses show that, as argued by Leslie Thomas KC, 'judicial racism is still very much with us, and still influences the fate of the many Black and ethnic minority people who come before the courts as criminal defendants, civil litigants, victims of crime and bereaved families and survivors'.⁴⁹

David Lammy, in his report on justice-system treatment and outcomes for ethnic minority people, challenges the system to explain or reform.⁵⁰ Explain means finding reasons for disproportionalities that do not have to do with racial discrimination. With so little scrutiny of judicial bias, some might have concluded that the problem simply resides with ethnic minority people themselves and not the justice system - no further action needed. But the accounts above present detailed portraits of disparate treatment that cannot be ignored. If the disproportionalities cannot all be explained away, with racist bias widely in evidence, change is urgently needed. How well does the Judicial Diversity and Inclusion Strategy answer this call?

45. See L. De Neronha (2020) *Deporting Black Britons: Portraits of Deportation to Jamaica* (Manchester University Press); G. Battacharyya et al (2021) *Empire's Endgame: Racism and the British State*. Pluto Press.

46. *The Lammy Review* includes a recommendation that speaks to the lack of accountability in the Magistrates court, particularly in relation to remand decisions and sentencing of racially minoritised women. 'Recommendation 11: The MoJ should take steps to address key data gaps in the magistrates' court including pleas and remand decisions. This should be part of a more detailed examination of magistrates' verdicts, with a particular focus on those affecting BAME women', p. 7.

47. On the claim that jury trials, overseen by a crown court judge, are fair, see C. Thomas (2017), 'Ethnicity and Fairness of Jury Trials.

48. On jury bias in trials presided over by judges, see for instance L. Curley, J. Munro, and I. Dror (2022) 'Cognitive and human factors in legal layperson decision making: Sources of bias in juror decision making', *Medicine, Science and the Law* 62.3: Pp. 206-15.

49. Thomas, 'Judicial racism and *The Lammy Review*'; Lammy, *Lammy Review*. [GOV.UK](https://gov.uk); Bar Council, [Race at the bar](https://www.barcouncil.org.uk/press-releases/2020/04/race-at-the-bar); Howard League, Making Black lives matter. [link](https://www.howardleague.org/making-black-lives-matter/)

50. Lammy, *Lammy Review*, P. 7.



From my experience prosecuting and defending in the Magistrates' Court, Black and Muslim Defendants are sentenced more harshly - longer prison sentences - and now that Mags can sentence up to 1 year, I fear the justice meted out to Black Defendants will not be the same as for White Defendants.

MAGISTRATES
COURTS



The
Royal
Courts
of
Justice

Section 2

JUDICIAL RACIAL
BIAS: TRAINING
AND EDUCATION

Section 2

JUDICIAL RACIAL BIAS: TRAINING AND EDUCATION

The picture that emerges from Section 1 is of disturbingly common discriminatory behaviours, interpretations and judgments towards ethnic minority people in urgent need of remediation. So, what kinds of solutions are proposed in the Strategy, a document that holds that ‘diversity, inclusion and equality are fundamental to the rule of law’?

The Strategy sets out four key objectives, each with a subsequent list of actions.

- 1. Creating an environment in which there is greater responsibility for and reporting on progress in achieving diversity and inclusion.
- 2. Supporting and building a more inclusive and respectful culture and working environment within the judiciary.
- 3. Supporting and developing the career potential of existing judges.
- 4. Supporting greater understanding of judicial roles and achieving greater diversity in the pool of applicants for judicial roles.⁵¹

As these objectives indicate, much of the Strategy speaks to questions of judicial population diversity and enhancing career progression of ethnic minority judges (a discussion we reserve for the next section). Race training, on the other hand, is largely sidelined⁵² and antiracist monitoring is all but non-existent from the Strategy objectives.

In this section, we turn first briefly to the weakness of the Strategy objectives in relation to training before moving onto consider: our survey findings on race training; the limits of training as an antiracist solution; our concerns about erasure of the topic of racism in the judge’s guidance manual, *The Equal Treatment Bench Book*; and finally to an insistence that sustained and mandatory antiracist education for judges as part of a multipronged approach, remains a vital tool – sorely missing at present.

Judicial Diversity and Inclusion Strategy

Generic training is the only behavioural measure admitted in the Strategy to directly address possible bias of judges. The Strategy proposes appointing and giving responsibility to leadership judges and magistrates to be trained in diversity responsibilities, who will then provide support for the career aspirations of all serving judicial office holders in ‘a fair, objective and inclusive way.’ These leadership judges will be tasked with enabling more inclusive training of all judges, and the training will include helping to embed judicial understanding of the topics covered in the *Equal Treatment Bench Book*. However, training does not actually sit under any of the key objectives in the Strategy, so it is not fully binding and (as below) the use of the *Bench Book* as a basis of antiracism training is concerning.

Generally, the language of the Strategy conveys no sense of urgency or even focus. Where is the commitment to real reform in an attenuated construction like ‘creating an environment in which there is greater responsibility for and reporting on progress in achieving ...’?⁵³ The vagueness of the strategy objectives in no way captures the sense of imperative of many of our survey respondents who expressed a desire to learn more about and have the means to challenge racial bias in the system.

Race training (survey findings)

Race training has not been required nor consistently undertaken by legal professionals in recent years. In our survey, over half of the respondents had not received any training in the preceding three years: out of 373 respondents, 54% had not done any professional training relating to race (41% had done some kind of race training, and 5% were unsure). The answers on training break down according to legal role and jurisdiction in Table 3 below:

		Yes	No	Unsure	Total
Legal Role	Counsel	44.2%	51.4%	4.4%	100%
	Solicitor	31.8%	66.7%	1.5%	100%
	Other	41.7%	45.8%	12.5%	100%
Jurisdiction	Civil	43.0%	53.0%	4.0%	100%
	Crime	34.7%	58.7%	6.6%	100%
	Family	42.8%	55.6%	1.6%	100%
	Tribunal	64.5%	35.5%	0.0%	100%
	Other	73.5%	23.5%	3.0%	100%

Table 3 - In the last 3 years, has the survey respondent received any professional training in relation to race?

In terms of legal role, Counsel respondents had received the most race training in the last three years (44%) and, in terms of Jurisdiction, the highest training rates were in Tribunal and Other.

51. Courts and Tribunals Judiciary. *Judicial Diversity and Inclusion Strategy*. P.10.
52. The references to the training in the Strategy are generic and there is no reference to race, stating ‘by 2022 there will be training and support for all judicial office holders to gain a deeper understanding of diversity and inclusion, to take an anti-discriminatory approach, and to promote positive behaviour and a culture of respect that is sensitive to different needs and intolerant of any discrimination, bullying and harassment’. Courts and Tribunals Judiciary. *Judicial Diversity and Inclusion Strategy*. P. 13.
53. First of the four core objectives in Courts and Tribunals Judiciary. *Judicial Diversity and Inclusion Strategy*. P. 10.

For the 45 survey respondents who identified as part-time judges, the numbers were similar. When these part-time judges⁵⁴ are isolated, only 49% of them said they had received any race training in the preceding three years (22 had received some race training; 22 hadn't; and 1 person wasn't sure). It is concerning to think that people in such positions of power in a system in which ethnic minority court users are often very overrepresented might have developed so little antiracist and antibias literacy.

The lack of engagement with any recent race training of so many judges, along with the lack of an effective complaints procedure and accountability, may help explain a number of survey comments from legal professionals describing judges trivialising and shutting down conversations of race and racism when they arose.

Expressing exasperation when race issues raised by defence counsel as though it is irrelevant.

In essence, the legal system is rife with an undercurrent of racism but not overtly. And what is worse than being a racist? Being called a racist.

Refusal to accept the potential for racism in court at all

Judges are routinely ignorant and dismissive of issues pertaining to race often asserting that 'we don't see colour'.

The latter comment returns us to the lack of awareness of the basic premise of social cognition that antiracist training must address. This entails a much deeper understanding of historic and ongoing racism - including engaging with the concept of white privilege - than that set out in the 5-Year Strategy.

In the face of such judicial racial impunity - where judges being accused of racism can be construed as more injurious than actual racial discrimination towards minorities - survey findings that offer some support for the advantages of both antibias and antiracist race training approaches make sense. Although only a large minority of legal-professional respondents had undertaken any race training in the preceding 3 years, those who had, tended to believe it was valuable. 53% of respondents rated race training with a 4 or 5 (on a scale of one meaning poor and five meaning excellent). In terms of judicial respondents, 57% stated it had changed their approach, with an average ranking of 3.7 out of 5 on the effectiveness scale. Our survey found that unconscious bias training was much more common than antiracism training (47% versus 9% respectively); and that those who had received both kinds of training held the most positive perceptions about its influence on their approach.

This generally positive evaluation of training indicates that legal professionals want to learn more about racial bias and antiracism, and this was reflected in some of the survey comments.

I have been disappointed to see that Unconscious Bias training has often been rubbished by the media. It is my view that this is simply an attempt by the "anti-woke" cohort to attack those who are trying to make things better.

It is very clear to me that everybody has unconscious biases, and it is obvious that learning about that has the potential to improve decision making. I think it is crucial that judges have unconscious bias training, and yet I have not been offered any such training by the judicial authorities, and I am not aware of any such courses being created for judges.

While in broad terms our findings suggest that race training has benefits, we would need to know much more about what kinds of things legal professionals thought training had beneficially influenced. For instance, someone might score the training highly because they believe it reduces the risk of saying something that might contravene equality laws, while another legal professional might think the training effective because they believe it enhances their egalitarian legal practice. We would also want to know whether a perception of benefit, and insights gained during the training session, actually translated into any behavioural change.

In the minority of cases where respondents stated that the race training they had received had not changed their approach or they were not sure if it had, the reasons given suggest diametrically opposed assumptions, from '*I was already working with an anti-racist lens*' to '*I do not consider I have any racial bias/prejudice*'. This raises the question: is race training effective?

Limits of race training

Many have questioned the usefulness of race training as an intervention, especially when not backed substantially by leaders in the system. Race scholar and author Arun Kundnani goes so far as to describe it as 'the graveyard of struggle'.⁵⁵ As he has detailed, the recent proliferation of training programmes in some sectors has been premised on understandings of racism as a problem confined to individual attitudes and psyches.⁵⁶

Leading sociologist Alex Vitale agrees: unless accompanied by wider changes to culture and practice, race training efforts are at best marginally effective at addressing specific problems, while distracting from much larger ones. Having worked over a long period with police departments in the US and internationally on social justice reform efforts, he doubts the lasting effectiveness of race training initiatives, usually announced in the face of legitimacy crises. He found through painful experience that, rather than a good-faith desire for change, too often race training is launched as a means to manage public relations. Even if individuals in the system respond well to training, continuing workplace norms in a racist, hierarchical and complexly discriminatory system make it hard to convert understanding into action.⁵⁷

When race training is done badly - stripped of antiracist precepts to do with institutional, historic, intersectional and interpersonal racism and with only shallow support from leaders - there is a strong danger of it naturalising rather than disrupting

54. Part time judges, [ex-]magistrates, or 'other' legal professionals who stated that they are (also) judges.

55. A. Kundnani (2020) 'Training is the graveyard of struggle: An anti-racist history'. Available [here](#).

56. For a thorough critique of such, see Tate and Page 'Whiteness and institutional racism'

57. Alex Vitale, *The End of Policing* (Verso, 2018).

discriminatory attitudes. Because bias training tends to stress how pervasive bias is, researchers worry that, when the terms of the training are narrowly conceived, it becomes normalised: ‘too much focus on how good innocent people can be biased without intention can sap people’s motivation to do something about it’, explains Eberhardt.⁵⁸ This risk is richly illustrated in the experience of training of one of the survey respondents:

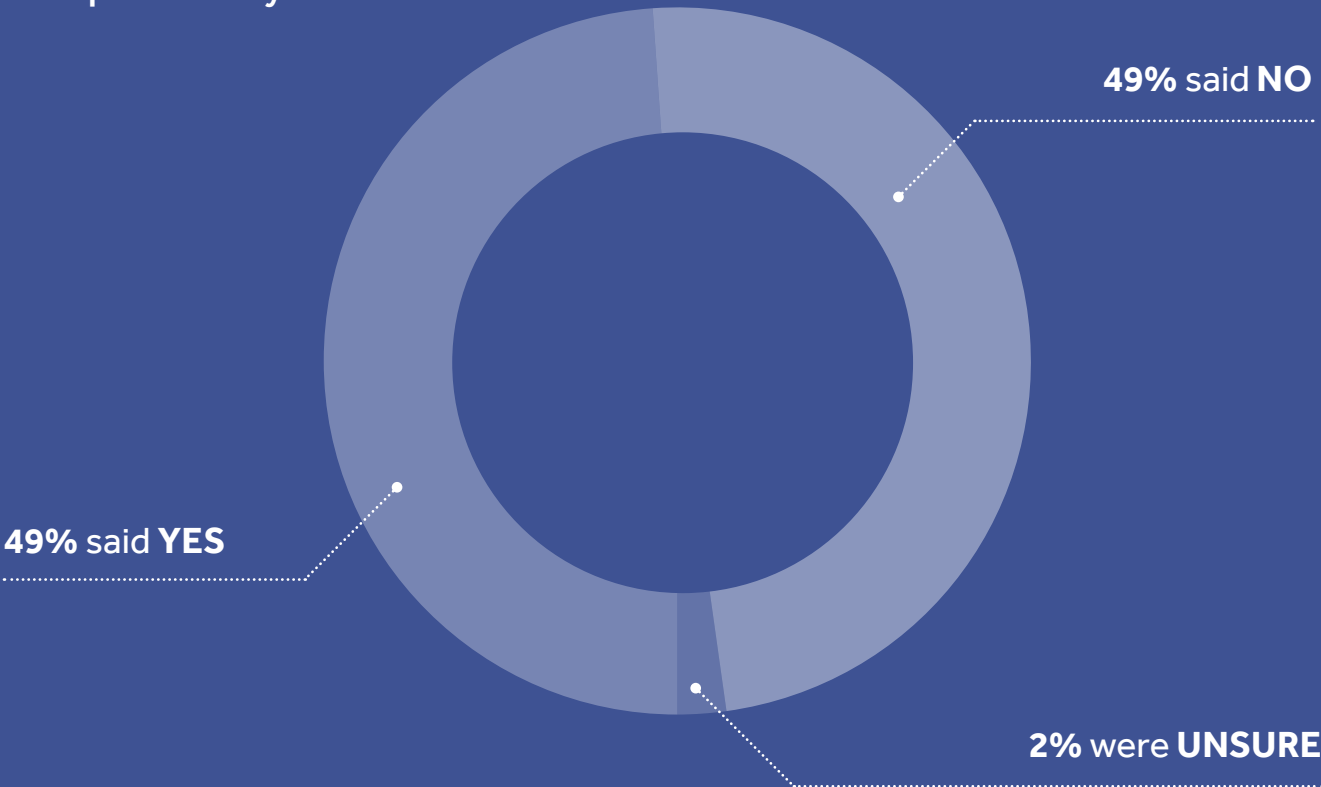
In the first few weeks of training as a magistrate, there were compulsory visits to prisons and young offenders institutions, so while this is useful (awareness of what you were sending someone to if custodial sentence imposed), presenting (without context) a large black and mixed heritage prison population - sets the scene for black men to be seen as inherently criminal.

It is the presentation of the training ‘without context’, as this respondent expresses it, that is so problematic. If new magistrates are given mandatory training tours that normalise Black men as ‘inherently criminal’, the training is doing harm. The missing

context from the training, as we have been arguing, is structural racism. A proper understanding of this, and how it routinely plays out would lead to less racist decision-making, due regard, and, in the criminal courts, no doubt a reduction in custodial sentences for ethnic minority people. Can we address some of the problems with contemporary training models by engaging with approaches from the past?

58. Eberhardt, *Biased*, p. 282.

When part time judges were asked if they had received race training in the past three years...



History of race training

In 1991, the Judicial Studies Board, the public body then responsible for training the professional judiciary, set up an Ethnic Minorities Advisory Committee (EMAC). The chair of the new committee was High Court judge Henry Brooke, who had previously led the newly formed Race Relations Committee of the Bar starting in 1989. EMAC comprised of six Asian members, six Black members and five white members, mostly from outside the judiciary. They set about training judges on 'race relations' via a series of residential seminars that took place between 1993 and 1996 and the preparation of a handbook.

Despite resistance, especially from older judges, the training, according to sociologist Michael Banton who has written an in-depth account, was taken seriously, well funded and backed by many in the senior judiciary, some of whom (including two Court of Appeal judges and 17 High Court judges) had attended a one-day seminar in the planning stages.⁵⁹ According to then-Lord Chief Justice Gosforth, Brooke had 'engendered enthusiasm and commitment in others, not least in the Lord Chancellor to enable the judicial training initiative to be taken forward'.⁶⁰ The seminars, which spanned two days, were tailored to each region and grappled with developing understanding of structural discrimination. Banton writes: 'Each started in the late afternoon with addresses by a senior judge (normally the Presiding Judge for the circuit, or region), and by one of the ethnic minority members of EMAC who spoke on "ethnic minority perspectives", illustrating the talk with statistics of racial inequalities within the criminal justice system and highlighting issues of particular concern to local ethnic minorities'. By the end, the seminars had been attended by about 2750 participants, including over 90 percent of the circuit judiciary. Participants included 474 circuit judges, 831 recorders, 385 assistant recorders, 60 paid magistrates and 274 district judges. Some 750 guests from minority ethnic communities had been invited.⁶¹ According to Banton, the overnight intensive discussions stirred up a lot of challenging and productive responses among judges who had no idea about some of their own behaviours.

Accompanying the seminars, EMAC launched the first handbook on Ethnic Minority Issues in the early 1990s.⁶² Importantly, in our view, the training and handbook were founded on a public recognition that there was structural and interpersonal

discrimination in the justice system and that judges were central to remedying this. This starting premise was evident in the 1993 Kapila Lecture delivered by the EMAC chair in which he detailed various examples of unfair treatment of and outcomes for racially minoritised defendants and professionals in the courts to stress the urgency of the programme. These included the striking observation that EMAC 'has a white chairman and a black vice-chairman. We are, I believe, about the same age, and we both live law-abiding lives.... I have been stopped once by the police in the last ten years. In the same period he has been stopped 34 times'.⁶³ The majority of examples he presented were of anti-Black racism.

Describing the training agenda, Brooke said: 'Any form of training for judges is a comparative novelty in this country. For a judicial body to invite outsiders to form most of a committee whose only function was to advise on part of the training provided for judges ...was radical. For the majority of that committee to be black and Asian men and women was revolutionary.'

The Kapila lecture captures the focus of EMAC's work that, for a brief moment, was aimed at changing the practices of judges, and was identified as such in the Stephen Lawrence Inquiry Report: 'Sir Henry Brooke's perceptive 1993 Kapila lecture should be required reading in the field of race relations. He reminded us that in the 1st Century AD Philo wrote "When a judge tries a case he must remember that he is himself on trial."'⁶⁴

The history of EMAC warrants more research and recognition. Its framing in terms of structural discrimination (including its specific recognition of anti-Black discrimination in the criminal-legal system) leading to unfair outcomes instrumentalised by judges, contrasts with the Strategy. It fed into Macpherson Report deliberations. One of the key elements of the training appears to be its commitment to a multiracial democratising practice in which judges were not only trained by their peers and professional practitioners but within wider communities including those affected by the inequalities (leading to some difficult but essential conversations). Such a participatory democratic legal practice should be developed now. The question, as with Macpherson, is what has happened since and why was this early good-faith attempt to begin to build literacy among judges suspended and even reversed thereafter?

59. Banton. 'Judicial training in Ethnic Minority issues'. Pp. 562, 566..

60. Gosforth quoted in Henry Brooke (1993) 'The 1993 Kapila lecture'. Henry Brooke website. [transcript](#).

61. Banton. 'Judicial training in Ethnic Minority issues'. Pp. 565, 568, 570, 566..

62. Justice Studies Board (1994) *The Handbook on Ethnic Minority Issues*.

63. Brooke. 1993 Kapila Lecture. [Transcript](#).

64. Macpherson, *Stephen Lawrence Inquiry Report*. Para. 6.47. Writing in 2015, Justice Brooke stated: 'When I look back over nearly 80 years of life, I regard my Kapila Lecture in 1993 as the best thing I ever wrote. It was delivered to a packed audience.... I include Lord [Chief Justice] Taylor's opening remarks ... because they represented a statement, loud and clear, from the very top of the judiciary, that in this area of human life the judges had a lot to learn and that they should not be too proud to start learning, in Brooke. 1993 Kapila Lecture.

Revising the *Equal Treatment Bench Book*

As above, one of the Strategy's stated proposals is to embed judicial understanding of the topics covered in the *Equal Treatment Bench Book*. Issued on appointment to every judicial office holder, this 'dynamic document' stretches to 546 pages.⁶⁵ The authors (an 'Editorial Team' comprised mainly of judicial office holders) today work diligently to produce a document that, in the words of Lady Justice King in her foreword to the 2021 edition, is 'a key work of reference. It is used, daily, by the Judiciary of England and Wales'.⁶⁶ Indeed, there are three very positive comments about the *Bench Book* from the survey respondents as a tool of antiracist practice, including how it was already being incorporated into a training course.

The judicial training on equality and diversity, including the ETBB, is very impressive and progressive

I have made submissions quoting the Equal Treatment Bench Book passages on the disparity of treatment for black/Asian defendants in comparison to their white counterparts. Whilst judges may feel uncomfortable being challenged this way particularly at sentencing hearings I have found the bench book an invaluable source when gently but firmly reminding judges not to treat defendants more harshly just because they are black/brown.

Open reference to the sentencing guidelines and the equal treatment bench book, with regard to disparity in outcomes

These comments suggest that the *Bench Book* can have significant potential to be used to challenge aspects of racial bias by, and in front of, judges. It is a valued document that has been buffeted by conservative 'political correctness' critiques ever since its launch, leading one commentator to title their *Time* piece: 'Commonsense guidance on equality does not deserve scorn'.⁶⁷

However, despite several instances of antiracist uses, the *Bench Book*, we suggest, is in need of revision in relation to race. Perhaps spurred by a desire to bring on board recalcitrant judges, it concedes far too much ground in its framing of equal treatment principles and is very uneven in its coverage of race and racism.

Bench Book and colour-blind framing

The Introduction to the 2021 *Bench Book* starts with the assertion that 'for most, the principles of fair treatment and equality will be inherent in everything they do as judges and they will understand these concepts very well'.⁶⁸ Thus, its opening premise is that most judicial office holders are already free of bias. We believe this is a dangerously unreliable assumption.

As the field of social-psychology holds, we all harbour biases, including racial biases.⁶⁹ Indeed this is simply a truism that now

stands as a starting assumption of implicit bias training courses used in institutions across the country. Judges are of course not exempt from such socially-informed cognitive short-cuts.⁷⁰ To assume that, for most judges, bias has already been overcome or was never present in the first place, simply risks further sedimenting bias. Indeed, US research suggests that unconscious biases among judges might be even more problematic than overtly understood ones. In a study by a sitting District Court judge of sentencing decisions, those judges who were 'only' unconsciously biased were found to be more susceptible to acting in biased ways because their actions were not consciously accessible through introspection.⁷¹

Mrs Justice Cox, the High Court judge who previously chaired the *Bench Book* editorial team, is no doubt right that 'the vast majority [of judges] want to get it right and are very grateful to have the information' contained in the *Bench Book*.⁷² Yet, even a judge who wants to get it right may find the comforting opening words of the *Bench Book* lull them into a false sense of their own impartiality. It leads them towards the erroneous 'color-blind' assumption that 'the so-called reasonable person has no race (or would not be invested in paying attention to race)'.⁷³

If the *Bench Book* 'self' is set up as benign then the *Bench Book* 'other', just as troublingly, is framed in stereotypical ways. The introduction to the chapter on race and ethnicity warns the reader: 'It is important to avoid thinking in terms of stereotypes based on perceived characteristics associated with a particular ethnic group'. So far, so good. However, the next sentence undercuts the admonition: 'Just because the majority of members of an ethnic group have certain characteristics or views does not mean all members of the group have those characteristics or views'.⁷⁴ The *Bench Book*, a manual on eradicating bias, tells us that many racist stereotypes are, more often than not, accurate. A definition of racism is the belief that different races possess distinct characteristics, abilities, or qualities, especially so as to distinguish them as inferior or superior to one another.

The *Bench Book* Introduction goes on to quote the famous words of Justice Harry Blackmun of the US Supreme Court: 'In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently'.⁷⁵

This is a powerful statement by one of America's leading lawyers, written in 1978 (five years after Blackmun had written the majority opinion in the historic *Roe v Wade* decision), built on a deep understanding of structural racism. He was writing in relation to the dissenting opinion supporting affirmative action on the basis of race in the landmark *Bakke* decision. He was acknowledging

65. Judicial College (2021; July 2022 revision) *The Equal Treatment Bench Book*, p. i. [Available at](#)

66. Judicial College, *Bench Book*, p. 1.

67. J. Keddle (2018) 'Commonsense guidance on equality does not deserve scorn'. *Times*.

68. Judicial College, *Bench Book*, P. 5.

69. See for instance, P. Agarwal (2020) *Sway: Unravelling Unconscious Bias*, Bloomsbury; Eberhardt, *Biased*.

70. For US examples, where these matters have been studied, see, for instance, J. Levinson, M. Bennett, and K. Hioki (2017) 'Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes', *Florida Law Review* 69: P.p. 63-114; Faigman et al, 'Implicit Bias in the Courtroom'; A. Wistrich, et al (2015) 'Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?', *Texas Law Review* 93: Pp. 855-911.

71. M Bennett (2017) 'The Implicit Racial Bias in Sentencing: The Next Frontier', *Yale Law Journal Forum* 126: Pp. 391-405.

72. Cox quoted in J. Rozenberg (2004) 'Throwing the book at judges: Woman behind Equal Treatment Bench Book says ethnic minorities should become minority ethnic communities', *Daily Telegraph*, P. 23.

73. E. Achiume and D. Carbado (2021) 'Critical Race Theory Meets Third World Approaches to International Law', *UCLA Law Review* 67: P. 1478.

74. Judicial College, *Bench Book*, P. 209.

75. Blackmun quoted in Judicial College, *Bench Book*, P. 5.

that, within a context of a system skewed towards whites, there is a need for remedial action on behalf of minorities – a government-backed and interventionist form of racial redress that the UK has never countenanced. Shorn of any dating or context, it is inserted into a judge's textbook that assumes that most judges (who are disproportionately white, male and privileged) are already free of racial bias.

Blackmun's words are radically recontextualised. Their implication in the *Bench Book* seems to be that, aside from exceptions, English and Welsh judges already treat court professionals and users equally, and from this benevolent baseline, the task is simply to think proactively and informally about how to go above and beyond. This starting assumption flatters judges and vastly overstates fairness in the system. The *Bench Book* premise is antithetical not just to Blackmun's stance but also to the difficult self-reflection needed for judicial arbiters to understand and address their own and others' racial biases, interpersonally and institutionally.

If readers of the *Bench Book* do not recognise and understand the persistence of institutional racism – and crucially, are not adequately encouraged and expected to do so by the Judicial Diversity and Inclusion Strategy and by leadership judges – then even if they believe they are acting in fair and just ways, this will be undermined. What is needed is proactive practice: 'In a racist society, it is not enough to be non-racist, we must be anti-racist', as Angela Davis famously said.

The Bench Book's neglect of Anti-Black Racism

On Page 1 of the 2021 *Bench Book*, the Foreword flags revisions to the sections dealing with criminal justice: 'updated to take account of action following the Lammy Review and the more intense focus on racial injustice'. However, surprisingly, the new edition has little to say about anti-Black racism. Chapter 8: 'Racism, Cultural/Ethnic Differences, Antisemitism and Islamophobia' gives an account of some types of racism, including sections rightfully devoted to 'Anti-Muslim Racism: Islamophobia' and 'Antisemitism'.⁷⁶ Yet, there is no commensurate section on anti-Black racism. This is despite the gross disproportionalities in representation and treatment of Black people in the justice system, from immigration tribunals to criminal justice, indicated by our survey comments, coupled with the stark underrepresentation of Black courtroom professionals, including of course among judges. In the place of a section on racism towards Black people, there is a short section called 'Black perspectives.' Where the sections on Islamophobia, Antisemitism, and Gypsies, Travellers & Roma begin with a clear assertion of the racist barriers and recognition of the rising hate crimes that these groups face, the section on the Black community commences with its perceptions of injustice: the 'perspectives' of those who 'feel nothing has improved in their lifetime as regards levels of racism'.⁷⁷

Where the racism targeting some groups is an objectively true starting point in the *Bench Book*, bias towards Black people is largely cast as subjective – perhaps in the eye of the beholder. The *Bench Book* discussion of 'Black Perspectives' and also in the section on 'Windrush', despite making some valuable points about unfair treatment, generally sees solutions in terms of improving not Black people's outcomes but instead their awareness of the fairness of the system.⁷⁸

In neither of these sections focusing on Black communities is racism properly registered. Indeed, the word 'racism' and 'racist' is barely used at all (out of two usages, one relates to Black 'feelings').

The lack of attention to Black people and anti-Black racism is also very apparent in the lack of specificity they are granted. A look at the overview of sections at the start of Chapter 8 is indicative. In the one for 'Black Perspectives', there is not a single mention of Black people on their own. Instead, there are references to 'minority ethnic people' and 'black, Asian and minority ethnic communities'. In its glossary of terms, the *Bench Book* states: 'Many people feel the use by private and public institutions of collective terms such as "BAME", "minority ethnic people" and "people of colour" has the effect of obscuring important differences in the life chances and experiences of discrimination of numerous groups'.⁷⁹ Yet, the *Bench Book* fails to heed its own advice adequately for Black people. Given the widespread understanding that race determines experiences of the justice system in deleterious ways for Black people we find this lack of specificity alarming.

The *Bench Book* contains references to the Lammy Review, especially in a section called 'The Criminal Justice System' on the treatment and outcomes of racially minoritised communities in criminal justice – some of this is implicitly and sometimes explicitly about Black communities.⁸⁰ But (partly, it must be said, echoing the emphasis of the Lammy Review itself) much of the focus continues to be on perceptions – on the distrust and misunderstanding of Black defendants about the fairness of the system. There is therefore little or no direction or onus for judges to do things differently.

Bench Book and Ethnocentrism

Ultimately, we believe there is a racial omission in the *Bench Book* that is even greater than its neglect of Black people and the racism they endure. The foundational omission is a denial of whiteness: the omission from consideration of white normativity among judicial office holders. Judges preside over an eco-system in which there is pressure even for judiciary of colour to cleave to unspoken white norms.⁸¹ In our view, the *Bench Book* should not start as it does with 'the other' and issues to do with making marginalised groups feel fairly treated; it should start with the self. It should begin with a recognition that judges preside over structurally and interpersonally ethnocentric courtroom proceedings and that negative valuations of others rest on

76. Judicial College, *Bench Book*, Pp. 1., 208–69.

77. Judicial College, *Bench Book*, Pp. 220–22. 209.

78. Judicial College, *Bench Book*, Pp. 221–22.

79. Judicial College, *Bench Book*, Pp. 209, 263.

80. Judicial College, *Bench Book*, Pp. 244–49.

81. Faigman et al, 'Implicit Bias in the courtroom'.

attitudes and behaviours of the self. To return to the words of Henry Brooke, the Bench Book should start by putting the judge-as-reader on trial.

Without changes, the document, in central areas, reproduces the biases of the status quo. That the Judicial Diversity and Inclusion Strategy stipulates that its race training initiatives should rest on this textbook is concerning. The necessary *Bench Book* revisions will be to the introduction's assumptions about judges and bias and to the centring of institutional racism and discrimination against Black people in particular. With such changes, we believe that this living document will become a lever of antiracist and bias-mitigating action, via judicial training and in legal proceedings.

Bespoke package of antiracist training

Race training and education are complex and controversial topics. Determining the shape of a bespoke package for judicial office holders is beyond the scope of this report. However, as the following comments demonstrate, it is urgently required:

Diversity and training on anti racism, unconscious bias needs to be vastly improved in the judiciary. It's abysmal

Judges should have compulsory annual training on these matters.

We believe that the correct starting point is to implement compulsory and ongoing high-quality antiracist training and education for all judges, advocates, JAC members and court staff, complemented by a revamped *Bench Book*. To ensure that understanding is converted into action, and in an attempt to avoid the pitfalls of many previous ineffectual training initiatives, such race education must be conducted in an environment where there is a recognition of institutional racism in the justice system. When reviewing implementation, consideration should be given to the structure and approach that was utilised by the Judicial Studies Board and EMAC at the turn of the century and it must stand as one part of a multifronted project to rid the judiciary of racial (and other) inequalities and injustices. The training and education should be tailored to particular justice system groups. For example JAC members, those involved in the disciplinary system or appraisal judges, should have training that focuses on recruitment whilst different skill sets would be concentrated on for court staff or advocates. Race training cannot be a generic one size fits all.

“

Judges are routinely ignorant and dismissive of issues pertaining to race often asserting that 'we don't see colour'.

A photograph of a traditional courtroom interior. The room features extensive wood paneling on the walls and ceiling. In the center, there is a large wooden door. Above the door is a coat of arms. To the left of the door, there is a judge's bench with a green cushioned seat. In the foreground, there are wooden benches for the public, separated by a metal railing. The overall atmosphere is formal and historical.

Section 3

JUDICIAL BIAS AND REPRESENTATION

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JUDICIAL BIAS AND REPRESENTATION

The Strategy document holds that public confidence in the judiciary is dependent on its capacity to reflect the 'broad composition of the society it serves.'

It suggests that a lack of diversity in the judiciary raises questions about fairness and equality of opportunity and that recruitment from a narrow pool may be detrimental to the judiciary itself, as it may miss out on 'talented individuals'.⁸²

However, the social justice utility of this statement is undermined by the starting premise of the Strategy that procedures are already basically fair. It claims in the introduction that

Judicial office holders are appointed on merit following a fair and open competition from the widest range of eligible candidates.⁸³

As this final section explores, this opening statement about fairness, merit and an open competition clashes not only with our survey findings but also with:

- The government statistics on diversity within the judiciary
- The effects of intersectionality
- Judicial appointment procedures and white opportunity hoarding
- Over 50 years of JUSTICE⁸⁴ reports on diversity in the judiciary

This section relies substantially on published sources (as well as some further survey evidence) because we believe their insights are far too little acknowledged and operationalised. They not only reveal the flaws in the Strategy precepts but also offer some of the roadmap, we suggest, to a more truly representative judiciary.

Without an acknowledgment of structural and informal exclusionary mechanisms in the system, the Strategy will not be able to achieve its purported aims. By adopting a starting premise that the system works, ignoring evidence to the contrary, the danger is it will not find concrete ways to action its own high-minded principles. This section explores the central distinction between, on the one hand, what scholars call 'non-performative' commitments to diversity, which do not (and are not really intended to) bring about what they name, and on the other, projects designed to bring about genuine and deep representation.⁸⁵ The latter are necessarily premised on a recognition that entrenched and well-evidenced racism is reproducing disparities. Grasping the toxicity

of racial marginalisation and exclusion lends such projects the drive and authority to mount the multipronged, sustained action that is needed to remake the system on more equitable terms.

The government statistics on judicial diversity

There is a lack of diversity across the judicial sector, most pronounced at the very top. As its website declares,

The Supreme Court hears cases of the greatest public or constitutional importance affecting the whole population.⁸⁶

All 12 judges are white and the composition of the court has always been white. The current head of the court, Lord Reed, was reported as saying that he hopes that before he retires in 2026 a person from a 'BAME' background would be appointed.⁸⁷ In 2017, JUSTICE were more ambitious. They said that a reasonable request was a minimum of '2 non-white Justices by 2026' and a maximum of 7 white males.⁸⁸ The most recent appointments in August 2022 were two white retired men.⁸⁹ The Court of Appeal describes itself as 'the highest court within the Senior Courts of England and Wales, and deals only with appeals from other courts or tribunals'.⁹⁰ The Court of Appeal has no Black judges. Just 1% of the England and Wales judiciary are Black. This is a figure that has not changed since 2014.⁹¹

The Government's 'Diversity of the judiciary' statistics published in July 2022 analysed applications and selections for judicial appointments for the period 2019 to 2022 and they help to explain why the senior judiciary remains so white. The report stated: 'In the past three years of legal exercises, Asian, black, and mixed ethnic minority individuals were over-represented in applications for judicial appointment. All four ethnic minority groups had lower recommendation⁹² rates than white candidates.'

The figures revealed that the conversion rate of recommendations for judicial appointment for Asian, Black and other ethnic minority candidates were an estimated 37%, 75% and 52% lower respectively when compared to white candidates.

82. Courts and Tribunals Judiciary. *Judicial Diversity and Inclusion Strategy*. P. 10.

83. Courts and Tribunals Judiciary. *Judicial Diversity and Inclusion Strategy*. P. 6.

84. Established in 1957 by a group of leading jurists, JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. They are a membership organisation, composed largely of legal professionals, ranging from law students to the senior judiciary.

85. S. Ahmed (2012) *On Being Included: Racism and Diversity in Institutional Life*. Duke University Press.

86. See Supreme Court [Website](#)

87. O. Bowcott (2020) 'UK Supreme Court should have a BAME justice "within six years"', *Guardian*

88. JUSTICE (2017) states: 'The appointment of judges to the Court of Appeal and the Supreme Court being by ad hoc panels convened by the JAC' in 'Ensuring accountability' para. 3.2 -3.4. JUSTICE recommends that this should be replaced by a permanent senior selections committee with more accountability and transparency in 'A new, permanent senior selections committee' para. 3.7-3.10.

89. Prime Minister's Office (2022) 'New appointments to the UK Supreme Court and JCPC'. Press release. [Available at](#): For comment read: S Tobin (2022) 'Diversity concerns as Supreme Court reappoints old guard' *Law Gazette*, 18 August.

90. Court of Appeal website [website](#)

91. Ministry of Justice. 'Diversity of the judiciary'. Para. 1.2. The Strategy 2021 update has the same 1% figure but states that 'Numbers are rounded to the nearest whole number' so the true figure could be less. Page 8.

92. Once recommended for judicial appointment, it is highly likely the applicant will become a judge.

The effect of intersectionality

When these figures are broken down further to consider the intersectionality of gender, ethnicity and professional background the recommendations disparity is grim.

Intersection of ethnicity and professional background⁹³

Table 4	Barristers		Solicitors		Total
	Ethnic Minority	White	Ethnic Minority	White	
Percentage of applications	9%	36%	15%	40%	100%
Percentage of recommendations	7%	56%	5%	32%	100%

Ethnic minority barristers have lower judicial recommendation rates than white barristers. Moreover, as demonstrated by Table 4, ethnic minority solicitors have lower recommendation rates than the other three ethnicity-profession subgroups. Ethnic minority solicitors are least likely to be made judges.

Intersection of gender, ethnicity and professional background⁹⁴

When we bring gender into this intersectional picture on recommendation rates, the government statistics continue to tell a story of marginalisation. For the 3-year period of 2019 to 2022, the Ministry of Justice reports: ‘From application, white female barristers had a recommendation rate of 19% and white male barristers had a rate of 18%. Ethnic minority female solicitors had the lowest rate of 3%, whilst for ethnic minority male solicitors it was 4%.’

Intersection of gender-ethnicity-profession distribution in the judiciary⁹⁵

Table 5	Barristers		Solicitors		Total
	Ethnic Minority	White	Ethnic Minority	White	
Gender					
Male	3%	34%	2%	20%	59%
Female	3%	18%	2%	18%	41%
Total	6%	52%	4%	38%	100%

Table 5 illustrates gender-ethnicity-profession distribution in the judiciary. The impact of the disparities in recommendations for judicial office is extremely serious. As of the 1st April 2022, white male barristers were the most overrepresented gender-ethnicity-profession group in the judiciary and occupied most

senior court posts. Meanwhile just 3% of judges were ethnic minority male barristers, 2% were ethnic minority male solicitors, 3% were ethnic minority female barristers and 2% were ethnic minority female solicitors.

Our survey confirmed particular problems in judicial treatment of female lawyers of colour that likely hamper career development, including potential through-put into the judiciary. The comments run from observations about pipeline obstructions like

‘No hijab wearing women being recruited’

to prejudicial judicial treatment towards newly qualified female counsel of colour:

‘A request of a young black woman barrister to assist in translating the patois speech of a Jamaican male Defendant.’

And here is a disturbing account from a magistrates court, again targeting a trainee Black female barrister:

‘I have witnessed so much, but for me the worst was a young pupil who was standing on her feet for the first time. I was prosecuting. DJ told her to move from the Bar into the dock. She ran from the court in tears.’

Such racist treatment clearly has implications for retention, while in turn obstructing pipelines into the judiciary for Black and Brown female lawyers in particular.

These comments chime with recent conclusions in the Bar Council 2021 Race report that there are structural problems within the legal profession: ‘barristers from ethnic minority backgrounds, and especially Black and Asian women, face systemic obstacles to building and progressing a sustainable and rewarding career at the Bar.’⁹⁶

There were similar comments and evidence in the illuminating 2021 Northern Circuit Race Working Group Report.⁹⁷ The position is no different for solicitors. Law Society research in 2020 revealed that ‘Black, Asian and minority ethnic solicitors see slower career development up to and including partner status, impacting on retention rates, and there is a significant ethnicity pay gap.’⁹⁸

Judicial appointments and white opportunity hoarding

Part of the selection procedure for appointing judges is a controversial process whereby existing judges’ opinions are sought on the suitability of the applicant for the job. This so-called ‘statutory consultation’ has been critiqued in many quarters as nothing more than ‘secret soundings’ which allow applications to be influenced by the judiciary. In March 2022, after a review that was commissioned by the Judicial Appointments Commission [JAC], it was announced that ‘consultations’ for certain exercises would be dropped but some would remain.⁹⁹

93. Ministry of Justice. ‘Diversity of the judiciary’. Para. 1.6
94. Ministry of Justice. ‘Diversity of the judiciary’. Paras 1.7 and 10.1.
95. Ministry of Justice. ‘Diversity of the judiciary’. Para. 1.7 states: ‘Representation of these groups differed between courts and tribunals, with higher proportions of ethnic minority individuals, solicitors and women among tribunal judges’.
96. *Bar Council Report*. Pp 8 and 55.
97. According to the Northern Circuit Race Working Group, ‘The experience of practitioners on circuit from Black and Asian backgrounds in 2020/2021 is that they experience discriminatory attitudes based on race in terms of access to opportunities for work, the attitudes of their fellow professionals, and their experiences in court and at formal and informal social events. In addition, there is a lack of effective procedures that such grievances can be expressed and resolved’. *Report*. P.6.
98. Law Society. ‘Race for inclusion’. p.6. *Report*.
99. Judicial Appointments Commission (2022) *Response to the review* of the operation of statutory consultation conducted by Work Psychology Group.

The JAC-commissioned review has been severely criticised with the Judicial Support Network [JSN] calling for a 'deeper dive' by an independent organisation into how judges are selected.¹⁰⁰ The Law Society president I. Stephanie Boyce stated that the whole process of judicial appointment should be overhauled and the statutory consultation process abolished.¹⁰¹ Michael Rooze, a former deputy district judge, went further. Under the headline 'Judicial appointments system is not fit for purpose', he stated that the JAC should be abolished.¹⁰²

These criticisms of the procedure for appointing judges and requests for fundamental change are set against a backdrop of the 2019 Supreme Court ruling that found that excluding judges from whistleblowing protections breached their human rights. In addition, eight judges, in 2021, requested an inquiry into 'discrimination, bullying and the system for appointment and promotion of judges'.¹⁰³ In May 2022, the GMB trade union set up its first branch to help protect judges who had been mistreated by their employers.¹⁰⁴

Of course, the judiciary and wider justice system do not bear unique responsibility for these entrenched dynamics of exclusion and bias. They are reflective of profound and complex inequalities and unfairness in society. Structural discrimination feeds into educational progression and outcomes; professional mentoring, work experience and internship opportunities that confer social capital are extremely unequally distributed. The education system bears responsibility, determining through-put into professional careers, including becoming a lawyer in the first place.¹⁰⁵

At each stage, class- and gender-inflected racial biases abound, as this survey respondent suggests:

I also think that there is too much racial bias in work experience and pupillage selection. Candidates are chosen because they say the things in the way in which the barristers expect them to be said, and because they tick the boxes academically. The candidates who enforce and flatter the social and academic nuances of the assessors succeed, meaning white posh people succeed. Those with alternative perspectives and manners of expression don't. I think there should be greater flexibility to bring in people of racialised communities who may have had less work experience opportunities, and who express themselves differently.

As researchers stress, opportunity hoarding (by 'white posh people') tends to be driven primarily by an impetus to shore up the in-group more than directly to keep minorities out. Informal white hoarding of opportunities is the primary way that racially exclusionary workforces, including the judiciary, are reproduced, and, in its informal ethnocentrism, it is hard to interrupt, keeping out the 'alternative perspectives' that are vitally needed.¹⁰⁶ It is shocking that such informal hoarding is further facilitated by procedures like secret soundings.

For ethnic minority lawyers (who have aspirations to become judges), judicial racial bias has serious implications for

professional morale, advancement and retention, as the following observations from advocates suggest:

I have lost cases where I have perceived that the real reason for losing is racial bias towards me or my client or both.

I have been addressed by a white Judge whom I have appeared before several times over a number of years by the name of litigant in person who also happened to be a person of colour. This occurred on two separate occasions.

The most frequent incidents I have seen are judges cutting across the submissions made by a barrister of colour, being dismissive and appearing not to afford the same time and space for submissions to be heard and developed

As I am of the same ethnic background as most judges, their bias is never directed towards me. I have seen judges treat advocates from black backgrounds differently from the other advocates (I typically act in cases where there are multiple parties). I have seen black advocates shouted at and treated dismissively by judges in circumstances where I thought the advocates' ethnicity was a factor.

As the last comment indicates, white as well as ethnic-minority respondents reported witnessing such judicial sleights, further suggesting the routine nature of the problem—it is visible to many of those not targeted and even 'benefiting' from such informal but everyday practices of racial stratification. We believe judicial bias therefore affects successful career progression of advocates as they gear up for a judicial application, even before candidates confront the blockages of the appointments process itself.

If this judicial treatment of Black and Brown advocates serves as representative of what some judges are bringing to the task of recruitment into their ranks - 'being dismissive and not appearing to afford the same time and space' to ethnic minority applications - then the picture is disturbing. The recruitment of new judges isn't exclusively left to the senior judges (as there are lay members of recruitment committees); but they have a pivotal role in the process. The lack of transparency and accountability in the system of recruitment is giving a green light to those judges so inclined - whether consciously or unconsciously - to encourage the blocking of applications of able ethnic minority candidates. Actively ethnocentric judges, who are clearly still numerous in the senior courts, will look unfavourably on the very applications that are desperately needed to bring about a more racially just system.

The discrepancy between applications and recommendations, the opaque recruiting systems, the intersectional barriers and the contribution that judicial racism plays in the lack of career progression detailed above all suggest blockages in the pipeline. This is confirmed by our survey findings, and central to the case made by legal reform organisation JUSTICE over many years.

100. The JSN previously made a submission to the Equality and Human Rights Commission (EHRC) to investigate the system of making judicial appointments in England and Wales stating that 'the regime was thoroughly unfair, arguably unlawful and institutionally discriminatory'.

101. In Fouzder (2022), Boyce asserts: 'We know a diverse pool of candidates is applying - not least from among the much more diverse solicitor profession. They're just not making it through the process in the same numbers. It is time for the whole appointments system to be overhauled to deliver a more diverse judiciary.' *Law Society Gazette*.

102. Rooze: 'Judicial appointments system is not fit for purpose'. P. 4. *Law Society Gazette*.

103. D. Collins (2021) 'Discrimination is keeping UK bench white say judges'. *Times*.

104. Fouzder (2022) 'Part of the union: GMB sets up branch for judges' *Law Society Gazette*, P. 4.

105. See P. Shin, D. Carbado and M. Gulati (2014) 'The diversity feedback loop'. *University of Chicago Legal Reform* 1.6: Pp.371-74.

106. Eberhardt. *Biased*, P. 269

JUSTICE reports on judicial diversity

In 2017 (and updated in 2020) the JUSTICE report *Increasing judicial diversity*¹⁰⁷ made a number of recommendations for structural change that echo the findings above. They highlighted the presence of discrimination, and noted that bias played a role in the lack of judicial diversity:

1.19 When BAME people and solicitors (a group more diverse than barristers) do apply for judicial appointments they are much less likely to be successful than white candidates or barristers.

1.20 'The Working Party is concerned that "merit" can very easily become a vehicle for unconscious bias and a tendency to replicate the characteristics in the existing judiciary.

2.11 More diverse pools of candidates exist but are not currently being appointed. Systemic barriers need to be dismantled, because history suggests that change will not happen organically.

4.33 The first step is surely to acknowledge that biases play a part in judicial selections just as they do in all other human decision-making. Our intuitions of how a judge ought to be are surely shaped by who many senior judges are: white, male, privately-educated former barristers.

6.5 'Structural change – not tinkering – is required if the complexion of the bench is to really change.'

Specifically under the heading 'Creating new entry points to the senior judiciary' there was a repeat of a recommendation JUSTICE made in 1972 and 1992 that a respected career path should be created from the tribunals to the 'Circuit bench or High Court.'¹⁰⁸

Tribunal judges, as well as solicitors, are much more ethnically diverse and would provide the widest range of eligible candidates.¹⁰⁹

However, very few make the transition to senior courts as there is a glass ceiling and 'the perception of a strong divide between the tribunal and court judges.' As such, JUSTICE stated that

one obvious solution for the diversity crisis is to increase appointments from the Upper Tribunal to the High Court. The Upper Tribunal as a whole is significantly more ethnically diverse than Recorders or Circuit judges (10% compared with 6% and 4%, respectively).¹¹⁰

JUSTICE's longstanding recommendations may be finally gaining traction. The Lord Chief Justice has announced plans for a 'One Judiciary' unified leadership structure, in which he would take over responsibility for tribunals, partly, it is reported, to promote a working environment in which all judges have opportunities to progress, 'irrespective of personal or professional background.'¹¹¹ This would bring tribunals together with the courts,¹¹² constituting a structural change that, depending how it is put into practice, could implement some of JUSTICE's proposals. Following sustained advocacy, this structural change combined with a cultural shift in how tribunal judges' skills and experience are viewed,¹¹³ has potential to meaningfully increase judicial diversity.

The proposed restructure may be partly influenced by the current judicial recruitment crisis, meaning that more judges urgently need to be hired to reduce case backlogs. According to the Lord Chief Justice, the senior 'judiciary risks becoming overly reliant on part-time judges', with the Judicial Appointments Commission struggling to fill vacancies, while the district bench is, he stated, operating 'well below complement.'¹¹⁴ Demands for judicial diversification find new leverage in conditions of labour supply scarcity. Civil rights legal scholars have long suggested that meaningful racial reform tends to occur when there is 'interest convergence' between minority demands and the needs of the establishment.'¹¹⁵ Such moments of interest alignment must be seized.

Beyond empty diversity exercises

In our concluding remarks to this section, we consider the limitations of seeing judicial diversity and inclusion as an end in itself. Although we argue that strong intervention is needed to bring about fairer representation in the judiciary, we make this case conscious that changing the ethnic profile of the judiciary will not, on its own, bring about changes to racial bias and racism in the judiciary. Any intervention to increase diversity, admirable and necessary as it may be, should not be mistaken for the entirety of what is needed. As Leslie Thomas warns, it is worth remembering that, even if the judiciary were representative of the wider population, racisms would still endure in the system.¹¹⁶ This assertion is supported by evidence from the criminal justice system in the UK and the US. Take the *Lammy Review*, which confirms that the Crown Prosecution Service, a part of the justice system in which ethnic minority staff are slightly overrepresented compared to the overall population, still reproduces disparities in charging rates for some offences.¹¹⁷

107. JUSTICE. *Increasing judicial diversity*.

108. JUSTICE. *Increasing judicial diversity*. In 'Creating new entry points to the senior judiciary' para. 5.2 it states 'at present there is no real "upward" career path to the Circuit bench or High Court. Instead, there is a de facto route, leading to a later, second career, for senior barristers. They gain some sitting experience as fee-paid Recorders and/or Deputy High Court Judges, before becoming permanent, full-time judges. Very few of those who reach the High Court break this mould. In contrast, lawyers from underrepresented groups (particularly people from a visible minority ethnic background) tend to cluster in the lower ranks of the judiciary, and stay there' (p. 175). It continues 'So, for instance, almost half of tribunal judges are women, 10% are BAME and 65% are not barristers by professional background. Yet High Court judges are 21% female, less than 2% are BAME, and almost exclusively come from the independent Bar' (p. 176).

109. JUSTICE (2020) '*A route through the tribunals*', Para. 3.22-3.26

110. JUSTICE. '*A route through the tribunals*', Para. 5.18.

111. The One Judiciary plan is not mentioned in the Judicial Diversity and Inclusion Strategy.

112. A. Carey (2022) 'Judiciary and ministry of justice announce next steps in plan to unify courts and tribunals under "One Judiciary"', *Local Government Lawyer*.

113. JUSTICE. '*A route through the tribunals*', Para. 2.29-2.30.

114. M Fouzder (2022) 'Lord chief worried about growing reliance on part-time judges' *Law Society Gazette*.

115. D. Bell (1980) 'Brown v. Board of Education and the Interest-Convergence Dilemma', *Harvard Law Review* 93: P. 523.

116. Thomas. 'Judicial Racism and *The Lammy Review*'.

117. Lammy. *Lammy Review*. Pp. 94-95, 63. For a US criminal justice example, see *NPR* (2020) 'Does Diversifying Police Forces Reduce Brutality Against Minorities?'

The appointment and promotion of individual ethnic minority professionals must move beyond a gestural, institution-legitimizing 'diversity dance' that some scholars in the US have dubbed 'Black faces in high places.' What is needed is a critical mass¹¹⁸ of diverse professionals, reflective of society, that will help surmount the problematic tokenism and marginalization that sociologists Joseph-Salisbury and Johnson (following Nirmal Puwar) call 'bodies out of place',¹¹⁹ poignantly captured by a number of our survey respondents:

At a social evening put on by chamber's HHJs invited, to which I happened to be at, too (been co defending. Was in chambers working with co-ds barrister when party started. Invited to stay). HHJ spoke to every white person but not once to those with a different ethnic background to him.

A close friend is a DJ... in England. [Identifiable attributes mentioned] Tells me of how lonely and isolating the experience can be. Feels like an outsider - especially at training events. Race and cultural issues at play. He's a robust personality so I was struck with how much even he was feeling it, on occasion - much though he loves the role.

I was a student marshalling the Judge at this time.... In about 2012, I saw a Judge in the Judge's chambers speak in an openly racist manner, resorting to stereotypes about applicants and their families. For example, reference to Jamaican women having multiple children with different men, reference to Nigerian applicants having suitcases filled with fake documents and reference to asylum seekers being largely non-genuine due to having the wealth or means to reach the UK. This latter comment was made openly at a lunch table attended by about a dozen or so other Judges and was not objected to by anyone.

JUSTICE and others have led the way with their 'critical mass' proposal and how to bring about the deep institutional change needed to end the uncontested white cronyism, privilege and bigotry by judges described above, including drawing more substantively from the ranks of solicitors and tribunal judges.

The adoption of their proposals and our recommendations will help to ensure that the Strategy moves beyond empty diversity exercises to the implementation of structural reforms that will help to eradicate racial bias in the justice system.

Ultimately of course the antiracist judge can be of any colour and needs to be of all colours. The following example, in which the judge's race is not mentioned, exemplifies the antiracist praxis needed, directed at both the defendant and the counsel making a submission on the defendant's behalf:

I was mitigating on behalf a black male who was being sentenced for his second offence of Class B drug supply... This judge listened and engaged with my submissions, then passed a sentence which allowed the defendant to remain out of custody and addressed head on issues of structural racism that had contributed to his offending behaviour, allowing this young defendant to feel seen and heard. The judge further acknowledged how difficult it was for me as a Black barrister to make such a submission, thereby exposing myself to attacks within the system.

Therefore, we do not mount an 'essentialist' case: diversity exercises which increase the representation of ethnic minority judges are not, on their own, a sufficient answer. Interventions need to be attuned to intersectional inequalities and complemented by actions like grants for university, paid internships and long-term mentoring. Through structural reform, the justice system could draw in, retain and promote voices that can productively disrupt in-group bias and white ethnocentrism, creating spaces for more active and vital interpretations and decision-making that is not only more antiracist but also more feminist, 'non-establishment', internationalist and fair. It can breed more understanding, empathy and action on behalf of those treated as out-groups that will, in turn, protect and revitalize the rule of law and civil rights for all citizens.

118. JJUSTICE. *Increasing Judicial Diversity*. For example, para. 3.16.

119. R. Joseph-Salisbury and A. Johnson (2018) 'Are you supposed to be in here?' Racial microaggressions and knowledge production in higher education'. Eds J. Arday and H. Mirza, *Dismantling race in higher education*. Palgrave Macmillan. Pp. 143-60; N. Puwar (2004) *Space invaders*. Berg Publishers.



The most frequent incidents I have seen are judges cutting across the submissions made by a barrister of colour, being dismissive and appearing not to afford the same time and space for submissions to be heard and developed.

Conclusion

The Judicial Diversity and Inclusion Strategy, the *Bench Book* and the colour-blind courtroom utterances of some members of the judiciary present a picture of judges as neutral arbiters in need only of light-touch, even voluntary adjustments.

However, the widespread views and lived experiences of legal professionals surveyed, supported by numerous reports, reveal a system overseen by judges in which racial bias plays a significant role. That is to say, they reveal institutional racism.

The assumption in the Strategy that the judiciary is by and large free of racism is not only wrong descriptively; it also actually weakens the very objectives it seeks to achieve. Not addressing racism, instead espousing a commitment to colour-blind equality and diversity, works to silence race, undermining efforts to promote the rule of law. No wonder the public's trust in the system that is supposed to protect us is in decline. Denying the way racism taints and undermines judicial decisions leading to unfair trials, sentences and hearings is also a denial of the disastrous consequences for many ethnic minority people. By contrast, an open acknowledgement of institutional racism and racial bias – including positive racial biases that equate whiteness with professionalism and trustworthiness – will start the conversation of challenging those assumptions and help transform the modus operandi of the judiciary.

Two years ago JUSTICE asked 'for the judicial leadership to prioritise and commit to a cultural change.' We repeat that call. Such top level judicial engagement is vital to foster a receptive environment for the required constitutional reforms to be successfully implemented and for public faith in the justice system to be restored.

Meaningful solutions have been proposed by us and many others. What has remained lacking is the political will to publicly acknowledge that Institutional Racism in the justice system exists and to make the changes that not only address this toxic problem but have knock-on benefits in building a fairer, more resilient and more democratically-accountable judiciary.

Appendix

Summary statistics of survey respondents			
Variable	Value	Number of responses	% of total
Race	Asian or Asian British	48	12.9
	Black, Black British, Caribbean or African	48	12.9
	Mixed or multiple ethnic groups	32	8.5
	White	214	57.4
	Other ethnic group	23	6.2
	Prefer not to say	8	2.1
	Total	373	100
Ethnic group	Indian	22	5.9
	Pakistani	12	3.3
	Bangladeshi	5	1.3
	Chinese	1	0.3
	Any other Asian background	8	2.1
	Caribbean	22	5.9
	African	21	5.6
	Any other Black, Black British, or Caribbean background	4	1.1
	White and Black Caribbean	6	1.6
	White and Black African	6	1.6
	White and Asian	11	2.9
	Any other Mixed or multiple ethnic background	9	2.4
	English, Welsh, Scottish, Northern Irish, or British	166	44.5
	Irish	17	4.6
	Gypsy or Irish Traveller	2	0.5
	Any other White background	27	7.2
	Arab	4	1.1
	Other	18	4.8
	NA	12	3.3
	Total	373	100
Gender	Male	172	46.1
	Female	192	51.4
	Non-binary	1	0.3
	Other	1	0.3
	Prefer not to say	7	1.9
	Total	373	100

Appendix

Summary statistics of survey respondents (cont)			
Variable	Value	Number of responses	% of total
Did one or more of your parents/guardians graduate from university?	Yes	168	45.1
	No	197	52.8
	Prefer not to say	8	2.1
	Total	373	100
Jurisdiction	Civil	100	22.5
	Crime	213	48
	Tribunal	31	7
	Military	3	0.6
	Family	63	14.2
	Other	34	7.7
	Total	444	100
Legal role	(Ex-) magistrate	3	0.8
	Counsel	251	67.3
	Legal executive	4	1.1
	Solicitor	66	17.7
	Tribunal member	1	0.3
	Other	48	12.8
	Total	373	100
Time spent in role	Up to 4 years	55	14.7
	5-9 years	57	15.3
	10 - 19 years	93	24.9
	20-29 years	98	26.3
	30+ years	70	18.8
	Total	373	100
Part-time judge	Yes	45	12.1
	No	328	87.9
	Total	373	100

Within the demographic questions in the survey the response rate totals add to 373, other than jurisdiction. This is because legal professionals can work within multiple jurisdictions, so respondents were able to provide multiple answers and the total adds to 444.

RACIAL BIAS AND THE BENCH

**A response to the Judicial Diversity
and Inclusion Strategy (2020-2025)**

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