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ARTICLE

Section 27 Past, Present and Future Potential: A Critical Evaluation of s 27 Cultural Reports and Discounts in Sentencing

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The use of "cultural reports" at sentencing under s 27 of the Sentencing Act 2002 has exploded over the last decade, prompting criticism from the current Government. Section 27 reports are now a standard tool in a defence counsel's toolbox for securing at least nominal discounts. These discounts reflect the influence of systemic socio-economic and cultural traumas that influence criminal offending, as outlined in these reports. This article challenges the assumed benefit of s 27 at sentencing in three respects. First, there is a general lack of cohesion in how judges account for systemic trauma outlined in cultural reports at sentencing. Secondly, accounting for an offender's background trauma as impairing their moral culpability contradicts several underlying purposes of criminal justice. Thirdly, s 27 cultural reports fail to achieve the provision's legislative purpose of reducing over-incarceration of Māori. This article argues that sentencing judges require a cohesive and balanced approach when accounting for an offender's background trauma to obtain a "just" outcome. In addition, criminal punishment is limited in providing rehabilitation and addressing systemic racism against Māori. Therefore, the potential value of s 27 depends on recognising these limitations and applying corresponding structural change in the criminal justice system.

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I Introduction

In 2022, the Supreme Court heard its first appeal over the appropriate approach to the influences of systemic deprivation in criminal offending articulated in s 27 reports.[1] This appeal corresponds with the dramatic increase of "cultural reports" at sentencing since Whata J's landmark judgment in *Solicitor-General v Heta.*[2] Accordingly, a potent line of case law has developed that stresses the importance of accounting for the offender's background cultural trauma at sentencing.[3] Aotearoa New Zealand's legal community further praises these reports as innovative means of allowing judges to better comprehend the causes of offending and to facilitate more rehabilitative sentencing outcomes. This progress springs from national and international condemnation of New Zealand's previous failures to utilise culturally sensitive provisions in the Sentencing Act 2002 (the Act).[4] Such culturally responsive mechanisms are particularly crucial in the context of the Māori experience within the criminal justice system.[5] In contrast to the optimism surrounding s 27 cultural reports, the current coalition Government has recently announced that it will scrap legal aid funding for these reports, citing the existence of a "cottage industry" of report writers that do "nothing for the victims of crime".[6]

While it does not focus on the Government's policy, this article critiques the acclaim which has often surrounded s 27 reports and argues that the reports and subsequent discounting at sentencing are a flawed practice in three key respects. First, although legally cognisant with the Act, there is a lack of judicial cohesion over how systemic trauma outlined in cultural reports is accounted for in sentencing. The Supreme Court in *Berkland v R* has recently attempted to consolidate the various standards of causation adopted by lower courts.[7] However, despite the Court's comprehensive judgment, there remains insufficient clarity over what is a sufficient causal link between an offender's background and their offending to warrant mitigation in their sentence. Without cohesion, mitigating final sentences to account for an offender's traumatic background is an amorphous practice, prone to unpredictability.

Secondly, the theoretical justification accounting for an offender's background trauma to mitigate their culpability is largely inconsistent with the underlying theoretical framework of the Act. The only exception is the value of rehabilitation and restoration, which stands in contrast with the Act's punitive outlook.

Thirdly, s 27 reports and discounts fail to achieve the provision's legislative purpose: to mitigate Māori over-incarceration. Cultural reports and sentencing discounts do not provide the structural change necessary to address systemic racism against Māori.

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1 *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509 [*Berkland* (SC)].

2 *Solicitor-General v Heta* [2018] NZHC 2453, [2019] 2 NZLR 241.

3 See *T (CA502/2018) v R* [2022] NZCA 83; *Kolofale v* R [2022] NZCA 74; *Waikato-Tuhega v R* [2021] NZCA 503; *Williams v R* [2021] NZCA 535; *Webber v R* [2021] NZCA 133; *Clarke v R* [2021] NZCA 96; *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583; *Carr v R* [2020] NZCA 357; *Berryman v R* [2020] NZHC 544; *Carrol v R* [2019] NZCA 172; *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648; *Heta*, above n 2; *Arona v R* [2018] NZCA 427; *Fane v R* [2015] NZCA 561; and *R v Rakuraku* [2014] NZHC 3270.

4 See *Concluding observations on the combined twenty-first and twenty-second period reports of New Zealand* UN Doc CERD/C/NZL/CO/18-20 (22 September 2017).

5 Stephen O'Driscoll "A powerful mitigating tool" [2012] NZLJ 358 at 359.

6 Radio New Zealand "Prison reforms: Government ditches reduction targets and cultural reports" (8 February 2024) <www.rnz.co.nz>.

7 *Berkland* (SC), above n 1, at [107]–[112].

Despite this core failure, s 27 cultural reports and discounts still offer substantial individual benefits. Practices and principles of Indigenous sentencing from Australia and Canada can help enhance s 27's potential. This potential depends on the corollary structural change coupled with the recognition of the limitations of criminal punishment.

Part II of this article will evaluate the practice of s 27 discounts in light of Parliament's original intention. Part III will critique the lack of judicial consistency and cohesion when judges apply s 27 discounts as a personal mitigating factor in sentencing. Part IV will undertake a normative evaluation of the practice of s 27 discounts in light of the theoretical values and objectives underpinning the Act. Part V will then challenge the assumed benefit to Māori offenders in light of the unique experience of Māori within the criminal justice system. Part VI will compare and evaluate similar practices in foreign jurisdictions. Finally, Part VII will reflect on these critiques and posit effective solutions to enhance s 27's potential to provide meaningful transformation in the criminal justice system.

II Section 27 in Context: Legislative Intention and Current Practice

A *Why critiquing s 27 matters*

Section 27 could herald the most significant reform to New Zealand's sentencing regime out of all the legal mechanisms of the Act. The information provided in s 27 reports leads to more culturally rehabilitative sentencing outcomes.[8] Additionally, s 27 discounts often lead to substantially reduced or even non-custodial sentences to otherwise disproportionate outcomes. Such a contrast reflects a fundamental question of criminal justice: should we punish or help offenders?[9] Every case is unique. The need for punishment and deterrence as opposed to rehabilitation and restoration varies from one case to another.[10] However, the increased use of s 27 reports, and the willingness of judges to account for cultural trauma in sentencing, heralds a potential shift in the New Zealand justice system.

Ministry of Justice figures demonstrate a sharp rise in popularity of s 27 reports. Figures released by the Ministry of Justice show that a total of 2,328 reports, either linked to Legal Aid or the Public Defence Service, were invoiced for a total of $5.91 million from 1 July 2021 to 30 June 2022.

Looking only at cases referred to Legal Aid, there was a dramatic increase from just 346 reports in 2019 compared to 1,557 reports in 2020, representing a cost increase from $639,311 to $3.3 million.[11] This rise in cultural reports corresponds to an increased motivation among policymakers to facilitate more rehabilitative and restorative responses to crime.[12] Furthermore, recognition of tikanga Māori and the traumas of colonisation is a developing feature throughout our legal system.[13] Writing extrajudicially, Joe Williams

8 O'Driscoll, above n 5, at 359.

9 Jeremy Finn and Debra Wilson *Sentencing Law in New Zealand* (Thomson Reuters, Wellington, 2021) at [2.2].

10 At [2.3].

11 Rod Vaughan "Costs balloon for offenders' cultural reports" (16 April 2021) Auckland District Law Society <https://adls.org.nz> accessed via <https://web.archive.org>.

12 Kim Workman and Tracey McIntosh "Crime, Imprisonment, and Poverty" in Max Rashbrooke (ed) *Inequality: a New Zealand Crisis* (Bridget Williams Books, Wellington, 2013) 120 at 122.

13 Matthew Palmer (ed) *Professional Responsibility in New Zealand* (online looseleaf ed, LexisNexis) at [2.1].

notes that s 27 reports, alongside the inclusion of te ao Māori in courtroom processes: "have the potential to change sentencing practices in respect of Māori. The statistics suggest trying something different on a wider scale cannot possibly do any harm."[14] Such sentiments highlight developing judicial awareness of the intersection between socio-economic precarity, criminality, and individual criminal responsibility.

Yet there is surprisingly little academic critique questioning whether s 27 meaningfully accounts for an offender's background trauma in sentencing. Most critique is limited to discussing cultural reports in individual cases. However, two articles stand apart. Tara Oakley provides a compelling thesis on the effectiveness of s 27 at addressing the high rate of Māori incarceration.[15] Oakley's critique focuses on the uptake of s 27 in criminal defence and the lack of sufficient resourcing to support the use of cultural reports in the courtroom.[16] Additionally, Oliver Fredrickson critiques the reluctance of judges to readily infer causation between an offender's trauma and their offending.[17] Both Oakley and Fredrickson provide valuable input into the realities of s 27 cultural reports in the sentencing process. However, these critiques fall short of evaluating the overall value of s 27 discounts in sentencing and their assumed benefit for Māori. This article, therefore, critiques s 27's role in sentencing and its supposed benefit in reducing Māori over-incarceration.

B *Section 27 and cultural reports*

Before evaluating s 27 discounts and cultural reports, we first must understand the provision's original legislative purpose and function. Section 27 provides that an offender may request any person to speak on certain matters at sentencing. Subsection (1) of the Act identifies these matters as:

> (a) the personal, family, whānau, community, and cultural background of the offender;
> (b) how that background may have related to the commission of the offence;
> (c) any restorative justice processes that have been tried or that are available;
> (d) how the family, whānau, or community may help prevent further offending by the offender; and
> (e) how the offender's background, family, whānau, or community support may be relevant regarding possible sentences.

Section 27 generally allows for family and community participation in the sentencing process by enabling interested parties to speak on these matters. This can occur both retrospectively, as to why the offence occurred, and prospectively, as to the offender's prospects of rehabilitation, efforts to make amends, and the capacity of the offender's whānau and community to support those ends.[18] The court must hear any person called unless doing so is unnecessary or inappropriate.[19] Equally, the court may suggest to the

14 Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev at 29.
15 Tara Oakley "A Critical Analysis of Section 27 of the Sentencing Act (2002)" (MSocSc Thesis, University of Waikato, 2020).
16 At 2.
17 Oliver Fredrickson "Pūnaha whakawā – criminal justice: Systemic deprivation discounts and section 27 reports: progress but not perfect" [2020] Māori Law Review 4.
18 Geoff Hall (ed) *Hall's Sentencing (NZ)* (online looseleaf ed, LexisNexis) at [SA27.2A].
19 Sentencing Act 2002, s 27(3).

offender that it may be of assistance to hear a person in respect to these matters.[20] These persons called are not sworn, required to enter the witness box or be cross-examined. The core intention is informal participation in the courtroom process without challenge from prosecutors. Section 27 therefore breaks with legal tradition by allowing lay persons to engage informally and directly with the judge, as the person called under s 27 only serves an advisory role at the sentencing hearing.[21]

While the text and purpose of s 27 envision whānau and community members informally providing *oral* evidence in court, the current practice of s 27 has diverged from this intention. Today, the dominant use of s 27 is through the provision of formalised cultural reports. Anyone can write these reports, but an independent professional often drafts them. The report writer usually interviews the offender, their whānau and other relevant parties to obtain material relevant to the offender's culpability and prospects of rehabilitation. This information is usually submitted to the court in a standardised report before the sentencing hearing. The reports are usually a few pages long and vary in quantity and quality.

"Cultural report" is a misnomer. The content of a s 27 report can relate to any feature of a person's life so long as it fits within the ambit of s 27(1). Therefore, a cultural report can identify a myriad of features in an offender's life so long as they are relevant to their offending. What is usually identified in a report are personal traumas such as substance abuse, mental illness, lack of education and employment or structural traumas such as intergenerational poverty and cultural disconnection.[22] Reports can also highlight wider socio-economic or historic traumas that intersect with the offender's circumstances. The latter is particularly powerful in the context of Māori offending and the traumas of colonisation. Despite the wording of s 27, a cultural report need not express the perspectives of an offender's whānau or community. This is because there is no prescribed form a cultural report must take. However, an effective report will demonstrate a clear causal nexus between the offender's background and their offending.[23]

C *Section 27 and the Sentencing Act 2002*

(1) Section 27 reports and "individualised justice"

Accounting for an offender's background trauma occurs in the second half of the two-stage sentencing process. The first stage identifies the relevant starting point by assessing the seriousness of the offence in guidance from any relevant tariff cases. The second stage either increases or decreases that starting point by an overall calculation of any aggravating or mitigating factors alongside any guilty plea.[24] Therefore, the final sentence is determined according to the complementing or competing principles and purposes of the Act in light of the particular case facts.[25]

Prior to the 2018 judgment of *Heta*, comparatively few sentencing decisions employed s 27 cultural reports. The mitigating value of an offender's trauma highlighted in a cultural

20 Section 27(5).
21 *Wells v Police* [1987] 2 NZLR 560 (HC) at 570.
22 Oliver Fredrickson "Some clarity on cultural discounts" [2020] NZLJ 409 at 409.
23 Natasha Murden "Discount Resulting from Information Contained in a Cultural Report Provided Pursuant to s 27 of the Sentencing Act: *Solicitor General v Heta* [2018] NZHC 2453" [2018] NZLJ 350 at 353.
24 *Moses*, above n 3, at [6].
25 At [4].

report was unclear.[26] However, Whata J's decision in *Heta* affirmed the utility of s 27 reports in assessing culpability:[27]

> [Section 27] mandates and enables Māori (and other) offenders to bring to the Court's attention information about, among other things, the presence of systemic deprivation and how this may relate (if at all) to the offending, moral culpability and rehabilitation. Thus, the cogency of any s 27 information, and the likely presence of systemic deprivation and strength of the linkages between (among other things) that deprivation, the offender and the offending, together with the availability of rehabilitative measures to specifically address the effects of systemic deprivation, will be critical to the assessment.

Whata J's approach responds to the reality of crime. Judicial recognition of social, cultural, and economic deprivation encapsulates the underlying factors that drive most offending. The unfortunate reality is that these forms of deprivation are so deeply intertwined that an offender will likely suffer all three. These traumas manifest in experiences of familial instability, childhood abuse, exposure to drugs, alcohol, and gangs, intergenerational deprivation and cultural and social disconnection.[28] All of these are risk factors that severely increase youth offending, and subsequently adulthood criminality.[29] The Court of Appeal in *Zhang v R* explains this nexus by highlighting how s 27 reports correspond to the ideal of "individualised" justice, whereas sentencing outcomes respond to the particular culpability of the offender in light of their circumstances and the consequences of the offence.[30]

(2) Section 27 discounts and personal mitigating factors

Section 9(2) of the Act requires the court to account for personal mitigating factors when determining a sentence. Background trauma is not expressly provided for in the Act as a ground of mitigation. However, s 9 is inclusive of any other mitigating factor the court thinks relevant.[31] Case law stipulates that an offender's background trauma causally linked to their offending may be mitigating of their overall culpability. Sentencing judges must therefore tailor their sentence according to the principles and purposes of the Act whenever this link is established.[32] Namely, s 8(1)(i) requires judges to consider an offender's "personal, family, whānau, community and cultural background" when imposing a sentence.[33] The rationale is that influences beyond the offender's control (such as structural or personal traumas) heighten the risk of offending compared to someone free from those influences. These forces impair the offender's rational choice by creating circumstances that motivate criminality. Culpability is therefore reduced because if those traumas did not exist, the offender would probably not have offended. This mitigates the offender's overall culpability and can result in a reduced final sentence.[34] However, courts

26 Murden, above n 23, at 350.
27 *Heta*, above n 2, at [38]–[39].
28 Alison Cleland and Khylee Quince *Youth Justice in Aotearoa New Zealand: Law, Policy and Critique* (LexisNexis, Wellington, 2014) at [2.4.2].
29 At [2.8.4].
30 *Zhang*, above n 3, at [25].
31 Sentencing Act, s 9(4).
32 *Carr*, above n 3, at [65]; *Zhang*, above n 3, at [132]–[138]; and *Heta*, above n 2, at [39].
33 *Heta*, above n 2, at [39].
34 *Waikato-Tuhega*, above n 3, at [51]; *Berkland v R* [2020] NZCA 150 [*Berkland* (CA)] at [76]; *Zhang*, above n 3, at [133]–[135]; and *Heta*, above n 2, at [40]–[43].

have also affirmed that background deprivation merely explains the offending and is not itself an excuse. The court has discretion to refuse or to grant only nominal discounts if other principles and purposes of the Act, such as deterrence and community protection, weigh against sentence mitigation.[35] The impact of s 27 reports upon the final sentence is subject to an overall evaluation of the offending in light of various other values and objectives.[36]

Section 27 cultural reports are therefore significant in current sentencing practice. The right report can identify traumas in the offender's life, which can tip the judge's discretion in favour of a rehabilitative, rather than punitive, outcome. For the offender, this could mean the difference between a lengthy term of imprisonment or a shorter term or a community-based sentence. However, such discounts are a matter of discretion in light of other sentencing aims including deterrence, community interests and maintaining public confidence in the judiciary.[37] Section 27 discounts have therefore varied from nominal five per cent reductions to starting points to wholesale 30 per cent discounts.[38] This means that a sentence's rehabilitative potential also varies depending on the case and judge.

III Lack of Cohesion

This section critiques the lack of legal cohesion when applying s 27 cultural reports as a "personal mitigating factor". It will first outline how accounting for an offender's background trauma fits into the framework of the Act. It will then critique the courts' lack of cohesion over the requisite "causal nexus" between the offender's background and the offending to warrant a discount. This arbitrary application of s 27 prompts serious questions over judicial consistency in sentencing outcomes where defendants submit cultural reports.

A *Alignment with the Act: does background trauma amount to "personal mitigation"?*

(1) Systemic deprivation as a personal indicating factor

In *Berkland*, the Supreme Court unanimously affirmed that background factors such as addiction, deprivation and historic dispossession can mitigating a sentence "if they help to explain in some rational way why the offender has come to offend".[39] The judgment reinforces the notion that an offender's past social, cultural or economic deprivation may mitigate the sentence as a "personal mitigating factor".[40] This deviates from the tradition of Western criminal law which presupposes a convicted offender is a rational actor who freely chooses to offend and must be punished accordingly.[41] The traditional conception of criminal liability operates regardless of structural influences upon the person, as "a laudable motive which prompts the defendant to commit an offence is no defence".[42]

35 *Zhang*, above n 3, at [133].
36 *R v Patangata* [2019] NZHC 744 at [45]; *Keil v R* [2017] NZCA 563 at [58]; and *Mika v R* [2013] NZCA 648 at [12].
37 Sentencing Act, ss 7–8.
38 Hall, above n 18, at [SA27.2A].
39 *Berkland* (SC), above n 1, at [16]. See also at [89]–[94].
40 Sentencing Act, s 9(2).
41 See AP Simester, WJ Brookbanks and Neil Boister *Principles of Criminal Law* (5th ed, Thomson Reuters, Wellington, 2019) at [4.1].
42 At 123.

Therefore, we must naturally ask the question: is there scope within New Zealand sentencing law to account for systemic deprivation?

Arguably, such an approach runs afoul of the Act as an exhaustive legal code. There is no express Parliamentary intention to consider systemic trauma as a personal mitigating factor under ss 9 or 27. Additionally, unlike other personal mitigating factors, the influence of background trauma is not the free choice of the offender to make amends or to ease the judicial process for all involved.[43] Nor is it to account for defects in the criminal process causing undue hardship on the offender. Instead, the rationale for discounting rests on the premise that external structural factors increase the offender's risk of offending. These structural factors thus impair the offender's rational agency and moral culpability as they would likely not have offended but for those factors.[44] As such, accounting for background material *might* contradict the fundamental principle of criminal law: that convicted criminals are rational actors whom the state holds responsible for their free choice to offend through criminal sanction.[45]

(2) An offender's overall culpability

Such argument, however, forgets that the sentencing process punishes the offender according to their *overall culpability* and not simply in response to their crime.[46] Mitigating circumstances are therefore not limited to an offender's own actions. Rather, the Act envisions (and the court undertakes) a holistic exercise to determine the offender's overall culpability in light of the circumstances. This necessarily involves weighing the Act's competing aggravating and mitigating factors, and punitive or rehabilitative focused principles and purposes, in each specific case.[47] For example, in *R v Taulapapa*, the 19-year-old defendant's s 27 report demonstrated that she was coaxed into burglary and kidnapping of a new-born through familial pressure, cultural isolation and a misunderstanding of tikanga Māori.[48] In such circumstances, the Court of Appeal emphasised the Act's principles and purposes of promoting rehabilitation, imposing the least restrictive outcome, and accounting for the offender's cultural background when passing sentence.[49] On this basis, coupled with youth, genuine remorse and early surrender, the Court of Appeal upheld Ms Taulapapa's discharge without conviction.[50] Likewise, in *Kolofale v R*, the Court of Appeal upheld a 20 per cent discount to account for the defendant's ADHD, history of childhood abuse and social isolation in an otherwise serious intentional-wounding case.[51] Although Mr Kolofale still received a lengthy custodial sentence, the Court considered that the reduction struck an appropriate balance between accounting for the seriousness of Mr Kolofale's offending and his impaired culpability.[52]

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43 For instance, an offender's timely guilty plea (s 9(2)(b) of the Sentencing Act), limited involvement in the offence (s 9(2)(d)), genuine remorse (s 9(2)(f)), taken steps to reduce cost and time of proceedings (s 9(2)(f)), previous good character (s 9(2)(g)), are all mitigating factors that are the offender's free actions which reduce their culpability.

44 Sentencing Act, s 9(2)(f).

45 See Andrew Von Hirsch *Censure and Sanctions* (Oxford University Press, New York, 1993) at 11.

46 Andrew Ashworth "Is the criminal law a lost cause?" (2000) 116 LQR 225 at 232.

47 *Moses*, above n 3, at [49].

48 *R v Taulapapa* [2018] NZCA 414.

49 At [10]–[16]; and Sentencing Act, ss 7(h), 8(g) and 8(i).

50 *Taulapapa*, above n 48, at [30].

51 *Kolofale*, above n 3, at [17]–[24].

52 At [24].

In contrast, in *Arona v R*, the Court of Appeal refused to reduce an offender's sentence for rape on account of his involvement in the "hip-hop subculture" outlined in his s 27 report.[53] The Court refused to consider his anti-social background as mitigating his culpability upon considering the seriousness of the offence.[54] Similarly, in *Keli v R*, the Court of Appeal endorsed limiting the mitigatory value of a s 27 report given the seriousness of the offending.[55] *Keli* involved a brutal home invasion in which multiple victims suffered life-threatening injuries.[56] The Court, therefore, considered that the particular severity of the offence "necessarily subordinated the purposes of personal rehabilitation" in favour of denunciation, deterrence and community protection.[57]

Sentence mitigation, on the grounds of background trauma linked to offending, is central to assessing the offender's overall culpability. In this way, accounting for an offender's background trauma is consistent with the Act even if not expressly provided as a personal mitigating factor. Section 27 discounts therefore do not "excuse" crime. Even if a s 27 report demonstrates a connection between the most profound background trauma and the offence, mitigation is not guaranteed. Mitigation is only found where systemic deprivation impacts on the offender's rational choice to commit crime and not as a mere background feature of the offender's life. The offender's moral culpability is impaired as it cannot be said that the offender freely and rationally chose to commit their crime.[58] Diminished rational choice in structurally precarious circumstances further reduces the value of punishment and deterrence.[59] However, the weight afforded to such mitigation is still a matter of judicial discretion.[60]

Punitive objectives of sentencing, such as deterrence, denunciation and community protection can subordinate the desire for rehabilitation. Conversely, the desire to address the offender's underlying trauma that motivates anti-social behaviour can outweigh punishment. The nature and degree of this balancing act is a matter of "individualised sentencing".[61] Assessment of individual culpability is therefore dependent on a bespoke evaluation of the offending in light of all relevant circumstances. Therefore, the impact of s 27 reports in the courtroom is confined within the prevailing evaluation of personal culpability outlined in the Act.

B *The "causal nexus" question*

Despite its consistency with the Act, there is insufficient clarity over where and how systemic trauma should warrant a discount at sentencing. What amounts to a person's background which mitigates their offending, versus a background that is merely their personal history, is a question of causation. A worthwhile s 27 report will articulate a clear link between their background deprivation and their *specific* offending.[62] Such a question is vital in the second stage of the sentencing process as demonstrating some form of "causal nexus" vindicates the notion that systemic deprivation is used to explain the

53 *Arona*, above n 3, at [58]–[60].
54 At [50].
55 *Keil*, above n 36.
56 At [4]–[8].
57 At [58].
58 *Zhang*, above n 3, at [138].
59 At [137].
60 At [90]–[94].
61 *Moses*, above n 3, at [4]; and *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [72].
62 *Berkland* (SC), above n 1, at [97].

offending and not to "excuse it".[63] However, the courts have yet to provide a common standard of how to articulate this link.

The Supreme Court in *Berkland* sought to consolidate the varying standards of causation adopted by the lower courts between an offender's background and their offending.[64] The Court of Appeal had previously adopted conflicting standards ranging from a broad "causative contribution",[65] to a stricter "proximate cause", and even the more stringent "operative cause"[66] standard. The Supreme Court sought to create a "uniform standard" across these approaches as the various standards "may lead to inconsistency in the application of the purposes and principles of sentencing".[67] The Court therefore settled on a near two-tier causation standard. The first tier is that where a cultural report can demonstrate a "causative contribution" to explain why the offender's background led to their specific offending, mitigation is justified. The second tier is that where that background deprivation was a "operative or proximate cause" of the offence, then the mitigation is likely "potent".[68] The Court reasoned that higher standards of causation arbitrarily impose "restrictive rules or heuristics" that tend to exclude factors potentially relevant to the offender's culpability.[69]

Despite the Court's attempt at creating uniformity for cultural report discounts, the lack of definition of what amounts to "causation" between deprivation and offending leads to a lack of consistency or cohesion within the sentencing regime. Recognition of a simple "contribution" to the offending cannot be enough. An offender's "rational choice" to offend is not impaired simply because there are extraneous features or events that might have influenced an offender's free choices. The key element is when those features in some way *cause* the specific offending. Reducing the standard to a mere "explanation" removes the assessment of the offender's impaired agency, which is key to finding mitigation. Without the question of impaired agency, there can be little consistency or cohesion in discounts for cultural reports.

(1) Lack of consistency

The lack of cohesion and consistency in outcomes is readily apparent upon an analysis of cases involving serious offending. In *Heta*, the defendant was convicted of causing grievous bodily harm after stabbing her ex-partner multiple times.[70] Ms Heta's s 27 report identified her familial history of alcohol abuse, parental neglect and violence. Ms Heta also suffered personally from cultural isolation and disconnection from her hapū and iwi.[71] Although Ms Heta's s 27 report failed to articulate an express link between her background deprivation and her offending, Whata J nevertheless considered that a link could "be reasonably inferred".[72] His Honour deduced that Ms Heta's familial history of alcoholism and her current addiction isolated her from positive whānau and pro-social influences. All of these factors substantially increased her chances of offending and, thus,

63 *Mika*, above n 36, at [10].
64 *Berkland* (SC), above n 1, at [146].
65 *Carr*, above n 3, at [65] and [71].
66 *Berkland* (CA), above n 34, at [77].
67 *Berkland* (SC), above n 1, at [100].
68 At [108].
69 At [108].
70 *Heta*, above n 2, at [7].
71 At [16]–[17].
72 At [65].

impaired her moral culpability. Whata J therefore considered a 30 per cent discount appropriate to recognise this mitigation.[73] Yet, His Honour did not articulate *how* Ms Heta's background influenced her particular offending. Instead, Whata J inferred that the systemic trauma pre-disposed Ms Heta's to offend without identifying any specific link with her decision to stab her partner.

The Court of Appeal in *Carr v R* affirmed this inferential approach.[74] The Court overturned the High Court's refusal to grant a s 27 discount due to an insufficient linkage between the offender's background and the offending.[75] Mr Carr's s 27 report identified extensive systemic trauma involving abuse, addiction, homelessness at age 12 and early introduction into gangs.[76] Despite acknowledging that such trauma motivates criminality, Downs J was unsatisfied that the report established sufficient linkage between Mr Carr's trauma and his particular offending. His Honour reasoned that liberal s 27 discounting only undermined "criminal law's precepts of human agency and choice".[77] The Court of Appeal, however, rejected a stringent standard of causation. Instead, it was enough that Mr Carr's report contained a "credible account" of systemic trauma that *might* impair rationale choice.[78] The Court of Appeal relied on *Zhang* which emphasised the need to account for systemic trauma holistically to accurately determine culpability.[79] However, the Court, in this landmark case, failed to articulate what amounts to sufficient causation under the "credible account" standard.

The failure to define a "credible account" or articulate how a s 27 report can identify such a link hampers predictable and consistent outcomes when defendants claim a s 27 discount. General reliance upon the links between social, economic and cultural deprivation and criminality does not automatically mitigate an offender's moral culpability. It is only when a cultural report highlights a causative connection that "may be regarded in a proper case to have impaired choice and diminished moral culpability" that such factors must be accounted for.[80] Still, a "credible account" is an extremely low bar in which causation can be readily inferred.[81] The result is the judicial appreciation of systemic deprivation as a cause of criminality without consideration of its influence on the specific offending. Since a "credible account" is a subjective standard of assessing a s 27 report, there are no objective criteria to determine whether a "causal nexus" is established. Therefore, judicial evaluation of s 27 reports is amorphous and largely dependent on an individual judge's assessment of the material. This is readily demonstrated in the divergent treatment of s 27 reports in similar levels of offending in *Carr* and *Heta.*

In *R v Patangata*, the defendant was convicted of manslaughter after stabbing her partner.[82] Ms Patangata's s 27 report identified that her childhood was marred by alcohol, drugs, violence and gang affiliation, manifesting in severe cultural and social deprivation. Downs J considered that the report "perhaps provide[d] a very broad explanation" but failed to articulate sufficient linkage to the particular case.[83] His Honour therefore only

73 At [64].
74 *Carr*, above n 3.
75 *R v Carr* [2019] NZHC 2335 at [62].
76 At [56]–[57].
77 At [60].
78 *Carr*, above n 3, at [65].
79 See *Zhang*, above n 3, at [159].
80 At [159].
81 Fredrickson, above n 17, at 6.
82 *Patangata*, above n 36.
83 At [46].

granted a 10 per cent discount to reflect the defendant's youth.[84] By contrast, in *R v Ruddelle* (another manslaughter case), Palmer J undertook a critical evaluation of the offender's comparable traumatic cultural background.[85] His Honour concluded that the persistence of systemic trauma in the offender's life created "circumstances of social entrapment", which inherently impaired culpability.[86] Palmer J did not consider whether a causal link between the offender's background and the *particular* offending existed before awarding discount just below 20 per cent.[87]

More recently, the Court of Appeal in *Berkland v R* upheld the High Court's refusal to grant a s 27 discount despite the defendant's report demonstrating severe trauma.[88] The Court refused to accept that Mr Berkland's history of drug addiction and abuse was an "operative cause" of his methamphetamine dealing. The Court considered that commerciality and profitability of the dealing went well beyond subsistence and thus was disconnected from systemic deprivation.[89] This was despite the Court accepting that the offender's background deprivation "may be the reason for his familiarity with the drug world".[90] Conversely, the Court of Appeal in *Waikato-Tuhega v R* recently affirmed that evidence of systemic trauma need not be extensive.[91] Mr Waikato-Tuhega was convicted of a series of aggravated robberies causing a loss over $1 million. Like the cases above, the defendant's s 27 reports identified serious background trauma, including exposure to family violence and substance abuse at a young age. However, the report did not articulate a direct link to the offending.[92] In keeping with its decision in *Carr*, the Court emphasised the need for a holistic approach when considering how systemic deprivation might have contributed to culpability or offending over a mechanical exercise of proof.[93] Accordingly, the Court awarded a 15 per cent discount to account for the defendant's deprivation.[94]

(2) Lack of cohesion

Despite the Supreme Court's judgment in *Berkland*, there is lingering uncertainty about what amounts to a "causal nexus" and how it is identifiable within a s 27 report. As a result, the s 27 case law lacks cohesion over how reports demonstrate a "credible account" let alone a "causal nexus". These cases involve a similar level of offending in light of similar trauma. All of these decisions acknowledge the influence of systemic deprivation on the defendant's anti-social behaviour. Nevertheless, there is incongruity over how the courts assess causation. *Carr*, *Patangata* and *Berkland* assert the offender's own rational choice to offend over the influence of systemic trauma, hence the Judges' adoption of a stringent causation standard that necessitates a connection with the *particular* offence.[95] However, the Courts in *Heta*, *Ruddelle*, *Carr*, and *Waikato-Tuhega* emphasise a holistic assessment of the offender's personal history to identify a general impairment of rational choice and

84 At [48].
85 *R v Ruddelle* [2020] NZHC 1983, [2021] 3 NZLR 505.
86 At [41].
87 At [38]–[41].
88 *Berkland* (CA), above n 34, at [200]–[211].
89 At [77].
90 At [77].
91 *Waikato-Tuhega*, above n 3.
92 At [13]–[15].
93 At [51]–[52].
94 At [57].
95 *Carr*, above n 75; *Patangata*, above n 36; and *Berkland*, above n 34.

moral culpability.[96] Under this standard, the report need not articulate an express connection with the offending to warrant mitigation. The Court of Appeal in *Carr* also seems to broaden the scope of the applicability of the s 27 discount by holding that the s 27 report need only provide a "credible account" of impaired culpability. Despite this widening scope, a "causal nexus" requirement remains, yet is persistently undefined.[97]

Using the amorphous "holistic approach", a court can assume causation between deprivation and impairment of an offender's moral culpability by the mere presence of the deprivation in the offender's life. The holistic nature of the "credible account" standard makes the question of an actual connection between the offender's past trauma and offence easy to forget. The subjective nature of the assessment, coupled with the abstract nature of systemic deprivation in an offender's life, also readily enables judges to draw strings of causation where there may be none. However, as rationalised by Downs J, "many people with disadvantaged backgrounds do not [go on to] commit criminal offences".[98] Requiring a "causal nexus" therefore rightly constrains the universal application of s 27 from simply "excusing" the offender's responsibility for their crime because of their own trauma. Accordingly, just because a defendant has suffered systemic deprivation, this does not necessarily mean it has influenced their offending. Therefore, it is wrong for courts to mitigate culpability by relying on a report's "credible account" of impaired culpability without articulating a causal link between the deprivation and the offending itself. Doing otherwise only undermines the significance of individualised sentencing.[99]

C *Evaluation*

Proponents of a holistic justice system would argue that such an approach is necessary to encompass the broad environment of trauma that motivates crime. Speaking extra-judicially, Williams agreed with emphasis on free choice but criticised ignorance of traumatic circumstances that fetter human agency. His Honour stated that "without a proper command of an offender's background, there can be no perspective—only myopia".[100] Fredrickson also rightly identifies that the "credible account" standard facilitates better sentencing outcomes by recognising that "offenders come from different starting points".[101] The problem, however, arises where this evaluation comes at the cost of an actual assessment of causation. The notion of "individualised sentencing" still requires an evaluation of an offender's culpability in their own circumstances. Such evaluation is fundamental to the Act.[102] Therefore, systemic deprivation articulated in s 27 reports must be connected through its influence on the offence itself rather than through an abstract assumption of impaired culpability.

Judicial understandings of a "causal nexus" must not fluctuate from case to case, or from judge to judge. While judicial discretion in individual cases is valuable, it must not come at the cost of predictability and consistency as to when a s 27 discount will be

96 *Heta*, above n 2; *Ruddelle*, above n 85; *Carr*, above n 3; and *Waikato-Tuhega*, above n 3.
97 Fredrickson, above n 17, at 4.
98 *Carr*, above n 75, at [61].
99 *Zhang*, above n 3, at [53].
100 Joe Williams "Build a Bridge and Get over It: The Role of Colonial Dispossession in Contemporary Indigenous Offending and What We Should Do about It" (2020) 18 NZJPIL 3 at 20.
101 Fredrickson, above n 22, at 413.
102 *Zhang,* above n 3, at [10]; *Moses*, above n 3, at [13]; and *Orchard v R* [2019] NZCA 529, [2020] 2 NZLR 37 at [28].

granted. Whether or not an offender receives a discount for personal mitigation should not depend on judicial discretion alone. While individualised sentencing is essential for justice, the approach toward mitigation must remain consistent and cohesive.[103]

IV Lack of Theoretical Consistency

The problem of causation under s 27 also raises another question: why should systemic trauma impair moral culpability? The issue of how an offender's status as a rational actor should be balanced with the influence of systemic deprivation is a question that cannot be answered by black letter law. Instead, how the criminal law should respond to the dichotomy between choice and environment is only answerable by legal theory. This section answers this question by evaluating s 27 discounts in light of the various theories of criminal punishment underlying the Act. It argues that discounting for systemic trauma is mostly consistent with the philosophical values of modern criminal punishment. However, this consistency is qualified by the need to account for the various other objectives of criminal justice.

A *New Zealand's sentencing theory*

No single theory or set of theories underpins New Zealand's sentencing regime. Instead, New Zealand's justice system and sentencing practice, as with other modern Western systems, operate on a "hybrid" or "dualist" philosophical basis.[104] This hybrid framework is an amalgamation of different conceptions and aims of justice that influence our responses to criminal offending. These understandings range from retributive theories, which emphasise criminal sanctions as a response to the inherent evil of crime, to consequentialist theories that focus on consequential benefits and detriments of punishment. Therefore, there is little judicial or legislative guidance as to what notion of justice should "win out" in a particular case.[105]

Sentencing in New Zealand is therefore an evaluative task for judges to determine on individual case facts. Judges hold significant discretion to determine starting points and the weight of any aggravating or mitigating factors. This broad judicial discretion reflects the amalgamation of values in criminal punishment. On the one hand, it is essential to duly assess the gravity of the offending and the circumstances of the offender, victim, community and wider public. On the other, the desire for judicial consistency tempers individual judgments to ensure sentencing outcomes reflect wider policy decisions and that like cases are treated alike.[106] The ideal outcome is therefore one that balances the "numerous and sometimes conflicting considerations" and that achieves a satisfactory result considering the "the range of outcomes within which reasonable disagreement is possible".[107]

It is therefore necessary to evaluate s 27 discounts in light of the hybrid nature of the sentencing regime. The function of modern criminal sentencing is to achieve justice through the exercise of public power to strike the "correct" balance of various competing social norms and expectations. These range from vindicating the victim and society to

103 Fredrickson, above n 17, at 5.
104 Finn and Wilson, above n 9, at [2.1].
105 *Osman v R* [2010] NZCA 199 at [22]–[33].
106 *Hessell*, above n 61, at [43].
107 *Kumar v R* [2015] NZCA 460 at [81].

preventing recidivism through deterrence or rehabilitation.[108] The state's sentencing practices must conform to certain moral standards that exist beyond, but are reflected in, laws and policies that govern criminal sentencing.

B *Section 27 and retributive (non-consequentialist) theories*

Accounting for an offender's background trauma in determining their punishment is inconsistent with a retributive theoretical approach. Retributive theories exclusively focus on the inherent immorality of the criminal act as the justification for punishment. Hence, retributivist philosophies are non-consequentialist as punishment is not justified by any outcome that may flow from the sentence. Instead, the retributive model follows Kantian philosophy that identifies a "just" punishment on the balance between the severity of the punishment and the immorality of the crime itself.[109] Punishment, therefore, should only respond to the offending, not be a means of pursuing some other aim. Punishment is only justified when it is "pronounced over all criminals proportionate to their internal *wickedness*".[110] This is because proportionality and consistency are what separate legitimate criminal sanction and the arbitrariness of revenge.[111] The principles and purposes of the Act uphold several retributivist objectives which are outlined below.

(1) Accountability: s 7(1)(a)

Section 7(1)(a) of the Act stipulates that the purpose of sentencing is to "hold the offender accountable for harm done to the victim and the community". "Accountability" means the sentence must impose the appropriate detriment onto the offender to properly account for the moral gravity of the crime.[112] From a philosophical standpoint, citizens abdicate the right of revenge for wrongs done to the state in return for its protection and guarantee of just and consistent punishment.[113] Traditionally this purpose was promulgated in the maxim *lex talionis* ("an eye for an eye, a tooth for a tooth"). In modern times this notion requires that the punishment should do nothing more than "fit the crime" by imposing the most proportionate detriment onto the offender. As Woodhouse P stated in *R v Puru*:[114]

> [The] judicial obligation is to ensure that the punishment [the courts] impose in the name of the community is itself a civilised reaction, determined not on impulse or emotion but in terms of justice and deliberation.

Mitigating sentences to account for background trauma contradicts this purpose. This is because the courts determine the sentencing according to circumstances external to the gravity of offending. Punishment, therefore, does not solely accord to the "wickedness of the offence" but also responds to the offender's circumstances. From an accountability lens, such an additional response is problematic as mitigation necessarily means a shortfall between the severity of the crime and the gravity of the offence. Thus, the

108 David J Cornwell *Criminal Punishment and Restorative Justice: Past, Present and Future Perspectives* (Waterside Press, Washington DC, 2006) at 21.

109 At 42.

110 Immanuel Kant *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right* (W Hastie (translator), T&T Clark, Edinburgh, 1887) at 198.

111 Finn and Wilson, above n 9, at [2.4.2].

112 Hall, above n 18, at [I.3.2].

113 At [I.3.2].

114 *R v Puru* [1984] 1 NZLR 248 (CA) at 249.

offender is not "fully" accountable. *R v Taimo* provides a confronting example.[115] In that case, Mr Taimo had sexually abused 17 boys over three decades. The abuse involved numerous instances of rape, genital touching, forced oral sex and emotional manipulation against 12- to 17-year-olds. Further long-term trauma followed, including suicide attempts, substance abuse and breakdown in whānau relationships.[116] And yet, Moore J accounted for the causal role of Mr Taimo's own history of childhood abuse outlined in his s 27 report.[117] The resulting five per cent discount may seem minor, but it did detract from Mr Taimo's length of incarceration (23 years down to 22 years).

From a retributivist lens, such outcomes are problematic because the final punishment fails to mirror the offending's inherent evil. This is particularly problematic where the offending is more serious and warrants a strong response.[118] Some consistency, however, may be found in the fact that retribution demands a *proportionate* response. Under retributivism, punishment must not go beyond what is morally deserved.

Therefore, if we accept that an offender's culpability is reduced because background trauma increased their risk of offending, retribution could align with cultural report discounts. However, such a perspective assumes background trauma is an *excuse* for the offence rather than a *cause* which must be accounted for.[119] The core feature of retributivism is that legitimate punishment proportionately responds to the choices of the individual. This means that retributive justice could account for personal traumas, such as addition, in delivering a "just" punishment. However, it would be inconsistent with retributivism for punishment to account for traumas that are beyond the offender's control, such as cultural deprivation.

Accounting for mitigating factors means that the punishment itself cannot fully remedy the essential harm the crime causes to the victim and the community. Any shortfall between the severity of a crime and a mitigated sentence is passed to the victim and community, who must bear the burden of the lingering unaddressed harm. Furthermore, the victim, their whānau and the community must also bear the burden of the offender's traumatic background alongside the offender. This is because s 27 discounts are provided through the mitigation grounded in the offender's circumstances and not necessarily through any redeeming quality of the offender. Thus, the victim and the community also lose out due to the offender's traumatic circumstances. This undue loss is inconsistent with the responsiveness between crime and punishment that retributivism demands.

(2) Denunciation: s 7 (1)(e)

Section 7(1)(e) of the Act provides that another purpose of sentencing is to "denounce the conduct in which the offender was involved". Denunciation sees criminal sanctions as justified as a means of publicly denouncing the societal injury of crime. However, punishment ought to respond to the inherent need to channel public outrage to remedy the community's disapproval of the offending.[120] Punishment therefore goes beyond the interpersonal conflict between the victim and the offender to reflect societal condemnation of criminality.

115 *R v Taimo* [2019] NZHC 234.
116 At [106]–[107].
117 At [67].
118 Ashworth, above n 46, at 230.
119 At 232.
120 Finn and Wilson, above n 9, at [2.4.3(2)].

The inherent tension between mitigating factors and denunciation is that mitigating an offender's sentence necessarily reduces the responsiveness to public outrage. Like the theory of accountability, there is a shortfall between what the public expects and the overall final sentence. The result is that the sentence does not meet public expectations which can put the justice system into disrepute.[121]

An example of this is *R v Havili*.[122] In that case, the defendant was convicted of a brutal "king hit" manslaughter of a local popular MMA fighter. The defendant received a 15 per cent discount to account for his violent childhood and history of substance abuse outlined in his cultural report.[123] The end sentence of two years nine months imprisonment, down from a starting point of four years, caused outrage among the victim's family and community. At the sentencing hearing, there was uproar in the public gallery at the final sentence, with one person shouting: "That's f***ing bulls***, man!"[124] A more articulated response came from New Zealand MMA star Daniel Hooker who explained the community reaction at the reduced sentence:[125]

> It's a heart-breaking result for our whole team … . A two-year sentence for murder, that's completely unreasonable. I don't think there's any reasonable person out there who's not going to think that a law change is going to be necessary.

Such outcries are not uncommon as the public often expects harsh punishment.[126] The public often perceives sentencing judges as too "soft" and that their decisions overfocus on the offender as a "victim" rather than a "criminal".[127] Sentencing discounts, therefore, can often fall short of what the public may expect from the justice system.[128]

Retributivism therefore leaves no room to account for circumstances external to the offence and holds little sympathy towards an offender's background trauma. Accountability and denunciation only work when punishment responds to the offence itself. When external circumstances are accounted for, the proportionality between the offence and the punishment is reduced. This shortfall causes the justice system to lose legitimacy as there is a disconnect between the crime and punishment. Therefore, s 27 discounts hold no consistency with non-consequentialist theories underpinning the sentencing regime.

C *Section 27 and consequentialist theories*

Section 27 discounts are also largely inconsistent with consequentialist theories, save when the focus of punishment is rehabilitation. Consequentialist theories are forward-focusing theories that examine the net "utility" of punishment upon considering the inherent harm of criminal sanction.[129] Consequentialism recognises that criminal

121 Christine French "The role of the Judge in sentencing: from port-soaked reactionary to latte liberal" (2015) 14 Otago LR 33 at 34.
122 *R v Havili* [2022] NZHC 753.
123 At [31]–[43].
124 Craig Kapitan "Fau Vake death: Daniel Havili sentenced for manslaughter in Auckland CBD attack" *The New Zealand Herald* (online ed, Auckland, 12 April 2022).
125 Kapitan, above n 124.
126 French, above n 121, at 35.
127 At 34.
128 Kim McGregor *Strengthening the Criminal Justice System for Victims: Survey Report* (August, 2019) at 11.
129 Finn and Wilson, above n 9, at [2.3].

punishment inherently involves harm inflicted upon the offender, their whānau and the community. Punishment is therefore only justified if the outcome produces more net good than the intrinsic harm of the offending and the punishment itself. As utilitarian philosopher Jeremy Bentham asserts: [130]

> … all punishment is mischief: all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil.

Accounting for an offender's background trauma does not sit well with this utilitarian approach. This is because the final punishment is not calculated on the net benefit to society but is tailored to the offender's moral culpability. As discussed below, many consequentialist theories do not support such discounting.

(1) Deterrence: s 7(1)(f)

Section 7(1)(f) of the Act upholds deterrence as one of the main purposes of sentencing. There are two dimensions to deterrence. The first dimension is "specific deterrence", which seeks to prevent the offender from re-offending through fear of similar or hasher sanction. The second is "general deterrence", which seeks to deter people generally by the public nature of criminal punishment. Deterrence lies in the assumption that a potential offender undertakes a cost-benefit analysis *before* carrying out the crime. Under deterrence, punishment is only legitimate if the threat of punishment is perceived to outweigh the likely gains from the offence.[131] As Catherine the Great observed in 1767: "The most certain Curb upon Crimes, is not the *Severity* of the Punishment, but the absolute Conviction in the People, that Delinquents will be *inevitably* punished."[132]

Section 27 discounts are therefore inconsistent with deterrence in two respects. The first is that mitigation of sentencing inherently undermines the punishment's deterrence. Section 27 discounts limit specific deterrence by signalling to prospective re-offenders that future punishment for any future offending will also be mitigated for their background circumstances. Conversely, general deterrence is also limited by the fact that mitigated punishment limits the communicative "cost" of crime to the general public. This is because the reduced punishment also sees the threat of future punishment diminished. Therefore, the "rational calculation" in the potential offender's mind will be less likely to favour lawful conduct, as the perceived benefit of crime may outweigh the reduced threat of punishment.[133]

Secondly, accounting for an offender's background trauma also demonstrates the fallacy that crime is always a rational choice. Deterrence is less likely to constrain choice when the offender's will is already constrained by mental disorder, addiction, poverty, duress or any other factor.[134] These traumas impair the offender's judgement by colouring their perception of risk and weakening their human agency. The latter point is particularly

130 Jeremy Bentham *An Introduction to the Principles of Morals and Legislation* (2nd ed, Clarendon Press, Oxford, 1823) at 170.

131 Finn and Wilson, above n 9, at [2.3.1(1)].

132 Catherine II *The Grand Instructions to the Commissioners Appointed to Frame a New Code of Laws for the Russian Empire* (Michael Tatischeff (translator), T Jeffery's, London, 1768) at [222] (emphasis in original).

133 Finn and Wilson, above n 9, at [2.3].

134 *Zhang*, above n 3, at [90].

true for drug-related offences where addiction motivates violent and impulsive behaviour. Thus, in such cases, the value of deterrence based on rational choice is "largely illusory" in cases involving systemic deprivation.[135]

For example, in *Zhang*, the Court of Appeal considered the relevance of deterrence when sentencing one of the appellants whose post-traumatic stress disorder (PTSD) was the catalyst for her methamphetamine use.[136] The Court noted that while the cause of the defendant's offending was her PTSD, she was still involved in the moderate sale and supply of methamphetamine for personal profit. The Court accepted that moderate sale of Class A drugs still warranted a level of deterrence in punishment. However, in this specific case, the Court upheld a 15 per cent reduction for personal circumstances to account for systemic deprivation and the limited value deterrence held in the defendant's case.[137]

In such cases, the Court considered that a punishment's ability to tip a prospective offender's cost-benefit analysis in favour of lawful behaviour is hindered. Therefore, the "utility" behind punishment is lost as accounting for background trauma necessarily means that courts must accept the futility of deterrence in many cases. Such an outcome is troubling if one believes that the purpose of the State's prosecutorial power is to limit criminality in society by deterring individual unlawfulness.

(2) Section 27 and rehabilitation: s 27 (1)(h)

In contrast to the previous theories, the principle of rehabilitating offenders aligns with the rationale behind s 27 discounts. Rehabilitation principles state that a primary objective of criminal punishment is to prevent re-offending by addressing the underlying factors that motivated the offending in the first place.[138] Rehabilitation assumes that an offender's choice to offend is shaped by extraneous circumstances that, if left untreated, will only see that choice being repeated regardless of the punishment. Therefore, effective justice remedies these underlying personal defects or wider structures that give rise to anti-social behaviour, rather than sanctioning the individual. The core rationale is that an effective justice system must:[139]

> … return the offender to society neither embittered nor resolved to get even for his degradation and suffering, but possessing a new set of values and morals and a desire to contribute to society.

Section 27 discounts are therefore consistent with a rehabilitative approach. Cultural reports help to demonstrate the traumatic circumstances that underpin most criminal behaviour. This information encourages judges to evaluate the gravity of offending in the context in which it was committed. Thus, the offender is judged and punished according to their own circumstances rather than simply being locked away. Section 27 discounts, therefore, acknowledge the true nature of the crime and signify that a particular offence had unique causes that must be addressed.

Put simply, rehabilitation treats crime as a social-psychological problem and not a merely a matter of moral choice. For example, in *R v Royal*, Grice J emphasised

135 At [88] and [92].
136 At [204]–[228].
137 At [221]–[228].
138 Finn and Wilson, above n 9, at [2.3.2].
139 Joel Meyer "Reflections on Some Theories of Punishment" (1968) 59 J Crim LC & PS 595 at 597.

rehabilitation as the most relevant principle in an otherwise serious kidnapping case.[140] As articulated in her s 27 reports, Ms Royal had since developed a "more stable lifestyle" since her involvement in the offence.[141] This stability included being in her first stable relationship and reconnecting with her children and Māori whakapapa.[142] These developments meant that "imprisonment would go nowhere toward rehabilitation".[143] Therefore, Grice J granted a period of intensive supervision to support Ms Royal's rehabilitation, citing that a custodial sentence would only increase the chances of re-offending.[144]

D *Evaluation*

Section 27 discounts, therefore, are consistent with the purpose of rehabilitating the offender. This is because mitigation in sentencing facilitates more robust sentencing outcomes that are more likely to address the underlying causes of crime.[145] It is no stretch of the imagination to believe that outcomes similar to *Royal* probably do more to prevent re-offending than any prison cell. It is well-understood that the inherently coercive and alienating prison environment exacerbates underlying risk factors that motivate offending.[146] Arguably, s 27 reports and discounts hold significant potential for achieving the most "just" outcome as they allow the Court to account for the true reasons behind the offence.

However, such an outlook forgets that rehabilitation is not the primary objective of criminal justice. Rather, modern criminal justice attempts to respond to the diverse expectations that a pluralistic society demands.[147] Because the New Zealand system operates under a hybrid theory, judges can only adjudicate these competing principles as an exercise of subjective discretion. What legislative guidance there is only serves as a general framework and cannot articulate a "right" outcome in an individual case. The Act operates within inherent tensions between consequentialist and non-consequentialist objectives, punitive and rehabilitative principles, and aggravating and mitigating factors.[148] Section 27 can therefore offer no "golden medium" in sentencing. No sentence can achieve an objectively "right balance" of punitive, rehabilitative, or community-orientated principles and purposes of the Act.[149]

However, this is not to say that s 27 discounts do not serve a purpose in sentencing. Section 27 discounts facilitate a more accurate assessment of criminal culpability. Socio-economic and cultural forces motivate criminality; crime is not a sole exercise of rational choice. Section 27 discounts are clearly an invaluable tool for facilitating effective outcomes by guiding sentencing calculations towards a rehabilitative response. However, where more punitive objectives justifiably prevail, then mitigation of sentence only serves

140 *R v Royal* [2020] NZHC 1321.
141 At [37].
142 At [36]–[41].
143 At [64].
144 At [83].
145 O'Driscoll, above n 5, at 359–340.
146 Workman and McIntosh, above n 12, at 122–123.
147 See David Brown "Recurring themes in contemporary criminal justice developments and debates" in Julia Tolmie and Warren Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis, Wellington, 2007) 7 at [2.5].
148 French, above n 121, at 38–39.
149 At 39.

to soften punishment. Therefore, s 27 discounts are consistent with the sentencing regime only when the particular case favours a rehabilitative response.

V Section 27 and Māori Over-Representation in the Criminal Justice System

Despite the legislative purpose and practice behind s 27, cultural reporting in sentencing has had very little effect in reducing the over-incarceration of Māori. Statistics show that between 1985 and 2022 the number of incarcerated Māori persons has steadily increased alongside the gross disproportion between Māori and non-Māori prisoners. As of March 2022, Māori represent 53.4 per cent of New Zealand's prison populations compared with 30 per cent European, 11.7 per cent Pacific, and five per cent other.[150] These outcomes persist despite a growing awareness among policymakers of the impacts of systemic racism and the trauma of colonisation.[151] The rise in cultural reporting and "decolonisation" efforts in the criminal justice system continuously fail to deal with underlying traumas that underpin Māori over-representation. These structural traumas ultimately constrain any benefit from cultural reports and subsequent discounts.

A *Section 27*, *Māori and the criminal justice system*

There is little quantitative research on the practical benefit of s 27 cultural reports for Māori.[152] Critiquing the actual effectiveness of cultural reports and s 27 discounts is therefore difficult. However, the shortfalls of cultural reporting are demonstrated by the context of Māori experience within the criminal justice system. The historic and contemporary role played by the criminal justice system in colonial trauma is well understood.[153] There is little worth in re-explaining the broad socio-economic, cultural, and political traumas that colonisation has inflicted upon Māori.

However, two key features of colonisation's trauma intersect with the role s 27 cultural reports play in the sentencing process. First, the loss of land, mana and connection to whānau and hapū is a pertinent cause of the socio-economic and cultural deprivation that characterises Māori offending.[154] Section 27 cultural reports unearth these traumas for individual defendants and also demonstrate the persistence of these structural influences on criminality. Secondly, cultural reports share an intrinsic connection to the structural trauma the criminal justice system historically holds over Māori. Throughout the 19th and 20th centuries, imperialist imposition of western legal systems to replace tikanga "smooth[ed] the route for Māori entrance into the criminal justice system".[155]

The criminal justice system, therefore, served as a mechanism to destroy Māori cultural capacity to resolve crime according to tikanga. Coupled with the loss of mana and autonomy, such events saw Māori unable to maintain their cultural identity or capacity.[156]

150 Department of Corrections "Prison facts and statistics - March 2022: Number of prisoners in each location by custody status at 31 March 2022" <www.corrections.govt.nz>.

151 Tracey McIntosh and Kim Workman "Māori and Prison" in Antje Deckert and Rick Sarre (eds) *The Palgrave Handbook of Australia and New Zealand Criminology, Crime and Justice* (Palgrave Macmillan, Cham (CH), 2017) 725 at 727.

152 Oakley, above n 15, at 2.

153 See generally Moana Jackson *The Maori and the Criminal Justice System: A New Perspective – He Whaipaanga Hou* (Department of Justice, February 1987).

154 McIntosh and Workman, above n 151, at 726–727.

155 Oakley, above n 15, at 10.

156 At 16.

Without this capacity, Māori were predisposed to socio-economic circumstances that lead to criminality. Ironically, it is through s 27 cultural reports and discounts that such traumas are identified and addressed by the criminal system.

B *Section 27 and its failures*

It is difficult to argue that s 27 changes the position of Māori in the criminal justice system in any meaningful way. New Zealand's prisons persist as "largely holders of Māori flesh and blood" and have a haunting presence in many communities.[157] As of 2022, Māori offenders are more than twice as likely to receive a custodial sentence than non-Māori. The situation for wahine Māori is even more dire as they comprised 65 per cent of the female prison population as of 2022.[158] This inequity is only exacerbated by the fact that the Māori incarceration rate is increasing despite a general overall reduction in conviction rates. Unsurprisingly, Māori remain over-represented at every stage of the criminal justice system.[159] It is therefore safe to conclude that the overall impact of cultural reports for Māori is minimal despite the intentions behind s 27 cultural reports.

The structural racism of the criminal justice system explains the failures of s 27 cultural reports to crime and criminal justice. The cultural alienation of Māori offenders and communities continues despite numerous attempts at change.[160] This is because systemic discrimination, across all areas of society, manifests in alienation from monocultural institutions and practices.[161] The criminal justice system contributes to this marginalisation by exacerbating cultural disconnection and individual trauma through incarceration. From a te ao Māori perspective, incarceration is an alien concept as prison removes the whānau, hapū and iwi's ability to deal with anti-social behaviour and disconnects the individual from their whakapapa. This disconnection is devastating for any community, but particularly so for Māori.[162] The disproportionate presence of the criminal justice system in Māori communities creates a cycle of offending that individualised cultural reporting cannot resolve. For instance, when a parent is imprisoned, their children suffer through social stigma, loss of identity and loss of familial stability. Such trauma leads to poor education and employment prospects, resulting in a heightened risk of offending.[163] For many Māori whānau, this cycle is all too well known as the traumas of colonisation persist into the modern day. Section 27 cultural reporting is therefore only a remedial measure of limited value as it has not lead to wider structural change.

C *Benefits of s 27 for Māori*

This is not to say that s 27 cultural reports and discounting are incapable of addressing systemic discrimination against Māori offenders. A carefully crafted cultural report and

157 McIntosh and Workman, above n 151, at 726.

158 Sophie Cornish "Māori even more overrepresented in prisons, despite $98m strategy" (1 May 2022) Stuff <www.stuff.co.nz>.

159 Ministry of Justice "Hāpaitia te Oranga Tangata" (18 July 2023) <www.justice.govt.nz>.

160 Juan Marcellus Tauri and Robert Webb "A Critical Appraisal of Responses to Māori Offending" (2012) 3(4) International Indigenous Policy Journal at 6.

161 John Pratt "New Zealand Penal Policy in the Twenty-first Century" in Antje Deckert and Rick Sarre (eds) *The Palgrave Handbook of Australian and New Zealand Criminology, Crime and Justice* (Palgrave Macmillan, Cham (CH), 2017) 347 at 355.

162 Tauri and Webb, above n 160, at 10.

163 Liz Gordon "Who Cares About the Children of Prisoners in New Zealand? A Journey from Research to Practice" (2015) 32 LIC 46 at 52.

robust sentence can have profound impacts for a Māori offender and their whānau. Often, s 27 reports facilitate better sentencing outcomes for Māori offenders. This benefit is either through a reduced imprisonment sentence or a community alternative to encourage rehabilitation, thereby mitigating prison's harmful effects. Community sentences in particular have the benefit of preventing the offender's alienation from their whānau and community. Cultural reports also often act as a catalyst for effective engagement and restorative justice in the courtroom process.[164] This is because the offender's underlying traumas are demonstrated to the court, motivating rehabilitative responses over the punitive default. In effect, s 27 can "tip the balance" in favour of an outcome with a lower risk of exacerbating the causes of offending.[165] Another advantage of cultural reporting is the capacity to "[enlighten] the offender through [r]econnection with culture/community/ whānau".[166] One could argue that s 27 cultural reporting has the potential to "enlighten" the courtroom process through te ao Māori and thus provide better outcomes for Māori. However, such benefits are individualised and confined to the courtroom. As part of the sentencing process, cultural reports cannot address structural traumas themselves as that is beyond the judiciary's constitutional role.

D *Evaluation*

The fundamental reason why cultural reports fail to address over-representation is because cultural reporting and subsequent sentencing discounts merely "tinker[s] around the edges".[167] Section 27 fails to adequately respond to the unique structural forces that underpin the experience of Māori within the criminal justice system. This is because sentencing reports and discounts are simply extensions of the existing justice system which deals exclusively in the individual moral culpability of an offender. The western criminal system's core notion of individual responsibility is ill-equipped to address the socio-economic and cultural circumstances that motivate most crimes. This is not to say that the individual responsibility of a Māori offender compared to a non-Māori offender is unimportant. Instead, the lack of judicial capacity to address wider systemic discrimination sees the unique traumas of Māori offenders and communities go unabated. The inherent logistical and resourcing limitations of the criminal system, coupled with the socio-economic and cultural poverty of most offenders, restricts the capacity of cultural reports to facilitate meaningful transformation.

VI Lessons from Australia and Canada

Abhorrent over-incarceration and intersecting negative socio-economic realities is a shared trauma for indigenous peoples throughout all post-colonial states.[168] Land loss, loss of autonomy, state-sponsored assimilation, and contemporary socio-economic

164 Palmer, above n 13, at [2.5.5].
165 At [2.5.5].
166 Oakley, above n 15, at 85.
167 JustSpeak "JustSpeak responds to He Waka Roitmata" (press release, 9 June 2019).
168 Elizabeth Adjin-Tettey "Sentencing Aboriginal Offenders: Balancing Offenders' Needs, the Interests of Victims and Society, and the Decolonization of Aboriginal Peoples" (2007) 19 CJWL/RFD 179 at 180.

depravity have created a global experience of indigenous trauma.[169] Accordingly, courts in Australia and Canada have developed varying means to account for this cultural trauma when sentencing indigenous offenders. These means also seek to strike a balance between the needs of indigenous offenders and the interests of the victim and society.[170] This section evaluates and critiques the practices of Australian and Canadian jurisdictions when accounting for the traumas underlying indigenous offending.

A *Canadian jurisprudence*

The Canadian Supreme Court in *Ipeelee v R* issued a landmark judgment setting out how all Canadian courts must calculate the sentencing of an indigenous offender.[171] The majority, led by LeBel J, held that sentencing judges *must* take judicial notice of indigenous offenders' unique systemic and background circumstances and account accordingly.[172] The Court emphasised the need to meaningfully address the phenomenon of indigenous trauma and over-incarceration when indigenous offenders are sentenced:[173]

> … courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples.

The difference between New Zealand and Canadian courts is that indigenous offenders need not establish a connection between their cultural background and their offending. Instead, a connection is presumed, which, until proven otherwise, will be a mitigating factor in sentencing an indigenous offender.[174] As such, there is less use for formal "cultural reports" at sentencing, especially given the flexible nature of Canadian sentencing processes.[175] New Zealand's courts, however, follow the same rationale in justifying accounting for an offender's cultural background. Many Aboriginal Canadians suffer from the same legacy of cultural dislocation, systemic discrimination, and disproportionately worse socio-economic conditions as Māori offenders.[176] Accordingly, like their New Zealand peers, Canadian judges are motivated to tailor their sentences towards a rehabilitative response wherever reasonably practicable. Additionally, Canadian common law emphasises the reluctance to impose custodial sentences on indigenous offenders, save for the most egregious offending.

This approach comes from acknowledging that custodial sentences are likely to exacerbate the traumas of colonisation. This is because custodial sentencing necessarily involves further cultural isolation and trauma, which may have motivated the offending in

169 Thomas Clark "Sentencing of Indigenous Offenders" (2014) 20 Auckland U L Rev 245 at 245–246.

170 Kate Warner "Equality Before the Law: Racial and Social Background Factors as Sources of Mitigation at Sentencing" in Julian V Roberts (ed) *Mitigation and Aggravation at Sentencing* (Cambridge University Press, Cambridge, 2011) 124 at 125.

171 *Ipeelee v R* [2012] SCC 13, [2012] 1 SCR 433 at [77].

172 At [59]–[60].

173 At [60].

174 At [59]–[72].

175 See Adjin-Tettey, above n 168, at 184–185.

176 Richard Edney "Imprisonment as a Last Resort for Indigenous Offenders: Some Lessons from Canada?" (2005) 6(12) ILB 23 at 24.

the first place. Therefore, there is a reasonable justification for judges to automatically account for the trauma of indigenous offenders without the need for extensive cultural reports or a subjective determination of a causal nexus.

B *Australian jurisdiction*

Like Canada, Australian state jurisdictions hold that an offender's cultural background is a relevant factor at sentencing. For instance, courts in the Australian Capital Territory must consider the offender's cultural background if relevant.[177] In Queensland, courts must hear submissions by a representative of the community justice group from the offender's community when sentencing an Aboriginal offender. Unlike s 27, the Queensland Penalties Act 1992 (Qld) provides that the sentencing judge *must* consider specific cultural issues at sentencing. These include:[178]

(a) "the offender's relationship with their community";
(b) any "cultural considerations"; and
(c) any rehabilitative programs the offender has or can undertake.

These considerations can be related to any aspect of the offender's life so long as it is relevant to their offending or rehabilitation. Similarly, in the Northern Territory, a sentencing court has the discretion to receive submissions relating to the offender's indigenous community or even aspects of Indigenous customary law.[179]

As with s 27, the Australian courts' application of these culturally responsive provisions is part of an overall holistic exercise of individual culpability. The weakness here is that there is no judicial notice of structural trauma reducing culpability. This means that the broader structural traumas that motivate indigenous offending can go unaccounted for. For instance, the New South Wales Supreme Court in *R v Fernando* established guiding principles to account for the unique circumstances of Aboriginal offenders.[180] Like *Heta* and *Zhang*, the Court in *Fernando* emphasises the relevance of individual traumas (including substance abuse, mental illness, cultural dislocation, and family violence) as causative of criminal offending and the distinct link between those traumas and colonisation.[181]

However, as in the New Zealand jurisdiction, the individualised nature of the Australian sentencing process means that punitive outcomes can prevail. For example, in *Bugmy v R,* the Australian High Court re-assessed the weight of systemic trauma and the need for punitive responses towards indigenous offenders upon consideration of particularly severe offending.[182] The High Court was asked to re-consider the lower courts' finding that Mr Bugmy's sentence was not manifestly excessive in light of mental illness and to re-assess the relevance of social deprivation at sentencing.[183] That case involved two assaults causing grievous bodily harm. Mr Bugmy, however, suffered extreme social deprivation during his formative years, including substance abuse at thirteen and family violence throughout his life. Upon considering Mr Bugmy's circumstances, the Court accepted that

177 Crimes (Sentencing) Act 2005 (ACT), s 33(1)(m).
178 Penalties and Sentences Act 1992 (Qld), s 9(2)(p).
179 Sentencing Act 1995 (NT), s 104A.
180 *R v Fernando* (1992) 76 A Crim R 58 (NSWSC) at 62–63.
181 At 62–64.
182 *Bugmy v R* [2013] HCA 37, (2013) 249 CLR 571.
183 At [21].

such traumas were "endemic" in Aboriginal communities and that sentencing judges must consider these circumstances.[184] However, the Court also concluded that Mr Bugmy's mental illness was insufficient to reduce the need for deterrence as a relevant sentencing principle. As such, the Court upheld Mr Bugmy's three-year sentence, despite implicitly accepting that this punishment would only exacerbate the underlying causes of his offending.[185]

C *Evaluation*

The Australian courts' approach parallels New Zealand's in accounting for systemic trauma in sentencing. In both jurisdictions, there is a general judicial acceptance of structural trauma's role in motivating criminality and the unique context in which indigenous offenders are grounded in. However, it is the need to account for other interests, such as punishment and deterrence, that hampers a proper solution for the inherent link between systemic trauma and crime.

However, Canadian courts appear to take a more progressive stance, accepting judicial notice of such linkage. The benefit of the Canadian approach is that the judiciary re-evaluates the sentencing criteria to resist ongoing systemic racial discrimination.[186] The presumption of mitigation for indigenous offenders ensures that courts, regardless of the offending's severity, generate appropriate sentences to account for systemic deprivation. This "bold" confrontation also recognises the discrimination Indigenous peoples face in the justice system to motivate more culturally sensitive judicial practices.[187]

However, there are two problems with the Canadian approach that the Australian and New Zealand approach seem to address. The first is that an indigenous offender is not driven to offend simply because they are indigenous. Systemic trauma is felt differently by different communities through the complex intersection of socio-economic and cultural forces that shape a person's life.[188] Therefore, it is a dangerous oversimplification to assume that all offending by indigenous persons is morally impaired through structural trauma. A just outcome requires the robust evaluation of a person's true culpability. An evaluation must also account for the varying aims and interests that underpin criminal justice. Secondly, criminal justice is not rehabilitation. Vindication for the victim, their whānau, community and wider public are central objectives of justice which clash with an offender-focused sentence. This conflict is particularly acute in cases involving severe crime. In such cases, the principles of denunciation, deterrence and accountability are important parts of a community response to the serious nature of the offending.[189]

There is also the concern that without a framework to ensure indigenous engagement, any form of recognition may amount to mere tokenism.[190] As discussed in Part V, there is a host of failed "indigenous" policy solutions to reduce indigenous offending. There is a strong argument that the individualised nature of western criminal justice simply cannot

184 At [38].
185 At [48]–[50].
186 *Ipeelee*, above n 171, at [67].
187 Clark, above n 169, at 268.
188 Khylee Quince "Maori and the criminal justice system in New Zealand" in Julia Tolmie and Warren Brookbanks (eds) *The New Zealand Criminal Justice System* (LexisNexis, Wellington, 2011) at 12.5.
189 *R v Mason* [2012] NZHC 1361, [2012] 2 NZLR 695 at [49].
190 Chris Cunneen "Community Conferencing and the Fiction of Indigenous Control" (1997) 30 ANZJ Crim 292 at 304.

address the wider structural trauma that motivates offending. Sentencing, therefore, may only be an "ambulance at the bottom of the cliff" solution, unable to achieve meaningful change.

VII The Future

Three key changes must be implemented to effectively deal with the issues outlined in this article. The first is that a coherent standard of "causation" must be adopted to provide sufficient certainty in how judges should apply s 27 discounts. The second, developing from the first, must see s 27 discounts motivate meaningful rehabilitative outcomes. Thirdly, courtroom structural processes must develop to adequately respond to the needs of Māori, lest s 27 cultural reporting remains a "token" gesture.

A *Creating cohesion*

There must be greater cohesion over when, how and to what degree a cultural report will merit a reduction in sentence. The sentencing calculation, although subject to judicial discretion, must produce consistent and proportionate results. One means to achieve cohesion is robust judicial evaluation of facts stimulated by objective criteria.[191] The Court of Appeal's amorphous standard of a "causal nexus" hampers cohesion by allowing a high degree of subjectivity.[192] The answer may be found in Edwards J's succinct explanation for why an offender's background can mitigate their culpability: [193]

> The intergenerational history of both social and economic deprivation diminished your opportunities and shaped the choices you made. That does not relieve you of personal responsibility for your actions that night. There is only one person who decided to pull the trigger. But it does help to understand how you got to that point, and to that extent it modifies your culpability.

This rationale accepts that individual choice is key to offending and culpability, but also enables mitigation where systemic trauma can *explain* the offence. From this basis it is logical to adopt a standard of causation to identify when background trauma "explains" the offence and when it does not. The "but for" test is one such standard. This test is frequently applied in tortious, contractual and criminal issues to determine whether one event led to another. It simply asks whether a party would have suffered loss "but for" the other party's actions.[194] If applied to s 27 discounts, the test would ask whether the offending would still have occurred "but for" the background trauma. If the answer is no, then causation is established as the offending would not have happened "but for" the presence of systemic trauma. This provides a cohesive basis to determine the impairment of free choice and moral culpability, and to adjust the sentence accordingly. Additionally, the strength of connection between trauma and offending can also inform the level of discount. An increased proximity to the offence will warrant substantial discounting due to the high level of impaired culpability, while a remote connection may only merit a nominal reduction.

191 Fredrickson, above n 17, at 12–13.
192 *Carr*, above n 3, at [63]–[68].
193 *R v Te Poono* [2020] NZHC 1188 at [35].
194 Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at [20.2.01].

The benefit here is that this test creates a strict factual standard which resists subjective inconsistency, even in the most complex cases. This is because a "but for" standard focuses the sentencing calculation onto the offending's factual circumstances. It avoids the pitfalls of finding mitigation through the mere presence of trauma in the offender's life.

Critics of a strict causation standard would argue that such an approach only enforces the myopic nature of individualised sentencing. It might be said that a "but for" test is too stringent and does not holistically account for an individual's circumstances.[195] However, it is a mistake to assume that a "but for" test cannot be holistic. Whether a test is holistically applied is ultimately a matter of *how* it is applied and not what the test is. It is vital that judges adopt a broad approach when dealing with the complexities of the presence systemic trauma in people's life. An overly stringent approach will inevitably ignore acute traumas of an offender's life in the pursuit of cold logic.

This does not mean that a level of consistency should be discarded. A standard test will focus judges' decisions towards the factual circumstances of the case. This focus avoids judges evaluating an individual's culpability on broad socio-economic injustices alone. Adopting the "but for" test, therefore, achieves the ideal of individualised justice by focusing on the causative links between trauma and offending in the defendant's life. The result will be that many offenders still receive at least some discount to account for the persistence of systemic trauma. However, a set standard still guards against the simplistic notion that background trauma automatically warrants mitigation. The result is a more cohesive balance between individual choice and background trauma within the sentencing calculation. This cohesion will produce more consistent and predictable outcomes when s 27 is applied.

B *Developing rehabilitative responses*

Secondly, s 27 cultural reports and discounts are only effective if the structural trauma they expose is properly accounted for in the sentencing outcome. A 10 per cent or even 30 per cent discount means nothing in the way of accounting for trauma if the final sentence is still a lengthy term of imprisonment.[196] Punitive sentencing practice, therefore, must give way to rehabilitative and restorative approaches for background trauma to be meaningfully addressed in the offender's punishment.

Newly arising restorative and therapeutic justice practices may provide the answer. Restorative justice involves direct engagement between the victim and offender to restore the imbalance created by the offending through mutual dialogue and resolution.[197] In contrast, therapeutic justice seeks to remedy the underlying causes of the offender's anti-social behaviour.[198] Accurate reporting into an offender's background is therefore essential in both processes. To this end, s 27 reports both identify the particular traumas in the offender's life and articulate the causes of that trauma. Hence, s 27 has the potential to facilitate greater use of restorative and therapeutic justice. For instance, the Act could be amended to empower the sentencing judge to order therapeutic options over imprisonment at sentencing regardless of the starting point. Or if imprisonment is necessary, then the judge could order particular rehabilitative options as part of that

195 Williams, above n 100, at 22–23.
196 Fredrickson, above n 17, at 5.
197 Kathleen Daly "Restorative justice: The real story" (2002) 4 SAGE Journals 55 at 56.
198 At 57.

sentence. Such approaches require a re-imagining of prison penal policy.[199] However, s 27 could act as a catalyst to facilitating rehabilitative and restorative approaches to address the underlying causes of offending. Doing so will go a long way towards reducing repeat offending.

Critics of restorative and therapeutic practices will rightly identify that rehabilitating the offender is not the primary purpose of criminal justice. Accountability, deterrence and expressing public anger are all legitimate objectives of criminal punishment. The sentencing process must respond to these values even if they may contradict the offender's rehabilitation.[200] However, it is a mistake to assume that a rehabilitative or restorative process cannot also achieve these values. It is also a mistake to assume that all offenders should undergo this process. There are many offenders who are not influenced by systemic trauma that warrant rehabilitative treatment. In such cases, punitive approaches are appropriate. Furthermore, most advocates of therapeutic justice accept that public safety concerns and victims' interests necessarily qualify rehabilitative approaches.[201] The potential of s 27 is therefore not to radically alter the criminal justice system. Effective use of s 27 will see the overall growth of rehabilitation and restoration in sentencing outcomes. Sentencing itself, however, will remain an evaluation of the varying objectives of justice in individual cases.

C *Creating better processes for Māori*

Finally, s 27 cultural reports or discounts at sentencing cannot meaningfully change the position of Māori within the criminal system unless there is corresponding structural change. As discussed above, there is an inherent nexus between the socio-economic traumas of Māori communities and the over-representation of Māori in the criminal system. Intersecting this nexus is the ongoing systemic discrimination of the criminal justice system and the lingering impacts of colonisation.[202] It is therefore important not to overstate the potential of cultural reports or discounts to facilitate change as they are constrained to individual outcomes in sentencing.

However, the *use* of cultural reports in the sentencing process can contribute to addressing the justice system's discrimination. This might be achieved through two means. The first is that cultural reporting can facilitate greater whānau, hapū and iwi engagement within the sentencing process. For example, s 27 cultural reports usually provide more culturally valuable information for Māori offenders than s 26 of the Act: Provision of Advice to the Courts Reports (PACs). PAC reports are often "cut and paste" documents that fall short of articulating the offender's holistic circumstances. Department of Correction report writers are often overworked and not attuned to the cultural traumas of Māori.[203] In contrast, the professionalisation of cultural report writing sees many writers successfully engaging with whānau to produce robust and responsive reports.[204] Additionally, many communities, particularly Māori, harbour distrust towards Crown

199 Pratt, above n 161, at 356–359.

200 Hall, above n 18, at [I.3.7].

201 Gabrielle Maxwell "The Defining Features of a Restorative Justice Approach to Conflict" in Gabrielle Maxwell and James H Liu (eds) *Restorative Justice and Practices in New Zealand: Towards a Restorative Society* (Institute of Policy Studies, Wellington, 2007) 3 at 21.

202 Tauri and Webb, above n 160, at 7–8.

203 Leigh-Marama McLachlan "Pre-sentencing reports for offenders criticised by judges and lawyers" (29 April 2019) Radio New Zealand <www.rnz.co.nz>.

204 Oakley, above n 15, at 101–103.

agencies. This distrust can see the offender and their whānau withhold essential personal information from PAC report writers. Independent third parties can more effectively build trust with an offender and their whānau and encourage them to share their stories.[205] Greater resourcing, guidance and community engagement in the report writing process can go a long way to achieve this outcome.[206] Secondly, the growth of cultural dialogues in the court process can facilitate greater judicial understanding.[207] The legal community as a whole has a limited understanding of the complexities that underpin offending. This cultural limitation is reflective of the wider issue of monoculturalism throughout the legal system.[208] Section 27 cultural reports therefore hold the potential to break this monoculturalism by encouraging legal discourse on the persistence of structural traumas.

However, these potential benefits must not be overstated. There is growing dissatisfaction at the consistent failures of state approaches to meet Māori cultural needs, whether through executive policy or judicial practice.[209] A key source of this dissatisfaction is the inability of the criminal system to address its monocultural myopia. Systemic racism, lack of resourcing and preference for the status quo are the primary inhibitors to change.[210] One could argue, therefore, that the Canadian approach has value as the only meaningful way to ever produce change within the system. Another argument is that genuine structural change for Māori within the western system is impossible. Further, it is only through recognition of Māori rangatiratanga to implement tikanga-based responses to offending that will ever mitigate systemic racism against Māori.[211]

Nevertheless, s 27 does hold the potential for genuine change. The increasing use of cultural reporting and the resulting impacts on sentencing outcomes are fostering academic and judicial dialogue. It is within this dialogue that effective policy may arise. However, one must accept that s 27 cultural reports are not a "magic bullet" to Māori over-representation in the criminal justice system.

VIII Conclusion

This article demonstrates three critical limitations of s 27 cultural reports and discounts in sentencing. First, judges must adopt a cohesive causation standard to ensure consistent and predictable outcomes. We can achieve this by embracing a simple yet effective, "but for" test of causation to accurately determine where background trauma influences offending. Secondly, the potential of s 27 cultural reporting is only realised where the sentencing regime moves away from defaulting to punitive options and towards encouraging rehabilitative responses to crime. Thirdly, s 27 reports hold significant potential to facilitate better outcomes for Māori in the criminal process, but only if structural change takes place.

On its own, s 27 cannot affect any progress in New Zealand's justice system. The legal community must accept that sentencing is an "ambulance at the bottom the cliff"

205 At 82–84.
206 At 105–106.
207 At 102.
208 At 102.
209 Tauri and Webb, above n 160, at 7.
210 At 10.
211 Moana Jackson "Justice and political power: Reasserting Maori legal processes" in Kayleen M Hazlehurst (ed) *Legal Pluralism and the Colonial Legacy: Indigenous experiences of justice in Canada, Australia, and New Zealand* (Avebury, Aldershot, 1995) 243.

approach to any real change in criminal justice. This limitation is particularly acute in the context of the Māori experience of the criminal justice system. However, s 27 cultural reports and discounts offer the hope that critical engagement with the link between systemic deprivation and crime can motivate wider judicial and ultimately political transformation.