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R v ZHANG AND SENTENCING'S PSYCHOLOGICAL INDIVIDUALISM

Advocating for greater focus in sentencing on the individual's capacity for rational choice

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Abstract

In the New Zealand criminal justice system, including the sentencing process, all individuals are assumed to have an uninhibited capacity for rational choice at the time of their offending. This assumption reflects psychological individualism which is at odds with the reality of criminality. Some individuals, as a result of their personal circumstances, have a diminished capacity for rational choice at the time of their offending. This disconnection between the courts' evaluation of choice and reality has contributed to severe problems in New Zealand's criminal justice system. To address the problematic nature of psychological individualism in sentencing, this paper proposes amendments to ss 7, 8, 9, 26 and 27 of the Sentencing Act 2002 to require future courts to evaluate the individual's capacity for choice, potentially affecting their final sentence. The approach taken by the Court of Appeal in the guideline judgment of R v Zhang *offers an important challenge to sentencing's psychological individualism and helps to inform the contents of these amendments. However, due to* Zhang's *limitations as a guideline judgment, legislative reform is the most effective mechanism to challenge sentencing's psychological individualism and create effective change in New Zealand's criminal justice system.*

Key words: 'psychological individualism', 'sentencing', 'rational choice', '*R v Zhang*', 'Sentencing Act 2002'

Contents

I Introduction

On 21st October 2019, the Court of Appeal released the guideline decision of *R v Zhang* (*Zhang*).[1] Although the focus of this guideline judgment was on methamphetamine offending sentencing, obiter comments made by the Court challenged the criminal justice system's fundamental assumption of rational choice on part of the individual subject to the sentence.[2] Such an approach, if consistently observed, can transform how judges sentence individuals. This paper proposes that the substance of this approach should be codified in the Sentencing Act 2002, by enacting a new principle of sentencing and a new mitigating factor and reforming ss 7, 26 and 27.

The system of criminal justice and the process of sentencing operates on the assumption that the individual subject to the sentence has a complete and rational capacity for choice at the time of their offending. Such an assumption, using the terminology of Alan Norrie, is the criminal justice system's 'psychological individualism'.[3] This paper will explore the origins of this psychological individualism and how it manifests in both the common law and in statute, namely through the sentencing purposes. However, this paper will also affirm that Parliament has left ajar a door for the judiciary to challenge sentencing's psychological individualism. This challenge is necessary as, alongside other factors, psychological individualism's assumption on part of the individual's capacity for choice has contributed to mass imprisonment, high rates of recidivism and the overrepresentation of Maori in the criminal justice system.

Psychological individualism's causative link to the issues mentioned above arises from the fact that its assumptions are inherently flawed and ignore the reality of criminality. This paper examines the flawed nature of these assumptions and the approach taken by members of the judiciary in applying it, thus resulting in these flaws in New Zealand's criminal justice system.

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[1] *Zhang v R* [2019] NZCA 507.

[2] This paper favours to use the phrasing 'the individual subject to the sentence', or simply 'the individual', over the phrases 'offender' or 'criminal'. These phrases are also a feature of the criminal justice system's psychological individualism. Such phrases colour the individual subject to the sentence in their criminality, ignoring their humanity and individual circumstances. This alternative phrasing is an attempt at acknowledging that these individuals are just that - people, with diverse experiences that brought them in front of the court.

[3] Alan Norrie *Crime, Reason and History: A Critical Introduction to Criminal Law* (3rd ed, Cambridge University Press, 2014).

The Court of Appeal in *Zhang* took the opportunity made available by the legislature and challenged psychological individualism in sentencing in three ways. Firstly, by affirming that an individual's personal circumstances are a relevant consideration to all offending. Secondly, acknowledging that these circumstances can impair the rational choice, and thus the moral culpability, of the individual. Thirdly, by articulating that, as the choice to offend can be impaired, deterrence as a purpose of sentencing becomes less relevant. However, this paper proposes that *Zhang*, as a guideline judgment, has its limitations in creating effective and consistent changes in sentencing practice. Accordingly, it cannot effectively challenge psychological individualism and positively impact the problems facing the criminal justice system.

Instead, a reformation of the Sentencing Act is the most effective mechanism to change the position and evaluation of choice in sentencing. In accordance with the approach taken in *Zhang*, this paper proposes that a hierarchy of sentencing purposes should be established in s 7, and that deterrence should be placed at the bottom of this hierarchy. Furthermore, ss 8 and 9 should be amended to introduce a new sentencing principle and mitigating factor that each require the court to evaluate the individual's diminished capacity of rational choice at the time of offending. Sections 26 and 27, too, would be amended to allow for the provision of the information necessary for this evaluation. Although there is no silver bullet, such amendments would push open the door left ajar by Parliament to effectively tackle sentencing's psychological individualism and create effective change to Aotearoa's criminal justice system.

II The Psychological Individualism of the Criminal Justice System

A The History of Psychological Individualism

To understand the criminal justice system and its position on offenders' capacity of choice, it is crucial to look to the origins of Western criminal law. Initially, the criminal justice system was a system of punishment.[4] This punishment was exercised by the state or Crown to regulate and

[4] At 20.

preserve social, political and religious stability.[5] The prime example of this approach to punishment is the 18th century English 'Bloody Code'.[6] The 18th century can be categorised as a period of mass population growth and immigration, political upheaval and economic instability.[7] These changes accompanied a "heightened perception of criminality", particularly by England's higher classes.[8] In an effort to quash these fears and regain a sense of stability, the British Parliament passed the Waltham 'Black Act' in 1723.[9] This Act created 50 offences that were punishable by death. By 1800, this number of capital offences had risen to over 200.[10] These offences reflected the feudalist nature of eighteenth-century England and were oriented around the protection of property and proprietary rights.[11] Although individuals were granted a trial under the code, the focus of this trial was determining whether the individual had committed the relevant punishable act - their mental state was irrelevant.[12] To avoid punishment, an individual had to be pardoned by a royal prerogative, at the order of the judge, or by members of the elite classes.[13] It was this "indiscriminate application" of the capital code that categorises this era as bloody.[14]

However, this system underwent gradual and major reform to resemble the modern criminal justice system. Such reform can be attributed to a wide range of factors; the academic works of Francisco de Vitoria and other theologians which emphasised the importance of human rights and individual freedoms,[15] the shift from feudalism to capitalism in European societies in the

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[5] Ian Marsh and others "The History of Crime and Justice" in Ian Marsh and others *Crime and Criminal Justice* (Routledge, London, 2011) 288 at 291.
[6] At 294.
[7] At 295.
[8] At 295.
[9] At 295.
[10] At 297.
[11] At 296.
[12] Alan Norrie, above n 3, at 20.
[13] At 20.
[14] John Walliss *The Bloody Code in England Wales, 1760 - 1830* (1st ed, Palgrave Macmillan, 2018) at 51.
[15] Alejo José G. Sison and Dulce M. Redín "Francisco de Vitoria on the Right to Free Trade and Justice" (2021) 31(3) Business Ethics Quarterly 1 at 2. Vitoria emphasised that all human beings are made in the "image and likeness of God" and thus belong to the "family of peoples". Accordingly, all humans are rational beings and are entitled to the rights to ownership, communication, travel and trade. Such rights stem from a natural law, rather than deriving from a particular state.

17th and 18th centuries,[16] the intellectual, philosophical and scientific 'Age of Enlightenment' in the same period,[17] and the 'Age of Revolution'.[18] At the heart of each of these catalysts was an acknowledgment that emphasis needed to be placed on the individual person - be it in religious, economic, political or legal discourses.[19]

Thus, when the criminal law underwent reform in the late 18th century, the individual was at the forefront of penal reformers' minds. Doctrines of legal culpability under the 'Bloody Code' that were intended to criminalise lower classes as a collective "were replaced by ones that [located] primary responsibility in individuals."[20] This responsibility no longer stemmed purely from the actions of the individual - whether they committed the punishable offence - and instead required that they also had the requisite mental state.[21] However, this 'individual' that was in the minds of reformers when the modern criminal justice system was under development was conceptualised in a particular manner. He or she was assumed to be a rational actor, one who is able to calculate what is in their own best interests by weighing up the costs and benefits of their actions.[22] Furthermore, these actions were presumed to be the result of the actor's own thoughts and choices, with no connection to their social context.[23] It is this construct of 'the juridical man', as phrased by Norrie, that pervaded criminal justice reform.[24]

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[16] Craig Haney "Criminal Justice and the Nineteenth-Century Paradigm; The Triumph of Psychological Individualism in the 'Formative Era'" (1982) 6 Law and Human Behaviour 191 at 193. Haney notes how, under feudalism, a person's status was defined by their place in the hierarchy of social status. Property, and thus power and wealth, stemmed from a collective - your family. As feudalism began to be removed from the law, a person's status came to depend upon their "personal efficiency and capability in a capitalist economy".

[17] Alan Norrie, above n 3, at 21. Norrie provides an overview of the liberal Enlightenment, specifically highlighting a key conception of the period - "that the social world was founded on individual self-interest and right."

[18] Craig Haney, above n 16, at 196. The Age of Revolution, specifically the American and French Revolutions, can be categorised by a change from monarchies and colonial powers to elected governments and written constitutions that reflect the will and needs of the people.

[19] Ian Watt *The Rise of the Novel* (1st ed, University of California Press, 1956) at 61.

[20] Craig Haney, above n 16, at 194.

[21] Alan Norrie, above n 3, at 23.

[22] At 25.

[23] Steven Lukes *Individualism* (1st ed, Harper & Row, 1973) at 73.

[24] Alan Norrie, above n 3, at 26. This paper will also use the phrases 'the culpable individual' or 'the responsible individual' as synonyms for 'the juridical man' construct.

Accordingly, at the heart of our modern criminal justice system is the concept of the 'responsible individual'.[25] The criminal law assumes that the individuals that pass through the system align with this concept. This assumption is what Norrie describes as the criminal justice system's 'psychological individualism'.[26] This psychological individualism is present in all aspects of the criminal justice system; in the liability stage, particularly in the evaluation of mens rea,[27] in numerous defences and, most importantly for this paper, in sentencing. Its presence is specifically present in the development of various goals, or purposes of sentencing which, in turn, manifest in the approach taken by sentencing judges. The following paragraphs will illustrate how psychological individualism has consistently been present in sentencing practices in New Zealand.

B Psychological Individualism's Presence in Sentencing

In the late 19th and early 20th century, legislators "handed over the reins" of the responsibility of creating sentencing policy to the judiciary.[28] However, sentencing was not solely at the mercy of judicial discretion. This discretion was constrained by a variety of mechanisms - prior precedent, tariffs and penalties set by guideline judgments,[29] and maximum penalties prescribed by Parliament.[30] One such constraint was the purposes of sentencing. These purposes began to emerge in the late-18th century reforms to the criminal justice system.[31] It is these purposes of punishment that create the psychological individualism background to sentencing practices. Norrie indicates that there are four core purposes or goals of sentencing - deterrence, rehabilitation, retributivism and incapacitation.[32] However, two of these goals - retributivism and deterrence - are particularly relevant when investigating the assumption of rationality of choice on part of the individual subject to the sentence.

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[25] At 36.
[26] At 35.
[27] Glanville Williams *Textbook of Criminal Law* (2nd ed, Stevens, 1983) at 71.
[28] Saul Holt "Appellate Sentencing Guidance in New Zealand" (2005) 3 NZPGLEJ 2 at 3.
[29] At 6.
[30] Law Commission *Sentencing Guidelines and Parole Reform* (NZLC R94, 2009) at 17.
[31] Alan Norrie, above n 3, at 335.
[32] At 335.

Retributivism justifies sentencing, and therefore punishing, individuals purely on the basis of 'doing justice' to that individual.[33] The retributive rationale for punishment says "this individual chose to commit this crime, and thus should be punished for that decision, regardless of any positive (or negative) effect that results from that punishment". Due to this rationale, an individual only deserves punishment because they rationally choose to offend. However, instead of evaluating whether an individual has chosen to commit the offence, the criminal law assumes that this is the case for all individuals subject to a sentence.[34] Such an assumption is the law's psychological individualism at work - the reality of the individual is ignored, and their rationality and freedom of choice are assumed.

Deterrence justifies sentencing on the basis that, through the punishment of particular behaviour, the criminal justice system is deterring the individual or others from doing that behaviour.[35] The former is termed individual deterrence, whilst the latter is general deterrence.[36] Again, this rationale for sentencing is founded upon the criminal law's conception of the responsible individual. Individuals that offend are rational beings and weigh up the perceived costs and benefits of their actions.[37] Accordingly, if there is a potential that their behaviour may result in a criminal sentence - either because they themselves have experienced this punishment before, or they have seen others receive such a sentence - they will be deterred from committing that criminal act.[38] Per deterrence theory, the costs of offending, due to this perceived punishment, would outweigh any benefits, and the individual would rationally choose not to offend.

At the beginning of the 21st century, New Zealand underwent a comprehensive sentencing reform. This reform was the result of, and a response to, a government review of sentencing policy and growing public discourse surrounding such policy and its apparent ineffectiveness to

[33] Andrew Ashworth and Rory Kelly *Sentencing and Criminal Justice* (7th ed, Hart Publishing, 2021) at 11.
[34] Alan Norrie, above n 3, at 347.
[35] At 337.
[36] Andrew Ashworth and Rory Kelly, above n 33, at 68.
[37] Russil Durrant *An Introduction to Criminal Psychology* (2nd ed, Routledge, 2018) at 37.
[38] At 373.

combat crime rates.[39] Such discourse came to a head in the 1999 criminal justice referendum.[40] One of the resulting pieces of legislation was the Sentencing Act 2002. The Act, alongside other reform, codified the above purposes of sentencing for the first time,[41] thereby affirming psychological individualism's place in sentencing.

These purposes "for which a court may sentence or otherwise deal with an offender" are found in s 7 of the Act.[42] Retributivism largely embodies the fifth purpose listed in s 7 - "to denounce the conduct in which the offender was involved".[43] Section 7(1)(a) reflects the retributive rationale detailed above - choosing to offend is socially repugnant behaviour, accordingly, both this behaviour and the choice to commit it must be denounced by punishing the individual subject to the sentence. Both general and individual deterrence is explicitly referred to in the Act - "to deter the offender or other persons from committing the same or a similar offence".[44] These purposes provide "the theoretical backdrop to the sentence of the court",[45] thus making psychological individualism the backdrop to sentencing practices.

Psychological individualism also manifests in sentencing by way of s 9's aggravating and mitigating factors. Section 9 of the Act provides a non-exhaustive list of factors that the court must take into account "in sentencing or (when) otherwise dealing with an offender".[46] These factors, as the name implies, have an aggravating or mitigating effect on the individual's final sentence. The listed aggravating factors are largely offence focused, thereby ignoring the individual behind the criminal behaviour. Such factors include whether "the offence involved actual or threatened violence",[47] or if "the offence involved unlawful entry into a dwelling

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[39] Julian Roberts "Sentencing Reform in New Zealand: An Analysis of the Sentencing Act 2002" (2003) 36(3) The Australian and New Zealand Journal of Criminology 249 at 250.
[40] At 251.
[41] Warren Young and Andrea King "Addressing Problematic Sentencing Factors in the Development of Guidelines" in Julian Roberts *Mitigation and Aggravation at Sentencing* (Cambridge University Press, Cambridge, 2011) 208 at 210.
[42] Sentencing Act 2002, s 7(1).
[43] Section 7 (1)(a).
[44] Section 7(1)(f).
[45] Alan Norrie, above n 3, at 335.
[46] Sentencing Act 2002, ss 9(1) and 9(2).
[47] Section 9(1)(a).

place".[48] These factors are underpinned by an assumption that the individual rationally chose to commit the actions that constitute the offence, and thus deserves a more severe punishment. This assumption could perhaps be justified if the mitigating factors were oriented towards informing the court of the individual's personal circumstances. However, most of these factors are catered towards incentivising behaviour that assists in creating more efficient criminal proceedings. For example, an individual subject to a sentence may have their final sentence reduced if they provided a guilty plea,[49] or took steps during their proceedings to shorten the proceedings or reduce the costs.[50] The only way to remove psychological individualism's embedded presence throughout the Sentencing Act is to reform the Act itself, namely the key sections in which psychological individualism manifests.

Although the legislature did affirm sentencing's psychological individualism by the enactment of the Sentencing Act, it also left ajar a door to challenge it. This challenge is namely enabled by s 27, and other related sections, that allow judges to reflect on the individual subject to the sentence's personal, family, whanau, community and cultural background.[51] The Act's sentencing principles require courts to take into account this background,[52] in conjunction with "any particular circumstances of the offender that mean a sentence […] would otherwise be […] disproportionately severe".[53] Section 27, much like its predecessor s 16 of the Criminal Justice Act 1985, was included in sentencing legislation to assist in the reduction of sentenced and incarcerated Maori.[54] The need for such a section spurred from the overrepresentation of Maori in New Zealand's penal system which was noted in 1985 by the Justice Department to be "ten times that of the general population".[55] Parliament reaffirmed and expanded on s 16 by way of s

[48] Section 9(1)(b).
[49] Section 9(2)(b). The Court in *Moses v R* [2020] NZCA 296 at [17] noted that a key justification of this mitigating factor is the fact that it results in "cost savings for the State and reduced trial backlogs".
[50] Section 9(2)(fa).
[51] Section 27(1)(a).
[52] Section 8(i).
[53] Section 8(h).
[54] Matthew Palmer "Foreword" in Alison Chetwin and others *Speaking about cultural background at sentencing: Section 16 of the Criminal Justice Act 1985* (Ministry of Justice, November 2000) at iii.
[55] *Wells v Police* [1987] 2 NZLR 560 at 569.

27 for two key reasons: s 16 was underutilised,[56] and the issue of the overrepresentation of Maori in the prison system persisted.[57]

By requiring the Courts to reflect on the individual's cultural background, the legislature acknowledged that certain circumstances, backgrounds or experiences create hardships or deny opportunities in a manner that is not experienced by other individuals.[58] In other words, Parliament is allowing judges to challenge sentencing's psychological individualism by acknowledging that circumstances can restrict an individual's capacity for rational choice. Furthermore, Parliament did not restrict this challenge by requiring courts to find a causative link between personal circumstances and the relevant offending. Instead, the legislature detailed that the courts must reflect on "the way in which [the] background *may have related to* the commission of the offence" (emphasis added).[59] Accordingly, courts have the freedom to evaluate an individual's circumstances and their - potentially restricted - capacity for choice, without the burden of finding a causative link.

However, despite this opened door, New Zealand's criminal justice system has still been fraught with issues that are connected to sentencing's psychological individualism. Firstly, Aotearoa's rate of imprisonment is the second-highest amongst countries in the Organisation for Economic Co-operation and Development (OECD).[60] However, this statistic is not a reflection of the second-highest crime rate in the OECD, but harsh sentencing practices.[61] Secondly, as acknowledged above, this "mass incarceration… is Maori incarceration".[62] Maori currently constitute over 50% of the prison population - specifically 50.4% of sentenced males and 56.9%

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[56] Alison Chetwin and others *Speaking about cultural background at sentencing: Section 16 of the Criminal Justice Act 1985* (Ministry of Justice, November 2000) at 138.

[57] Department of Corrections "Census of Prison Inmates 1999" Past Census of Prison Inmates and Home Detainees <https://www.corrections.govt.nz/__data/assets/pdf_file/0017/10664/snapshotdata.pdf>. In 1999, New Zealand's female prison population was 58.5% Maori, whilst the male prison population was 51.4% Maori.

[58] Julian Roberts, above n 39, at 260.

[59] Sentencing Act 2002, s 27(1)(b).

[60] John Pratt "The Dark Side of Paradise: Explaining New Zealand's History of High Imprisonment" (2006) 46 British Journal of Criminology 541 at 542.

[61] At 546. An example of such practices will be detailed in the upcoming chapter of this paper.

[62] Tracey McIntosh and Kim Workman "Maori and Prison" in Ante Deckert and Rick Sarre *The Palgrave Handbook of Australian and New Zealand Criminology* (Palgrave Macmillan, London, 2017) at 727.

of sentenced females - despite only making up approximately 15% of the national population.[63] Such a statistic indicates that the current approach to sentencing - one that ignores the personal circumstances of the individual as a result of the law's psychological individualism - disproportionately disadvantages Maori. Thirdly, those imprisoned in Aotearoa continue to return to the criminal justice system. As at June 2016, 41.3% of released Maori prisoners and 30.5% of released non-Maori prisoners were reimprisoned two years after their release.[64] This statistic indicates that our penal system, and the mechanism that introduces individuals into that system - sentencing - is flawed. Accordingly, the door left ajar by Parliament must be swung open - legislative change is required to change sentencing practice to effectively deal with these issues and the problematic presence of psychological individualism in sentencing.[65]

III The Problem with Sentencing's Psychological Individualism

The fundamental issue with the criminal law's psychological individualism is that the juridical man is an abstraction from real people. This abstraction is what Norrie refers to as the "conflict around the law's psychological individualism."[66] Although rationality and the ability to calculate the repercussions of our actions is an aspect of the human experience, a trait that we see as setting us apart from other animals, it is only one side of the human experience. The other side - which is multi-faceted and immensely different for each individual - is that this ability to reason and calculate is constrained and influenced by our social circumstances. The law's psychological individualism obscures this vital side to human actions, by maintaining a legal concept that largely disregards the influence that circumstances can have on our ability to exercise rational choice.[67]

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[63] Waitangi Tribunal *Tū Mai te Rangi: Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 11.
[64] At 11.
[65] It is crucial to note that these issues do not solely arise from the presence of psychological individualism in sentencing. Instead, the causes of these problems are complex and multifaceted. One such contribution is psychological individualism's presence in other aspects of the criminal justice system, specifically at the liability stage. To effectively address these issues, and thus remove psychological individualism from the system entirely, widespread reform is required. However, propositions for such reform are outside the ambit of this paper.
[66] Alan Norrie, above n 3, at 335.
[67] At 29.

This concept is incredibly problematic in a system that is intended to deal with and punish crime. Crime is an innately social problem.[68] A plethora of social issues and circumstances have been demonstrated to have a direct link with a heightened chance of criminality; cultural deprivation,[69] having an imprisoned parent,[70] growing up in poverty,[71] and so on. It is not that these experiences make an individual 'criminal'. Rather, these circumstances significantly reduce the range of options or choices that an individual has available to them, in contrast to those experiencing different circumstances.[72] Certain individuals have a diminished capacity for rational choice than others and, at times, this diminished capacity can result in criminality. As Williams J stated, "... agency does not come in a single, invariable quantum. It can be unfettered, or highly fettered".[73]

As detailed prior, the criminal justice system punishes individuals on the basis of retributivism and deterrence, amongst other sentencing purposes. However, these justifications for punishment become less significant when the idea of the 'rational individual' is replaced by the true manner in which offending occurs. If an individual's capacity for choice in relation to their criminal behaviour is fettered as a result of their circumstances, their moral culpability for that offending, too, becomes diminished.[74] Accordingly, retributivism's rhetoric that an individual should be punished for their offending because 'they chose to do it' loses some of its grounding. The individual cannot be truly said to completely 'choose' to offend if their capacity for choice was diminished. "Culpability can only flow from voluntary conduct".[75] Furthermore, deterrence appears largely redundant in circumstances where choice is fettered. Not all individuals are, in fact, undertaking a cost-benefit analysis to determine whether they offend. A harsher sentence - either that the individual has experienced before or has observed being delegated to others - will

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[68] At 26.
[69] Tracey McIntosh and Kim Workman, above n 62, at 732.
[70] Waitangi Tribunal, above n 63, at 14.
[71] Kim Workman and Tracey McIntosh "Crime, Imprisonment and Poverty" in Max Rashbrooke *Inequality: A New Zealand Crisis* (Bridget Williams Books, Wellington, 2013) at 123.
[72] The Honourable Justice Joe Williams, Supreme Court Judge "Build a Bridge and Get Over It: The Role of Colonial Dispossession in Contemporary Indigenous Offending and What We Should Do About It" (Robin Cooke Lecture 2019, Victoria University Law School, Wellington, 4 December 2019).
[73] Justice Williams, above n 72.
[74] Justice Williams, above n 72.
[75] Justice Williams, above n 72.

not have a deterrent effect. Doob and Webster affirmed this position in a comprehensive review of the general deterrent effects of severe punishment - we have to "accept the null hypothesis: severity of sentences does not affect crime levels".[76] However, despite its flaws and ultimate disconnect from the reality of criminality, psychological individualism still remains in Aotearoa's criminal justice system.

This psychological individualism has manifested in a particular approach taken to sentencing. Such an approach ignores these social realities of criminality and the door left open by Parliament to address them, instead favouring the abstraction that psychological individualism proposes.[77] An example of this approach is that of Downs J in *R v Carr* (*Carr*).[78]

Carr concerned the sentencing of a Mr Carr and a Mr Anderson for a range of offences, including aggravated robbery, aggravated assault and the unlawful taking of a car.[79] After outlining the facts, general and personal aggravating factors and the respective starting points, Downs J turned to the mitigating factors relevant to each individual. Interestingly, this section is entitled 'Mitigating factors?'.[80] The question mark was likely included on the basis that Downs J ultimately decided that neither Carr nor Anderson were entitled to discounts to their final sentence for the presence of mitigating factors. This conclusion is reached despite the presentation of both pre-sentence reports and cultural reports for each individual. Such reports demonstrated difficult upbringings with instances of sexual abuse and violence, involvement with youth gangs and problems with methamphetamine.[81]

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[76] Anthony Doob & Cheryl Webster "Sentence severity and crime: Accepting the null hypothesis" (2003) 30 Crime and Justice: A Review of Research 143 at 191.

[77] In contrast, other members of the judiciary have taken the opportunity made available by the legislature to acknowledge the impact personal circumstances can have on offending. One such example is the approach taken by Whata J in *Solicitor-General v Heta* [2018] NZHC 2453. In *Heta*, Whata J affirmed that Ms Heta was entitled to a 30 per cent discount to her sentence for matters provided by her s 27 reports, including cultural deprivation. Instead of dismissing the connection between these personal circumstances and Ms Heta's offending, Whata J stated, at [66], "... critically in this case recognition of deprivation and personal trauma does not involve condoning the offending. Rather it helps to explain it." Such an approach also affirms that these personal circumstances do not have to have a causal link to the offending to still be relevant to the sentencing proceedings. Instead, these circumstances help to provide the judge with greater insight into the case at hand and determine the most appropriate final sentence.

[78] *R v Carr* [2019] NZHC 2335.

[79] At [2].

[80] At [47].

[81] At [57] - [58].

However, Downs J did not find any relevant mitigating factors. There were three reasons for doing so - that "correlation and causation are not synonymous", that many disadvantaged individuals do not offend and to avoid "undermining the criminal law's precepts of human agency and choice."[82] These assertions to ignore the personal circumstances of Mr Carr and Mr Anderson indicate either an express or implied presence of psychological individualism. The requirement for the high threshold of causation fails to acknowledge that circumstances can correlate to offending, and thus reduce culpability, by way of diminishing an individual's capacity of choice. Furthermore, the requirement for a causative link is directly at odds with Parliament's intention conveyed in s 27 – that judges should evaluate how these personal circumstances "may have related to the commission of the offence".[83] Rather than confronting this reality, Downs J favours to ignore the door left ajar by the legislature and uphold the criminal law's precept of choice or, in other words, its psychological individualism.[84]

As affirmed above, the deployment of such an approach to sentencing has a direct correlation to the severe problems currently facing New Zealand's criminal justice system. For example, certain experiences, such as systemic deprivation, have a disproportionate impact on Maori in New Zealand.[85] If a court chooses to ignore these personal experiences and the impact that they can have on offending, as was the case in *Carr*, Maori are going to be disproportionately affected. A psychological individualism-based sentencing approach, thus, is one of the primary contributors to the issues facing Aotearoa's criminal justice system. Accordingly, a different approach must be taken to sentencing. Such an approach is that taken by the Court of Appeal in *Zhang*.

IV R v Zhang*'s Challenge to Sentencing's Psychological Individualism*

[82] At [61].
[83] Sentencing Act 2002, s 27(1)(b).
[84] Although this point uses Downs J in *R v Carr* as an example of an approach to sentencing that maintains the presence of psychological individualism, *Carr* is not an outlier. As stated above, *Carr* is merely one in numerous cases in which such an approach is deployed. Other cases involve *Keil v R* [2017] NZCA 563 and *Zhang's* predecessor *R v Fatu* [2006] 2 NZLR 72.
[85] *Solicitor-General v Heta*, above n 77, at [40].

In late-2018, the Court of Appeal indicated its intention to reconsider *R v Fatu*, the guideline judgment that detailed sentencing for methamphetamine-related offences.[86] The Court affirmed in *Zhang* that a new sentencing approach must be taken towards methamphetamine-related offending.[87] In accordance with the three-stage sentencing approach,[88] the Court engaged in two stages of analysis. The first stage retains *Fatu*'s bands of sentencing 'starting points' in regards to methamphetamine offending, with modifications.[89] Through an objective evaluation, the individual will be placed in one of five bands of sentence length that correlate to the quantity of methamphetamine and the role that individual played in the relevant offending.[90] The second stage of analysis involves a subjective evaluation of the personal circumstances of the individual subject to the sentence, which could, on the balance, have an aggravating or mitigating effect on the objective starting point determined in stage one.[91] It is this second stage of analysis in *Zhang* that is the key concern of this paper. Although the first stage is largely restricted to methamphetamine sentencing, the second stage has the potential to inform and reform general sentencing practices.[92]

A The Challenges

There are three ways in which the approach taken in the second stage of analysis in *Zhang* challenges the criminal justice system's psychological individualism. However, before elaborating on these challenges, it is important to note that *Zhang* was not the first case to employ a sentencing approach in which the capacity of choice of the individual subject to the sentence is evaluated. Such an approach was illustrated in *Heta*,[93] as discussed above, and *R v Rakuraku*,[94] amongst other judgments. Accordingly, *Zhang* can be viewed as the prime example of a growing trend in sentencing practice to take the opportunity made available by the

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[86] Tania Singh "*Zhang v R* [2019] NZCA 507: A Brave New World?" (2019) NZLJ 404 at 404.
[87] *R v Zhang*, above n 1, at [118].
[88] *R v Taueki* [2005] 3 NZLR 372 (CA) at [8], [28] and [42] - [44].
[89] *R v Zhang*, above n 1, at [118].
[90] At [125].
[91] At [130].
[92] Tania Singh, above n 86, at 405.
[93] *Solicitor-General v Heta*, above n 77.
[94] *R v Rakuraku* [2014] NZHC 3270.

legislature to evaluate the individual's personal circumstances and how these circumstances could have diminished the individual's capacity for choice.

The Court affirmed that personal mitigating factors are relevant to all types of offending. In prior decisions, the courts have suggested that as a particular kind or instance of offending is so serious, such as that related to methamphetamine, "less weight should be given to personal circumstances at the second stage of the sentencing process."[95] Other cases, such as that of *Carr*, take this suggestion one step further and argue that personal circumstances "may have little application, if any" to grave offending.[96] Such suggestions are the criminal law's psychological individualism at play - the individual subject to the sentence, by way of the intervention of the law, is isolated from the real world and their personal circumstances to be deemed a culpable, responsible individual.[97] The Court of Appeal in *Zhang* expressed concern with such an approach and acknowledged that "considerable caution must be exercised" in the dismissal of the relevance of the individual's personal circumstances.[98] In contrast to the *Carr*-like approach to sentencing, the Court affirmed that personal mitigating circumstances were applicable not only to "all instances of Class A drug offending" but all other offending.[99] Through the deployment of such an approach to personal circumstances, the juridical man will be placed back into his reality.

The Court acknowledged that these personal circumstances "can impair the rational choice made to offend, and thereby diminish (the) moral culpability" of the individual subject to the sentence.[100] As stated above, psychological individualism presumes that all offending occurs through rational choice. *Zhang*, with the assistance of the Sentencing Act itself, displaces that presumption. The realities of criminality and human actions are affirmed - certain circumstances can diminish the capacity for rational choice made to offend. As their capacity for choice is impaired, the individual subject to the sentence is less morally culpable for their offending.

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[95] *R v Zhang*, above n 1, at [130].
[96] *R v Carr*, above n 78, at [60].
[97] Alan Norrie, above n 3, at 36.
[98] *R v Zhang*, above n 1, at [135].
[99] At [136].
[100] At [138].

Accordingly, their sentence should be reduced to reflect this reduction in their culpability. In addition, the Court provided insight as to how these circumstances, and their effect on the individual's capacity for choice, can be evaluated. This insight was provided through the analysis of four mitigating considerations that were deemed to be particularly relevant to methamphetamine offending - addiction, mental health, duress or undue influence, and social, cultural or economic deprivation.[101] These considerations were brought to the court's attention by way of s 27, thus indicating the current legislation's part in challenging psychological individualism. The evaluation of these considerations resulted in the reduction of the sentences of four out of the six total individual appeals.[102] This application demonstrates how the consideration of a restricted capacity of choice of the individual subject to the sentence, and the dismissal of psychological individualism, can have a direct and positive effect on the issue of mass imprisonment in Aotearoa. Furthermore, by contextualising the approach in the context of these considerations, without setting an exhaustive list of choice-restricting circumstances, the Court is ensuring that psychological individualism can continue to be challenged in future sentences.

The Court articulated that, as choice can be impinged by these circumstances, deterrence as a justification for sentencing becomes less relevant. In previous judgments, specifically *Zhang*'s predecessor *Fatu*, the Court had sentenced harshly on the assumption "that lengthy prison sentences are an effective deterrent both for the individual offender and others who might be like-minded."[103] *Zhang* acknowledged that such an assumption is flawed. The Court acknowledged that "diminished opportunity to make a rational choice also diminishes the deterrent of sentencing, both general and specific."[104] As individuals subject to the sentence may have a diminished capacity for choice, they likely are not engaging in a cost-benefit analysis, and

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[101] At [137]. By including systemic deprivation as relevant mitigating consideration, *Zhang* is reaffirming Whata J's discussion in *Heta* - that systemic deprivation can have a causative link to offending, and thus impacts the individual's moral culpability. This affirmation is of great importance as it indicates how acknowledgment of personal circumstances can have a productive effect on issues facing New Zealand's criminal justice system, including the overrepresentation of Maori.

[102] At [201] - [202], [228], [245] and [309] - [310].

[103] At [23].

[104] At [138].

thus are not dissuaded from offending on the basis that they may be harshly punished. Accordingly, deterrence is not effective at preventing or reducing criminal behaviour and thus should not have a strong influence over a final sentence in these circumstances. As affirmed above, deterrence is one of the key purposes of sentencing and one of the primary mechanisms through which psychological individualism influences judicial discretion and sentencing practices. By dampening the effect deterrence has on sentences in which the individual's capacity of choice is diminished, *Zhang*, too, is restricting psychological individualism's place in sentencing.[105]

B *Z*hang's *Limitations*

Although *Zhang* did directly challenge sentencing's psychological individualism, it does not have the potential to create long-lasting and effective reform to general sentencing practices. This restriction to *Zhang*'s effectiveness is a result of it being a guideline judgment.

Guideline judgments offer authoritative guidance to lower court's sentencing practices for particular types of offences.[106] This guidance is usually through the provision of sentencing "bands", as seen in *Zhang*, which relates to the offence or offences in question, and any other objective aggravating factors. Each individual subject to a sentence can be placed into one of these bands to determine a starting point for their sentence, which is then personalised to suit the mitigating factors and aggravating factors relevant to that individual.[107] Accordingly, these instructions or bands will be non-fact specific and, thus, can be applied generally by sentencing judges.[108]

As stated above, the guidance provided by guideline judgments tends to be confined to particular kinds of offending. *Zhang* is a guideline judgment for methamphetamine-related offending.

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[105] However, it is important to note that *Zhang* does not advocate for the complete dismissal of deterrence as a purpose of sentencing. Instead, the Court affirms that the limitation of deterrence's effectiveness, given the impaired capacity of choice, must be acknowledged and other sentencing purposes should be closely analysed, at [58] of the judgment.

[106] Sean Mallet "Judicial Discretion in Sentencing: A Justice System That Is No Longer Just?" (2015) 46 VUWLR 533 at 539.

[107] At 539.

[108] Law Commission, above n 30, at 19.

Accordingly, there is the possibility that the psychological individualism-challenging approach taken in *Zhang* may only be adopted in future methamphetamine cases. As noted by Hall, guideline judgements are unable to "give coherence to sentencing as a whole".[109] If the prosecution did not wish for a *Zhang*-like approach to be taken in determining an individual's sentence, it could advance the argument that Zhang should be distinguished on the basis of fact.[110] The case in front of the court is not a methamphetamine case. Accordingly, a guideline judgment on methamphetamine offending should not be applied.

However, given *Zhang*'s recentness, this paper cannot ultimately conclude that *Zhang* will be exclusively constrained to methamphetamine-related cases. As noted by Tania Singh, *Zhang* has already had "impacts ranging well beyond methamphetamine sentencing".[111] One such case that demonstrates the impact of *Zhang* is *Orchard v R* (*Orchard*).[112] *Orchard* dealt with violent offending, including domestic violence, and thus was subject to the guideline judgment of *R v Taueki*.[113] However, the Court referred to *Zhang* to assist in its determination of an appropriate sentencing approach for Mr Orchard. The Court of Appeal emphasised that flexibility and discretion must be deployed in setting a sentence to "achieve justice in individual cases."[114] Furthermore, Mr Orchard's post-traumatic stress disorder was acknowledged by the Court as influencing his capacity for rational choice at the time of his offending and thus "contributed causally to the offending", making him less morally culpable.[115] It is this acknowledgement of Mr Orchard's mental health as a restriction on his capacity for choice that demonstrates the *Zhang*-like challenge to psychological individualism, outside the realm of methamphetamine offending.

Nonetheless, *Zhang* still does not have the potential to properly reform general sentencing practice, in view of the fact that guideline judgments are vulnerable to inconsistent application.

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[109] Geoff Hall *Sentencing Law and Practice* (LexisNexis, Wellington, 2004) at [1.2.2(c)].
[110] Law Commission, above n 30, 18.
[111] Tania Singh, above n 86, at 406.
[112] *Orchard v R* [2020] 2 NZLR 37.
[113] *R v Taueki*, above n 88.
[114] *Orchard v R*, above n 112, at [28].
[115] At [51].

Sentencing, ideally, should be consistent - "like cases should be treated alike".[116] Consistent sentencing ensures both respect for and compliance with the criminal justice system, in conjunction with the maintenance of the legitimacy and fairness of the system as a whole.[117] Accordingly, mechanisms, such as guideline judgments, have been put in place in an attempt to constrain judicial discretion and obtain consistency in sentencing practices.[118]

However, this ideal has not been achieved in Aotearoa. In preparation for its 2006 report, the Law Commission employed Taylor Duignan Barry to research sentencing practices across the countries, in an attempt to determine whether there is evidence of inconsistent sentencing approaches.[119] This research affirmed that there is substantial variation in sentencing practices - variation that cannot be explained by differences in "offence or offender variables."[120] Instead, such differences indicated that some courts in Aotearoa are simply more severe than others.[121] Such inconsistencies indicate that the current restraints on sentencing approaches are not effective at their intended role. The particular flaw for guideline judgments is in their title - these judgments, and their recommended approach, "are just that, guidelines".[122] Sentencing judges, particularly those dealing with non-methamphetamine offending, could choose not to take the guidance provided by *Zhang*, as it is within their discretion to do so. Accordingly, if *Zhang*'s approach does not have to be considered or applied to future sentences, it will be ineffective at challenging sentencing's psychological individualism.

V The Codification of the Approach in R v Zhang

Given these restrictions to *Zhang's* effectiveness, a different tact should be taken. Guideline judgments cannot be relied upon to spur effective and consistent change to sentencing as a whole. Instead, one must look to legislation for reform of this nature. This paper proposes just

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[116] Rajesh Chhana and others *The Sentencing Act 2002: Monitoring the First Year* (Ministry of Justice, March 2004) at [10].
[117] Sean Mallet, above n 106, at 535 - 536.
[118] Geoff Hall "Reducing Disparity by Judicial Self-Regulation: Sentencing Factors and Guidelines Judgments" (1991) 14 NZULR 208 at 219.
[119] Law Commission, above n 30, at 74.
[120] At 20.
[121] At 20.
[122] *R v Zhang*, above n 1, at [48].

that. The approach taken by the Court of Appeal in *Zhang* should be translated into the Sentencing Act 2002, by way of amendments to ss 7, 8, 9, 26 and 27.

A Section 7

Section 7, as mentioned prior, details the purposes for which the court may sentence an individual. These purposes are not outlined in any hierarchy, as affirmed in the Act itself:[123]

> "To avoid doubt, nothing about the order in which the purposes appear in this section implies that any person referred to must be given greater weight than any other purpose referred to."

Accordingly, sentencing judges are free to "pick and mix" from these purposes in accordance with their own individual preferences and perspectives.[124] If judges follow the aforementioned *Carr*-like approach to sentencing, thus favouring criminal law's psychological individualism, they have the freedom to employ purposes that support this approach - namely recidivism and deterrence. Roberts indicates that, if the legislature wishes to provide more direction towards a particular sentencing approach, a hierarchy of sentencing goals should be established.[125] This hierarchy would reflect the purposes that Parliament sees as most, and least, relevant to sentencing. Accordingly, s 7(2) would have to be removed from the Act. The instatement of such a hierarchy would assist in the Sentencing Act fulfilling one of its key purposes – to create greater uniformity and consistency in sentencing practices.[126]

Furthermore, to ensure that a *Zhang*-based approach is taken to sentencing purposes, *deterrence, or s 7(f), could be placed at the bottom end of this hierarchy.* This placement would not mean that deterrence would never be deployed as a justification for imprisonment. Instead, it would only be used when a deterrent effect - general and/or specific - is likely in those circumstances. In other words, deterrence would not be a key purpose of punishment when, as a result of an

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[123] Sentencing Act 2002, s 7(2).
[124] Julian Roberts, above n 39, at 256.
[125] At 256.
[126] At 257.

individual's diminished capacity for choice due to their personal circumstances, a deterrent effect is not going to occur. This legislative guidance would also ensure that sentencing no longer occurs under the flawed assumption observed in *Fatu*. As a result of this amendment to s 7, deterrence would have a diminished presence as a mechanism for punishment, thus diminishing the presence of psychological individualism in sentencing. However, it is not enough to just reduce deterrence's impact on sentencing. Psychological individualism will only be effectively challenged if sentencing judges are required to actively inquire into an individual's capacity for choice at the time of their offending.

B Section 8

Section 8 could be amended to require this inquiry, through the introduction of a new principle of sentencing. Section 8 largely reaffirmed principles that the judiciary was already familiar with. However, as noted by Roberts, the inclusion of these principles in the Sentencing Act promoted their visibility within the criminal process, thus enhancing their standing amongst judges and potentially resulting in a more consistent application.[127] Accordingly, the same should be done with a principle that coincides with the approach taken in *Zhang*. Following the structure currently used in s 8, an amended s 8(k) could read:[128]

> 'must take into account the offender's capacity for rational choice in the particular case, including whether and how this capacity was impaired at the time of offending.'

This principle specifically incorporates the phrasing used by the Court of Appeal in *Zhang*,[129] thus codifying the approach taken by the Court of Appeal, in conjunction with its challenge to psychological individualism in sentencing. In the application of s 8(k), future courts will be required to analyse any factors raised in proceedings that could have impaired or diminished the individual's capacity for rational choice. There will be no option but to open the door left ajar by

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[127] Julian Roberts, above n 39, at 257.
[128] As previously mentioned, this paper will refer to 'the offender' as 'the individual' or 'the individual subject to the sentence'. However, the term 'offender' was used to keep in line with the language of the Sentencing Act 2002.
[129] *R v Zhang*, above n 1, at [138].

the legislature and acknowledge the personal circumstances of the individual subject to the sentence.

The four considerations used by the Court of Appeal in *Zhang* provide a useful example as to the kind of factors that may be analysed by the court. However, these considerations are not an exhaustive list of choice-restricting circumstances. As in *Zhang* for the addiction consideration, the onus will usually lie on the individual subject to the sentence to establish the extent and effect of these circumstances.[130] Future courts will also have to analyse whether these restraints on the individual's capacity for rational choice were in relation to their offending. With previous principles and legal tests that have required a link or 'causal nexus' between a particular factor and the offending, there have been judicial inconsistencies as to what degree of link is required.[131] To avoid such inconsistencies, the link required in s 8(k) would be as detailed in Zhang - the factor is shown to "contribute causatively to offending".[132] However, a direct causative link is not necessarily required.[133] Instead, it may be sufficient that these circumstances contributed to the offending, without being the sole cause.[134]

Section 8(k) and its application draws heavily from the approach in the second stage of analysis in *Zhang*. However, as hinted at above, s 8(k) can influence sentencing practice in a manner that Zhang is not capable of. Due to s 8(k), judges will be required to - they "must" - take into account the individual's capacity for rational choice.[135] In contrast, *Zhang* could only have this effect, if at all, on methamphetamine offending cases, on the basis that it could be distinguished on a basis of fact, or its 'guidance' could simply not be followed. It is through the binding nature of legislation that psychological individualism can be effectively challenged in sentencing practices.

C Section 9

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[130] At [148].
[131] Oliver Fredrickson "Systemic deprivation discounts and section 27 Reports: progress but not perfect" (September 2020) Maori Law Review <https://maorilawreview.co.nz/2020/09/mahuru-2020-september-contents/>.
[132] *R v Zhang*, above n 1, at [159].
[133] At [147].
[134] At [152].
[135] Julian Roberts, above n 39, at 258.

To further cement the *Zhang* approach in general sentencing practice, and continue the challenge to psychological individualism, s 9, too, must be amended. As mentioned above, this psychological individualism also manifests through the current aggravating and mitigating factors. Accordingly, section 9(2) would be amended to introduce a new mitigating factor. This mitigating factor would, as s 8(k) did, draw on the phrasing used by the Court of Appeal in *Zhang*, as well as that of s 9(2)(e) which relates to diminished mental capacity. An amended s 9(2)(i) could read:

> 'that the offender has, or had at the time the offence was committed, a diminished capacity for rational choice.'

Hall, prior to the enactment of the Sentencing Act 2002, detailed that the validity and weight of aggravating and mitigating factors should be determined with reference to the principle of punishment being pursued.[136] Accordingly, s 9(i) would be tied to s 8(k). Therefore, just as s 8(k), the application of s 9(2)(i) would be similar to the approach taken in *Zhang*. An individual would be entitled to a sentencing discount through s 9(2)(i) if, due to their circumstances or a relevant consideration, their capacity of choice was diminished, thus diminishing their moral culpability.[137] The extent to which the presence of that consideration diminished their moral culpability determines the extent of this discount.[138]

D Sections 26 and 27

The information necessary to conduct the analysis under ss 8(k) and 9(2)(i) could be determined by way of two existing mechanisms under the Sentencing Act - ss 26 and 27.

Section 26 provides that where an individual who is charged with an offence that is punishable by imprisonment is found to be, or pleads, guilty, the court may direct that individual's probation officer to provide a report.[139] This s 26 pre-sentence report will include a range of information

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[136] Geoff Hall, above n 118, at 209.
[137] At [159].
[138] Such an approach to a sentencing discount is demonstrated in *Zhang* from [198] - [202] in relation to one of the individual appeals, Ms Crighton.
[139] Sentencing Act 2002, s 26(1).

that is intended to assist the determination of an appropriate sentence for the individual. This information may include factors that contributed to the individual's offending,[140] recommendations as to the most appropriate sentence,[141] and recommendations as to the conditions of this sentence.[142] Section 26(2) should be amended to specifically allow for pre-sentence reports to include information that would assist the court in conducting the analysis required under the proposed ss 8(k) and 9(2)(i). As the current s 26(2)(b) outlines that a pre-sentence report may include "information regarding the factors contributing to the offence", a s 26(2)(ba) could be introduced to indicate that a report may also include *'information regarding the capacity for choice of the offender'*.[143]

As detailed above, s 27 in its current state does have the potential to provide the information necessary to conduct an inquiry into the individual's capacity for rational choice in relation to their offending. *Zhang* acknowledged, in regards to the consideration concerning social, cultural and economic deprivation, that "s 27 of the Sentencing Act is clearly relevant" to this kind of inquiry.[144] However, to ensure that information can be provided on all considerations that can impair the individual's capacity for choice - not just those in connection with their background - s 27 must be amended. An amended s 27(1)(b) could read:

> 'the way in which that background may have related to the commission of the offence, including whether aspects of this background impaired the offender's capacity for choice'.

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[140] Section 26(2)(b).
[141] Section 26(2)(d).
[142] Section 26(2)(e).
[143] It is important to note that this amendment could accompany procedural barriers, namely that probation officers would have to be trained as to how they should inquire into the individual's capacity for choice at the time of their offending. A key area of 'upskilling' would involve educating officers as to how they should make a connection between the individual's personal circumstances and their restriction on their capacity for choice. Furthermore, officers will also have to be prepared to provide recommendations for the court in these reports on whether, and how, this incapacitation of choice should influence the final sentence. Although this would come at an expense to the criminal justice system, the use of these resources is a necessary step to address psychological individualism in sentencing, and the issues that spur from it.
[144] *Zhang v R*, above n 1, at [161].

This expansion on the existing s 27 would allow for the presentation of information relevant to the inquiry required under ss 8(k) and 9(2)(i). Furthermore, the continued use of the phrasing "may have related to the commission of the offence" affirms Parliament's decision to reject a sentencing approach that requires a causal link between this background and the offending. Instead, this amendment would affirm that the presentation of information as to the individual's personal circumstances helps provide greater context to the offending and, thus, the determination of the most appropriate sentence.

VI Conclusion

Psychological individualism has had a long and problematic presence in Aotearoa's criminal justice system. It has manifested itself into the purposes of sentencing, the Sentencing Act 2002, and in a particular approach taken by the courts. This presence has resulted in severe problems within the justice system - mass imprisonment, the overrepresentation of Maori and high rates of recidivism. This presence was threatened, though not effectively challenged, through the approach taken by the Court of Appeal in the second stage of analysis in *Zhang*. The Court took the opportunity made available by the legislature in the Sentencing Act and affirmed that personal circumstances can impair the rational choice made to offend, thus diminishing the moral culpability of the individual and reducing the effectiveness of deterrence. However, to truly challenge psychological individualism, the Sentencing Act must be amended. As a result of these amendments, judges will be required to consider the individual's capacity for choice as both a principle of sentencing and as a mitigating factor. This investigation will be facilitated by information expressly provided for under ss 26 and 27. If the individual's capacity for choice is found to be inhibited, the courts will not be swayed by flawed deterrence arguments. Accordingly, these changes will culminate into choice being a key and embedded consideration within sentencing practices in Aotearoa. *Zhang* does not have the potential to have this same effect. It is this reformation to sentencing practices that holds the potential to create effective change to the issues currently facing our criminal justice system.

Word Count

The text of this paper (excluding table of contents, non-substantive footnotes, and bibliography) comprises exactly 8,125 words.

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