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**How the Sentencing of Disadvantaged Offenders Illustrates
the Need for a New System**

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Abstract

New Zealand's current sentencing practices are inadequate. A new system is needed to ensure justice is achieved for every offender. This paper outlines the parameters for a renewed sentencing process in New Zealand. The treatment of socially disadvantaged offenders, a group who do not receive justice under current sentencing conditions, is the guiding example to justify the need for a new system. First, the decision in *R v Zhang* [2019] NZCA 509, [2019] 3 NZLR 648 is used to validate the claim that disadvantaged offenders deserve to be sentenced better. Second, an analysis of sentencing theorists' claims that disadvantage should be treated specially by sentencers is considered. Both inquiries lead to the conclusion that socially disadvantaged offenders deserve to have their sentenced mitigated. At present, the sentencing system is not equipped to ensure that in every case.

A comparative approach is used to argue that 'generic guidelines' would address issues present in the sentencing guidance produced in an ad hoc manner by the Court of Appeal. Generic guidelines would be produced through public consultation by an appointed Council of judicial and non-judicial experts, and would require a sentencer to consider the applicability of any relevant guideline in every case. The production and regulation of generic guidelines would be overseen by an independent Sentencing Council. Success in overseas jurisdictions of generic guidelines produced by a Sentencing Council supports the claim for similar success in a New Zealand context. In 2007, New Zealand passed legislation that would establish a Sentencing Council. The Act was later repealed. Practically, applying the conclusion of this paper would mean re-establishing a Sentencing Council that produces generic guidelines to ensure socially disadvantaged offenders receive mitigation of their end sentence. More generally, a Council of this nature is needed to ensure all offenders achieve justice in sentencing.

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I Introduction

Sentencing in New Zealand is a flawed process which requires development. Significantly, sentencing practices do not effectively address evidence of an offender's social disadvantage. The desired outcome when sentencing the disadvantaged is to make justice a more attainable result in individual cases. I will argue that justice is achieved when circumstances of disadvantage like poverty, addiction and cultural deprivation are used as justification to mitigate an offender's sentence. A recent Court of Appeal guideline judgment, *Zhang v R*¹, highlights how the judiciary already accepts addiction as a mitigating factor to a limited extent. *Zhang v R* validates the argument that if addiction can be a mitigating factor, other aspects of social disadvantage can and should be too. This paper will consider opposing sentencing theory concepts as to whether social disadvantage should mitigate sentences. The well supported model of proportionality, retributivism and just deserts will be weighed against the categorical leniency model. Conclusions drawn by proponents of the second school of thought will be used to support the claim that factors beyond addiction should be considered by all sentencers. Analysis will then turn to the best way to engage the Courts to achieve that. Overseas jurisdictions have implemented generic guidelines with success. Ultimately, this paper will argue that to achieve the primary purpose of engaging New Zealand Courts to justly sentence disadvantaged offenders, guidance in the form of so-called 'generic' guidelines is required.

Zhang v R demonstrates how guideline judgments function as the present method of regulating sentencing. The flaws that restrict the Court in *Zhang v R* from analysing issues beyond the scope of the appeals before it is used to justify the need for an alternative regulation system. Guideline judgments, as they currently exist, are an unproductive way to regulate sentencing and allow little room for what generic guidelines aim to achieve. In order to successfully give effect to generic guidelines, another mechanism is needed. A Sentencing Council offers the most effective means to create and manage generic guidelines. Such a system would necessitate input from experts outside the judiciary and include community consultation. The success of

¹ *Zhang v R* [2019] NZCA 509, [2019] 3 NZLR 648.

Sentencing Councils in comparative jurisdictions validates the use of a similar mechanism in New Zealand, which will ultimately ensure justice for disadvantaged offenders. This paper will find that re-legislating for a Sentencing Council would be the most effective mechanism to oversee the production and regulation of generic guidelines, therefore achieving justice for socially disadvantaged offenders and all offenders generally.

The scope of this paper is not to define the substance of generic guidelines, nor the exact structure of a Sentencing Council. Instead, focus is placed on the flaws currently present in the sentencing process and how generic guidelines administered by a Sentencing Council would generally work to remedy them. Achieving justice for offenders experiencing social disadvantage at the sentencing stage, indeed ensuring their end sentence is mitigated, requires this change to the sentencing process be made. I have not placed limits on what ‘social disadvantage’ includes to avoid constraining this analysis. Instead, the phrase should be understood broadly with the intention that it captures any individual’s past or present circumstances which renders life more challenging compared to the average person. Addiction is recognised as falling within this definition, as well as generally understood areas of disadvantage like poverty. However, any absence from the following analysis of other personal circumstances which could arguably be understood as social disadvantage is not an intention that they never be considered as such.

II Generic Guidelines for the Socially Disadvantaged

A Zhang v R²

Zhang v R is evidence that the New Zealand judiciary recognises socially disadvantaged offenders deserve to be sentenced better. The Court acknowledged this at outset with a statement this paper’s premise rests upon: “sentencing must achieve justice in individual cases”.³ I contend that the decision supports the proposition that sentencing

² *Zhang v R*, above n1.

³ At [10].

this group of offenders justly requires evidence of social disadvantage to be a mitigating factor across all sentencing decisions.

The decision is a guideline judgment, a tool of the Court of Appeal to regulate sentencing, which specifically revises sentencing practices of methamphetamine offenders. The previous guideline judgement for sentencing of methamphetamine offences was *R v Fatu*⁴, issued in 2006. *R v Fatu* was considered outdated for two reasons. First, it left little scope for the recognition of personal mitigating factors.⁵ Second, its application had resulted in disproportionately severe sentences.⁶ Six appeal cases were selected to be heard together because they presented relevant contexts for the guideline to be reconsidered.⁷

The Court decided to address the relevance an offender's personal circumstances could have to offending.⁸ The Court focused in particular upon the link between methamphetamine offending and an offender's addiction.⁹ Evidence was called on the issue and ten interveners submitted, seven of which made oral submissions at trial.¹⁰ (An intervener is someone not party to the case, but where the Court permits their participation in the proceedings if it is in the public interest.)¹¹ Parties included the Human Rights Commission, the New Zealand Law Society, the New Zealand Police and the New Zealand Drug Foundation.¹² The commitment by the Court of Appeal to be informed from a wide a range of independent bodies reflects their understanding that personal circumstances of social disadvantage should hold a place of significance in sentencing.

⁴ *R v Fatu* [2006] 2 NZLR 72.

⁵ *Zhang v R* [2019] 3 NZLR 648 at 649.

⁶ At 651.

⁷ At 648.

⁸ *Zhang v R* [2019] NZCA 509 at [2].

⁹ *Zhang v R* at [3].

¹⁰ At [4]-[5].

¹¹ *Review of the Judicature Act 1908: Towards a new Courts Act- Report 126*. New Zealand Law Commission.

¹² *Zhang v R* at [4]-[5].

The Crown held firmly there should be no special rules relating to personal factors, like addiction, in drug cases.¹³ Personal factors should carry the same weight as they do when sentencing for other types of offending.¹⁴ At this point, it is relevant to address ss9 and 27 of the Sentencing Act 2002, which are both statutory tools used to mitigate sentences. The Crown was essentially arguing that ss9 and 27 already safeguard justice for socially disadvantaged offenders and that no extra measures outside these sections were needed.

Section 9(2) lists mitigating factors which the court must take into account where applicable. The factors which relate to the offender specifically are the offender's age, whether a guilty plea was heard, involvement on the offender's part, remorse shown, an effort to shorten the proceedings, evidence of the offender's good character, time spent on electronic monitoring and any adverse effects on the offender because of the prosecutor's conduct.¹⁵ All stated factors are broad and generally relate to procedural matters. The only conditions which require a Court to consider more causative personal factors are ss9(2)(e) and (3). These deal with diminished intellectual understanding and voluntary consumption of alcohol respectively. Section 9(4)(a) also allows the Court to consider any other mitigating factor that could be relevant.

Section 27 is colloquially known as a 'cultural report'. The section allows a court to be generally informed on the offender's personal and cultural background, how that background may have related to the offence, and how the offender's community have or will prevent further offending.¹⁶ All factors may be relevant in respect of the possible sentence and will usually involve mitigation.

Ultimately, the Court of Appeal disagreed with the Crown and found addiction should give rise to a special discount of up to 30% of the end sentence in methamphetamine offending, depending on the extent to which it mitigates moral culpability for the

¹³ *Zhang* at [42].

¹⁴ At [42].

¹⁵ Sentencing Act 2002 s9(2).

¹⁶ Section 27(1).

offending.¹⁷ A greater discount could also be appropriate in some cases.¹⁸ The substantial discount of the overall sentence for addiction demonstrates the Court's recognition that factors of social disadvantage limit an offender's culpability. Recognition that addiction can not only reduce the end sentence by 30%, but that it could also go further in some instances, supports the Court's original proposition that sentencing must be individualised to achieve justice. At the same time, acknowledgment of the need for special mitigation was a subtle statement that ss9 and 27 do not go far enough. Additional measures beyond these sections are needed to ensure factors like addiction mitigate a sentence.

The Court went further to say the sentencing discount is applicable to all instances of Class A drug offending, not just methamphetamine offences.¹⁹ The Court attempted to stretch the justice this sentence mitigation would achieve. However, the Court could not allow addiction to discount sentences for any offending which did not involve drugs, because sentencing guidelines can only apply within the context of the facts. *Zhang v R* related only to Class A drug offending, and so the findings of the Court could not apply to other forms of offending. The limitation of a direction to explicitly consider a sentence discount for addiction in all types of offending brings the nature of sentencing guidelines into issue. Without the constraints the sentencing guideline's context imposed, the Court's analysis would have allowed the conclusion that addiction affects all offending.

The logic which allowed the Court to find addiction should mitigate an offender's sentence, similarly supports the conclusion that other factors of social disadvantage should mitigate sentences. The Court of Appeal arrived at the conclusion that addiction is worthy of a sentence discount on the basis that lengthy prison sentences are not an effective deterrent for offenders suffering from addiction.²⁰ The principle of general deterrence is based upon a theory of rational choice.²¹ Rational choice recognises that

¹⁷ *Zhang* at [149].

¹⁸ At [148].

¹⁹ At [10].

²⁰ At [23].

²¹ At [92].

an offender can weigh up the benefits and cons, and then choose whether to offend or not.²² Addiction affects an offender's rational choice and reduces their level of culpability. Rational choice as a theory is also less relevant where an offender's ability to choose is constrained by mental disorder, poverty or some other vulnerability.²³ The judgment went on to state that a vulnerability like poverty and cultural deprivation must be considered if it can also be shown to have impaired the offender's choice and therefore moral culpability.²⁴ A diminished opportunity to make that rational choice reduces the effect of deterrence.²⁵ The logic used by the Court of Appeal implies all forms of social disadvantage can impair an offender's rational choice to offend, which therefore diminishes the offender's moral culpability in the same way addiction does.²⁶ As such, any form of social disadvantage which can be proven to have had that effect should warrant mitigation of the end sentence.

Discussion of these other social disadvantage circumstances of poverty and deprivation was limited, not because the Court dismissed their importance, but again due to the nature of sentencing guidelines. Resources are limited and the Court is constrained by time and costs as to how many interveners can present on the issues at play. The Court is also constrained, by the same limitations, because it lacks the ability to independently and extensively investigate what interveners present to them. Had time or money not restricted their focus, the Court would have delved further into the issues of poverty and deprivation and arrived at the same well-reasoned conclusion I argue: because a circumstance like poverty affects an offender's rational choice to offend in the same way addiction does, poverty and other similar circumstances which remove that choice should allow mitigation of an offender's sentence like addiction does.

B Social Disadvantage as a Mitigating Consideration

²² *Zhang v R* at [92].

²³ At [92].

²⁴ At [10].

²⁵ At [138].

²⁶ At [138].

Zhang v R is the eminent decision used to support the idea that to achieve justice for socially disadvantaged offenders, sentencers should consider evidence of disadvantage and then mitigate sentences accordingly. In this section, sentencing theory will be analysed and used as a further justification. The debate analysed here is between the theory of just deserts, and the more recently proposed concept of categorical leniency which acts to critique and extend just deserts. I will argue the theory of categorical leniency must be relied upon by a sentencing judge to formally recognise individual experiences of social disadvantage and justly award a sentence discount. This proposition is validated because its logic is rooted in the judgment produced by the Court of Appeal in *Zhang v R*.

The orthodox and widely accepted standpoint of just deserts is propounded by theorist Andreas Von Hirsch. Von Hirsch has consistently opposed that a defendant's disadvantage should mitigate a sentence, for several reasons.²⁷ First, allowing mitigation for social disadvantage violates the principle of proportionality. The principle of proportionality upholds that offenders convicted of comparable offences should receive comparable punishments.²⁸ The offence which was committed becomes the most significant factor which determines the sentence.²⁹ Reducing an offender's sentence due to an individual experience of social disadvantage would mean sentences lack consistency.

Second, offenders need protection from a judge's power. Just deserts was born out of the perception that giving a judge too much discretion to acknowledge individual difference in sentencing encouraged discrimination.³⁰ Judges could not be trusted to objectively analyse an offenders' circumstances without their own subjective prejudices influencing the final sentence.³¹ Just deserts therefore recognises that judges

²⁷ Michael Tonry "Can Deserts Be Just in an Unjust World?" in *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Hart, United Kingdom, 2014) at 4.

²⁸ At 5.

²⁹ Michael Tonry *Malign Neglect: Race, Crime and Punishment in America* (Oxford University Press, Oxford, 1995) at 167.

³⁰ At 164.

³¹ At 164.

are usually from a specific social class different of most offenders. However, instead of providing tools to educate the judiciary on these differences, just deserts eliminates any opportunity for a judge to impose their own discriminatory biases by narrowing the scope of their authority.³² Just deserts does not allow individual circumstances to be considered because in its purest form it bases the end sentence entirely on the offence committed.³³ Von Hirsch's sentencing theory would deny mitigation of a socially disadvantaged offender's sentence to ensure that they were not punished more, or less, than a wealthy, well educated and privileged offender.³⁴

The theory of just deserts is not grounded in the reality of what offending in New Zealand looks like. Wealthy, or middle-class, or well educated offenders do not make up most of those being sentenced. Von Hirsch's concerns that these types of offenders are routinely favoured by the judiciary are unfounded. Eliminating considerations from sentencing that recognise an offender's individual circumstances makes it impossible to mitigate for disadvantaged offenders.³⁵ Patricia Williams highlights this common deficiency of legal thought in its search for neutrality:³⁶

Law and legal writing aspire to formalized, colour-blind, liberal ideals. Neutrality is the standard for assuring these ideals; yet the adherence to it is often determined by reference to an aesthetic of uniformity, in which difference is simply omitted.

Remove consideration of personal circumstances to limit discrimination or inconsistency by the sentencing judge means this school of thought has been ignorant to the reality that most offenders are deeply disadvantaged.³⁷ Sentencing must effectively recognise that many offenders experience situations of disadvantage, by allowing consideration of personal factors. Adhering to the retributive theory of just deserts does not achieve that.

³² Tonry *Malign Neglect* at 164.

³³ At 167.

³⁴ At 171.

³⁵ At 167.

³⁶ Patricia Williams. *The Alchemy of Race and Rights: Diary of a Law Professor*. (Eighth Printing, United States of America, 1991) at 48.

³⁷ Tonry *Malign Neglect* at 163.

In New Zealand, our sentencing system attempts to limit the full effect of retributivism. Unlike Von Hirsch's principle of proportionality, the offence committed is not the only factor considered. Our system does allow individual circumstances to be considered in a limited way during the sentencing process through ss9 and 27 of the Sentencing Act, as already discussed. However, retributivism is not constrained enough by these sections, as the Court of Appeal in *R v Zhang* found when they saw the need to create special consideration and subsequent sentence mitigation for addiction. If ss9 and 27 effectively ensured a sentencer would consider personal circumstances like addiction, the Court of Appeal would not have arrived at that conclusion.

Categorical leniency, the second school of thought, extends the Von Hirsch just deserts model by mandating a comprehensive analysis of an offender's social disadvantage. The theory argues that evidence of social disadvantage should mitigate an offender's sentence. Categorical leniency effectively limits retributivism in a way that means socially disadvantaged offenders can be sentenced, as the Court of Appeal stated, in a way that best achieves "justice in individual cases".³⁸ Although the two theories are not opponents at their core, because both would see the offence committed as a significant factor in setting the sentence, categorical leniency extends the limitations placed upon just deserts in a necessary way. There are two substantive arguments which support my proposition that categorical leniency should be the theory used in sentencing decisions, instead of the current limited form of retributivism founded in statutory tools like ss9 and 27.

I must take the time to state here that I do not hold all disadvantaged people go on to offend. In fact, a New Zealand report has acknowledged that many people who have had these experiences do not go on to offend.³⁹ In a New Zealand context, it has been recognised though that an approach which treats offenders as having made rational choices can no longer be used.⁴⁰ There is usually hurt behind their offences,

³⁸ *Zhang v R* at [10].

³⁹ Te Uepu Hapai i te Ora *Turuki! Turuki! Transforming our Criminal Justice System* (Safe and Effective Justice Advisory Group, 2019) at 11.

⁴⁰ At 11.

characterised by violence, drugs, alcohol and poverty.⁴¹ In this way, sentencing policy which acknowledges circumstances of disadvantage is still of importance because almost all offenders before the courts are in fact disadvantaged.⁴²

The first argument in favour of categorical leniency is that a disadvantaged offender is less morally culpable. Michael Tonry is one supporter of mitigating sentences for what he calls ‘deep disadvantage’.⁴³ Deep disadvantage is a term used to describe circumstances I have previously defined as social disadvantage. Tonry believes deep disadvantage is an appropriate justification for mitigation of any final sentence.⁴⁴ Disadvantaged people are desperate people who are tempted into criminal acts more than people who are not impoverished, or culturally deprived, or suffer from addiction.⁴⁵ Personal experiences of deep disadvantage, like physical and sexual abuse, poverty and single-parent homes are strongly associated with adult offending.⁴⁶ Criminal offending is therefore a consequence of such adversity.⁴⁷

Because offenders are born into these circumstances which are outside of their control, and because these circumstances are causative of the offending itself, the offender cannot be said to be morally culpable for the totality of the harm they have caused. Retribution, the just deserts principle which would see the offender suffer to the same extent as the suffering they have inflicted, is of a lesser importance when sentencing the socially disadvantaged if they are not culpable for all the harm caused. *Zhang v R* supports this justification for categorical leniency when the court found that social disadvantage impairs an offender’s rational choice to offend, and therefore diminishes moral culpability.⁴⁸

⁴¹ *Turuki* at 11.

⁴² Tonry *Malign Neglect* at 163.

⁴³ Tonry “Can Deserts Be Just in an Unjust World?” at 1.

⁴⁴ At 1.

⁴⁵ At 2.

⁴⁶ At 8.

⁴⁷ Tonry *Malign Neglect* at x.

⁴⁸ *Zhang v R* at [138].

The second argument in favour of mitigation is that imprisonment is not effective, nor just. It is not effective because deterrence, a significant purpose of sentencing, is meaningless for a disadvantaged offender. If it can be acknowledged that an offender has no control over the circumstances which led to their offending, then the same social disadvantage will cause offending again no matter the length of imprisonment. The Court's analysis of deterrence in *Zhang v R* arrived at the same conclusion.⁴⁹ Imprisonment is not just because it only exaggerates the disadvantage experienced by the offender. *Zhang v R* acknowledged that imprisoning the destitute intensifies an offender's already fragile state.⁵⁰

Categorical leniency extends the limitations on Von Hirsch's retributive model of just deserts, by allowing consideration of individual circumstances of social disadvantage. This sentencing theory model justifies its position by recognising that an offender is less morally culpable because disadvantage is a root cause of their offending. Further, the principle of deterrence does not logically support sentencing a disadvantaged offender in the same way as it does when sentencing a privileged offender. The judgment in *Zhang v R* relies upon both these justifications, and as New Zealand's highest appeal court, therefore validates my claim that categorical leniency should guide sentencing. Drawing back to this paper's premise, categorical leniency concludes a sentence discount must be given if we are to do better by justly sentencing disadvantaged offenders.

C Implementing Social Disadvantage: Why Mandatory Generic Guidelines are the Best Option

Recognising categorical leniency supports the extension of *Zhang v R* to include all forms of social disadvantage as a mitigating factor at the end sentence stage, begs the question as to how it should be implemented. I will argue that any evidence of social disadvantage should first be a mandatory consideration of a sentencing judge. Second, if it is to be a mandatory consideration, then the best form it can take is as a generic guideline.

⁴⁹ *Zhang v R* at [90].

⁵⁰ At [24]-[25].

Evidence of an offender's social disadvantage must be mandatory for the sentencer to consider. Justice is attained when the Courts reflect the lesser moral culpability of socially disadvantaged offenders in the sentences they hand down. If evidence of social disadvantage is not mandatory to consider, then the justice sought for is also lost because judges would have the option to refuse the relevance of an offender's disadvantage. Whether an offender's individual circumstances were considered by a judge would depend entirely upon the judge in question. Arbitrary prejudices and biases held towards an offender would play a part in impacting when a sentencing judge decided to mitigate an end sentence.

Consistency and certainty are also in issue if considering social disadvantage was not mandatory. Judges would not consistently mitigate end sentences for similar cases. Clarity of a suspected end sentence is also important for offenders coming to court, even if each case must be individualised. More clarity of the expected end sentence would be achieved if an offender could depend upon mitigation of their end sentence in a comparable way to another similarly disadvantaged offender's sentence mitigation. With these purposes in mind, any consideration of social disadvantage must be mandatory for a sentencing judge.

The most effective way for judges to consider social disadvantage is through generic guidelines. It must be noted that the focus of this paper is not the precise structure that generic guidelines should take. Rather, it is to advocate for their existence in New Zealand's sentencing practice. However, it is necessary to give a brief description of what generic guidelines would in fact do for a socially disadvantaged offender.

Generic guidelines would be imposed by an authority and then applied to every offender to which they are relevant. A generic guideline addressing a social disadvantage, like poverty for example, would outline what evidential burden the offender would have to satisfy. Like other mitigating tools before the court though, as in s27 cultural reports,⁵¹ the judge would also have the prerogative to suggest the relevance of a generic

⁵¹ Sentencing Act 2002 s27(5).

guideline to the offender's case. The sentencing judge would be given a broad range of circumstances that when met, means the offender satisfies the definition of living in poverty. (This is similar to the structure in s9(2),⁵² which gives a range of mitigating factors). The generic guideline would outline how the sentencing judge must mitigate the offender's end sentence to reflect how the level of poverty experienced by the offender has lessened their ability to rationally choose to offend. In this way, generic guidelines are considered across offences and jurisdictions. To limit their scope to certain offences or certain appellate courts would limit the provision of justice.

The United Kingdom provides a relevant context which supports the creation of mandatory generic guidelines. Guidance issued to sentencing authorities in the United Kingdom comes in the form of generic guidelines which are mandatory to consider. These two elements of the United Kingdom's sentencing guidance (their compulsory nature and their structure as generic guidelines) have been successful, and therefore give weight that similar mandatory generic guidelines should be implemented in New Zealand.

Generic guidelines in the United Kingdom are mandatory because they must be applied to every case, in every court, unless the judge can offer a very good reason to the contrary.⁵³ Without good reason every court must, when sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case.⁵⁴

In the United Kingdom, generic guidelines are referred to as 'overarching' guidelines. Overarching guidelines can be considered generic because they are not specific to a certain offence before the court. They cover issues that are relevant over many offence types.⁵⁵ Eight overarching guidelines are currently in force, with a ninth effective from

⁵² Section 9(2)

⁵³ Coroners and Justice Act 2009 (UK), pt 4, s 125(1).

⁵⁴ Section 125(1).

⁵⁵ Anthony Bottoms *The Sentencing Council in 2017: A Report on Research to Advise on how the Sentencing Council can best Exercise its Statutory Functions* (University of Cambridge Institute of Criminology, England, 2017) at 5.

October 2020. ‘Sentencing Children and Young People’⁵⁶ is a guideline which requires every sentencer imposing a sentence on a person aged under 18 to have regard to the principles the guideline highlights.⁵⁷ Another overarching guideline, ‘Imposition of Community and Custodial Sentences’,⁵⁸ applies to all offenders above the age of 18 who are sentenced for any offence after the guideline came into force.⁵⁹ Both examples of overarching guidelines are therefore generic, considering first the respective age of the offender, no matter the offence actually committed.

The limited number of overarching guidelines in the United Kingdom is not due to a lack of support. Rather, it can be put down to a lack of resources available to comprehensively develop more overarching guidelines.⁶⁰ As an independent review of the Sentencing Council in 2017⁶¹ advised, and the Sentencing Council accepted, the number of overarching guidelines should be increased.⁶² The existence of overarching guidelines is therefore well supported and indeed called for. The review goes on to note that academics and pressure groups are far more interested in overarching guidelines which address general issues, as opposed to guidelines addressing specific offences.⁶³ Further, overarching guidelines have transformed sentencing law in England and Wales because courts now rely to a significantly lesser degree on standard books on sentencing law and instead look to guidelines.⁶⁴ The call for more overarching guidelines by advocates outside the judiciary, and the effect they have caused within the judiciary, goes to prove their popularity and effectiveness. As such, the success of overarching

⁵⁶ *Sentencing Children and Young People* <www.sentencingcouncil.org.uk/overarching-guides/crown-court/item/sentencing-children-and-young-people>

⁵⁷ *Sentencing Children and Young People* at 1.1.

⁵⁸ *Imposition of Community and Custodial Sentences* <www.sentencingcouncil.org.uk/overarching-guides/crown-court/item/imposition-of-community-and-custodial-sentences>

⁵⁹ *Imposition of Community and Custodial Sentences at Applicability*.

⁶⁰ Bottoms at 21.

⁶¹ At 21.

⁶² Andrew Ashworth and Nicola Padfield “*Reviewing the Sentencing Council*” (2018) 8 Crim. L.R. 609 at 611.

⁶³ Bottoms at 21.

⁶⁴ At 36.

guidelines in the United Kingdom support the notion that implementing mandatory generic guidelines in New Zealand would also benefit our sentencing practices.

The most recent overarching guideline to come out of the United Kingdom is ‘Sentencing offenders with mental disorders, developmental disorders, or neurological impairments’.⁶⁵ It serves as a case study for the viability of social disadvantage in the form of generic guidelines in New Zealand, because it concerns many conditions this paper broadly classifies as social disadvantage: learning disabilities, PTSD and disorders causing substance dependency. The guideline recognises that these mental impairments or disorders act to reduce the offender’s culpability if the offender was not able to make a rational choice to offend.⁶⁶ The guideline applies to all offenders aged eighteen and over who at the time of the offence had a disorder as listed within its provisions. Therefore, this guideline requires all sentencers to mitigate a sentence for any offender across any offence who has diminished culpability for the totality of harm they have caused. It is precisely akin to the compulsory and overarching nature of generic guidelines I propose for New Zealand’s own sentencing practices. I would argue that the premise of this paper is therefore endorsed by the actions of the Sentencing Council for England in Wales in publishing this guideline.

Although I have attempted to steer clear of suggesting a clear structure for what generic guidelines should precisely look like, if implemented in New Zealand I would note that examples of generic guidelines in other common law jurisdictions should not be blindly followed. Michael Tonry, the proponent of categorical leniency, writes from the United States’ jurisdiction which favours a strict formulaic approach. These are typically very restrictive and are laid out as a literal grid.⁶⁷ This structure is not the right type of inflexibility sought after because it allows little movement outside of what the guideline considers. Comparatively, even though the United Kingdom has been used to validate

⁶⁵ *Sentencing offenders with mental disorders, developmental disorders, or neurological impairments*’ <www.sentencingcouncil.org.uk/overarching-guides/crown-court/item/sentencing-offenders-with-mental-disorders-developmental-disorders-or-neurological-impairments>

⁶⁶ *Sentencing offenders with mental disorders, developmental disorders, or neurological impairments*’ at 2.9 and 2.15.

⁶⁷ Bottoms at 7.

imposing generic guidelines in New Zealand, critics of their structure would suggest that they could be further tightened in a more productive way. Andrew Ashworth argues that overarching guidelines, even as a compulsory consideration of a sentencer as required by law⁶⁸, still allow too much flexibility.⁶⁹ Overarching guidelines are flexible to the extent that they can lack guidance on mitigation, and give sentencers enough discretion to allow for an inconsistency between the sentences awarded in different courts.⁷⁰ Therefore, if generic guidelines were imposed in New Zealand, inspiration should be drawn from other common law jurisdictions as long as the fundamental justifications for allowing social disadvantage as a mitigating consideration are kept at the core of their creation. Consideration in New Zealand would also have to be made for our own unique colonial and cultural context.

Ultimately, the need for generic guidelines of this nature is based on the understanding that circumstances of social disadvantage, like poverty, mean offenders lack choice. The lack of rational choice therefore reflects a lesser moral culpability on the offender's behalf. Lesser moral culpability requires a less severe sentence because the offender cannot be blamed for the totality of the actual harm caused. The previous analysis of *Zhang v R*⁷¹ demonstrates that the New Zealand judiciary understands addiction, among other factors of social disadvantage, reduces an offender's ability to rationally choose and would therefore mitigate the final sentence to reflect that. Michael Tonry's sentencing theory of categorical leniency supports the extension of *Zhang v R* to allow all circumstances of social disadvantage, beyond addiction, to mitigate an offender's sentence.

Drawing from success in the United Kingdom, the way for social disadvantage to be considered by a sentencer that upholds these underlying justifications is if it is mandatory for a sentencer to do so, and if they come in the form of generic guidelines. Generic guidelines must be mandatory to ensure every judge is considering the best way to achieve justice in an individual case. Implementing them in the form of generic

⁶⁸ Coroners and Justice Act 2009 (UK), pt 4, s 125(1).

⁶⁹ Bottoms at 20.

⁷⁰ Bottoms at 20.

⁷¹ *Zhang v R*, above n1.

guidelines means they are considered across every offence type; ensuring consistency, clarity and justice for every socially disadvantaged offender.

III What Mechanism will be most Successful to Enforce Generic Guidelines: why we need a New System

A Sentencing Guidelines

1 How New Zealand regulates sentencing

New Zealand's present method for regulating sentencing is Court of Appeal guideline judgments. *Zhang v R*, which regulates sentencing of methamphetamine offending, is one such example of a guideline judgment. Guideline judgments have existed since 1978, when the Court of Appeal expressed a need to supervise sentencing in an effort to achieve consistency.⁷² Before the practice began, a judge had almost unlimited discretion to create and tailor individual sentences.⁷³ The only strict guidance that was given was the maximum penalty as set by the legislature.⁷⁴ Judges could theoretically rely upon pre-sentence reports produced by probation officers and submissions by counsel to influence the appropriate end sentence, though these tools go no further than being opinions which a sentencing judge can set aside.⁷⁵ Comparator decisions could also be referred to, though this would often only happen when the judge was alerted to a relevant judgment by the parties before the Court. There was little other direction as to what the appropriate sentence level should be in each case.⁷⁶ Individual judges decided each case and handed down each sentence after considering these tools before them. The issue was that judges had unfettered power to define the outcomes of cases without any overseeing regulation or supervision.

⁷² *Zhang v R* at [44]-[45].

⁷³ At [44].

⁷⁴ Warren Young and Andrea King (2010). Sentencing Practice and Guidance in New Zealand. *Federal Sentencing Reporter*, 22(4), 254-261 at 254.

⁷⁵ At 254.

⁷⁶ At 254.

The varying levels of knowledge or experience each judge brings to their decision differs, and therefore there will always be an assumption that a judgment and sentence is influenced by the judge which handed it down. However, individual judges were found to influence sentences in an unwelcome way because within their essentially unlimited discretion there was the ability to impose biases they held onto an offender. Without an effective means of regulating what each sentence looked like these individually held prejudices meant offenders whom had committed comparable offences, and shared similar mitigating or aggravating features, received vastly different sentences based on perceived social differences. A judge's influence on the decision was going further than natural variances of personal knowledge and experience. The limited guidance that was provided did not go far enough because it only prescribed the maximum upper limit to the offence, allowing a judge to award a sentence at any point up to that maximum.

Guideline judgments acted to rectify this because they prescribe more definitive sentencing ranges for an offender and therefore reduce the degree individual bias can affect the final sentence. In valuing consistency above any other sentencing purpose, the Court of Appeal's guideline judgments can be said to adhere to Andreas Von Hirsch's principle of proportionality. The highest goal of a guideline judgment can therefore be to ensure that like offenders receive like sentences.⁷⁷ In saying that, it must be acknowledged that the Court of Appeal still maintained the belief that sentencing is an evaluative exercise, though only within the limits of mitigating factors they outline.⁷⁸ Because of these limits that are set within each guideline judgment, there is in fact little scope for considering anything outside of what is prescribed by the guideline.

The Court of Appeal will issue a guideline judgment when they find it appropriate to do so in the context of considering an appeal in an individual case.⁷⁹ A typical guideline judgment will set out sentencing bands which correlate to the varying degrees of seriousness for the offence in question, a criterion starting point for each band, and a

⁷⁷ *Zhang v R* [2019] 3 NZLR at 648.

⁷⁸ At 648.

⁷⁹ *Young and King* at 254.

number of aggravating features which determine where an offender will fall within a band.⁸⁰ A guideline judgment will usually include example fact situations which demonstrate how the bands will apply.⁸¹ Guideline judgments then become the precedent for all subsequent sentencing decisions of that offence.⁸²

Guideline judgments were essentially created to promote greater consistency and provide judges with a regulated framework to fit an offender's sentence into. However, when considering that the purpose of generic guidelines is to ensure a socially disadvantaged offenders' lack of moral culpability is recognised, guideline judgments do not serve as the best mechanism to achieve that. I will use *Zhang v R* to first argue that the deficiencies it highlights demonstrates guideline judgments are not effective to sentence socially disadvantaged offenders, and therefore why a new regulation method is needed in New Zealand if we are to justly sentence socially disadvantaged offenders.

2 *How Zhang Highlights the Deficiencies of the Current System*

The judgment of the Court of Appeal in *Zhang v R* purports that sentencing must achieve justice in individual cases.⁸³ According to the decision, individual justice requires flexibility and discretion on behalf on the sentencing judge.⁸⁴ The flaws present in the system of guideline judgments, as *Zhang v R* itself highlights, prove this reasoning to be a contradiction. If sentencing is to achieve justice in individual cases, then tighter guidance still is needed. Sentencing guidelines were created on the premise that too much discretion on behalf of individual judges resulted in prejudiced sentencing outcomes. At present, a sentencing judge still has too much discretion under guideline judgments to ensure justice in individual cases, or more specifically, justice for a socially disadvantaged offender. The flaws of the method will be unpacked to support this claim.

⁸⁰ *Zhang* at [46].

⁸¹ At [46].

⁸² Young and King at 254.

⁸³ *Zhang v R* [2019] 3 NZLR at 649.

⁸⁴ At 649.

The first flaw present in the guideline judgment system is its ad hoc nature. Significantly, there are only limited opportunities for the Court of Appeal to produce a guideline judgment.⁸⁵ Only particularly serious offences come before the Court of Appeal, which mean that the majority of common offences decided in the courts of first appearance never get the chance to have the Court produce guidance around sentencing for that offence.⁸⁶ Not only is it just the most serious offences which have this guidance produced in relation to them, but the Court must wait until the appropriate time to do so. As the Court in *Zhang v R* wrote, it decided to produce a guideline judgment around methamphetamine offending only in that specific instance because the six appeal cases heard together because presented a relevant context.⁸⁷ If these relevant contexts had never presented themselves, it is unknown when the judgment could have been produced. In fact, *Zhang v R* shows how long this wait may be. *Zhang v R* updated and replaced the previous guideline judgment concerning methamphetamine offending: *R v Fatu*.⁸⁸ *R v Fatu* was published in 2006. The Court of Appeal had to wait thirteen years to update the guideline judgment for methamphetamine offending. The delay in producing *Zhang v R* is purely a result of the ad hoc nature of the system. Essentially, guideline judgments are only ever issued for the most serious offences, and only when there the need for one and the relevant evidence falling before the Court at an opportune time cross over.

Zhang v R demonstrates the serious consequences when considering how this limitation affects socially disadvantaged offenders. *Fatu* was resulting in disproportionately severe sentences because the context of offending had changed in the thirteen years since it was produced.⁸⁹ Further, the Court decided that sentencing judges should be provided more guidance on offenders with addiction issues.⁹⁰ The ad hoc nature of guideline judgments therefore meant that offenders suffering from addiction, or other socially disadvantaged offenders, suffered from harsh sentences for thirteen years until

⁸⁵ Young and King at 257.

⁸⁶ At 257.

⁸⁷ *Zhang v R* [2019] 3 NZLR at 648.

⁸⁸ *R v Fatu*, above n4.

⁸⁹ *Zhang v R* at 651.

⁹⁰ At 652.

the Court had the ability to reconsider *R v Fatu*. Therefore, this limitation means guideline judgments do not currently serve the purpose of ensuring socially disadvantaged offenders are being justly sentenced.

The second significant flaw in the system is that the Court of Appeal are constrained by time and resources to produce guidance which is comprehensive. The Court relies largely on counsel submission, or on interveners.⁹¹ Further, because it is a judgment in relation to actual appeals, the Court is pressured to produce the judgment so the outcome of these appeals is known. In *Zhang v R*, the Court named the Human Rights Commission, The New Zealand Law Society, New Zealand Bar Association, Auckland District Law Society, Criminal Bar Association of New Zealand and Public Defence Service, and Te Hunga Roia Maori o Aotearoa amongst the ten interveners in the case.⁹² The Court's finding that addiction should mitigate sentences is an important step to ensure offenders receive a sentence that is reflective of their culpability. As previously acknowledged, the significance of allowing personal factors of social disadvantage to be considered by sentencers was confirmed by influential interveners submitting on this issue. However, its significance is affected by the fact that only ten interveners submitted on the issue. Such an important move forward should be recognised by allowing public submissions to ensure the widest range of opinion is heard as possible. Essentially, the current regulation that guideline judgments provide lack the breadth that would be possible with a system that allowed wider consultation and review.

Although *Zhang v R* allows addiction to mitigate a sentence, and therefore supports other factors of social disadvantage to be mitigating considerations, the process by which the Court of Appeal implemented their decision highlights the restrictive and ad hoc nature of guideline judgments. Sentencing guidelines do not achieve the justice in individual cases, as generic guidelines do. An alternative mechanism is needed to regulate sentencing.

B A Sentencing Council

⁹¹ Young and King at 257.

⁹² *Zhang v R* [2019] NZCA 509 at [4]-[5].

Using the case study of social disadvantage, I have argued that generic guidelines would be a useful and effective way to ensure mitigation for personal circumstances of disadvantage. Overarching guidelines used in sentencing within the United Kingdom was drawn upon to validate this claim. I will go on to argue that the body which creates and regulates overarching guidelines in the United Kingdom, the Sentencing Council for England and Wales, should be drawn upon to manage the production of generic guidelines in New Zealand as an alternative to the Court of Appeal publishing guideline judgments. Analysis will go through why a Sentencing Council in New Zealand would be an ideal alternative.

It must be acknowledged that New Zealand has previously legislated for the creation of a Sentencing Council, under the Sentencing Council Act 2007. The Act was repealed in 2017 and as at the time of writing, there is no current legislative action to re-introduce a Bill. It is my intention that the flaws outlined in current sentencing regulation practices would be remedied by a Sentencing Council in New Zealand, and would ultimately achieve justice for socially disadvantaged offenders by enforcing generic guidelines of the nature described.

1 Is the Sentencing Council for England and Wales effective?

The nature of the Sentencing Council for England and Wales would be suitable in a New Zealand context for ensuring generic guidelines are followed, and that justice is achieved for socially disadvantaged offenders in every case. Comparatively, the Sentencing Council for England and Wales fills necessary gaps that guideline judgments do not. It has membership outside of the judiciary, requires public consultation on guidelines, and can produce guidelines independent of contexts before the Courts.

The Sentencing Council for England and Wales is given its power by the legislature. It is formed of eight judicial members and six non-judicial members.⁹³ Judicial members

⁹³ Coroners and Justice Act 2009 Schedule 15, [1]-[2].

include judges of the various courts or lay justices, while non-judicial members are those who have experience in such areas as criminal defence, policing, rehabilitation of offenders and criminology.⁹⁴ The inclusion of non-judicial members, who have not worked as a criminal lawyer, means the core of the Council is informed by a range of experiences forged outside a courtroom. The benefit of non-judicial members offering their expertise is that a sentence informed by a guideline has considered the offender more so than an individual Judge, reflecting on her own individual understandings, could. This is in direct comparison to the Court of Appeal's guideline judgments, which are essentially written by the five sitting justices and somewhat informed by any intervener whom they choose to call.

The Council initially publishes all guidelines as drafts.⁹⁵ What follows is a consultation process. The Lord Chancellor, and any person they so directs, the Justice Select Committee, and any other persons the Council deems appropriate must be consulted.⁹⁶ The two forms of mandatory guidelines must be issued as definitive guidelines after appropriate amendments are made,⁹⁷ though any other amended draft guideline is not bound to become definitive guidelines after consultation.⁹⁸ Consultation adds to the scope of experiences that a guideline is built from. Lay people who may not have the expertise to sit on the Sentencing Council are provided, where appropriate, an opportunity to influence what sentences look like. In comparison to guideline judgments, outside consultation is only allowed to a small number of invited interveners. The benefits of public consultation ensure that guidelines which affect offenders can be scrutinised before they are formally decided.

A Sentencing Council in New Zealand which allows both public consultation and non-judicial membership would be the necessary acknowledgement by the State that we need a community response, and an acknowledgment of a connection between social disadvantage and criminal offending. Sentencing, as it stands, is not just. As I contend,

⁹⁴ Coroners and Justice Act 2009 Schedule 15 at [1]-[2].

⁹⁵ At [5].

⁹⁶ At [6].

⁹⁷ At [7].

⁹⁸ At [8].

offenders who are socially disadvantaged are not being sentenced as they should. If an alternative approach is needed, then extending the scope of influence beyond sitting judges is a positive starting point. The wider community should have the opportunity to become involved in policy which directly affects them. A Sentencing Council which is influenced by these two elements (non-judicial membership and public consultation) would achieve that.

A further important feature of the United Kingdom Sentencing Council, is that they have the power to draft guidelines whenever they deem appropriate. In the case of guideline judgments, the Court is constrained by the context of the appeals before it to decide when and how to update a guideline.

The United Kingdom Sentencing Council must also monitor the operation and effect of its sentencing guidelines.⁹⁹ Annual analysis of these factors means guidelines are consistently questioned as to their effectiveness. Essentially, this function means developments of significance that were not considered at a guideline's creation can be assessed. Guidelines remain effective and up to date. This function addresses the issue of guideline judgments seen in *R v Zhang*, where it took thirteen years to update the previous guideline.

Ultimately, the powers and functions of the United Kingdom Sentencing Council fill the gaps that New Zealand's current sentencing regulation structure is missing. I would conclude that a similar body should be re-legislated for in New Zealand that would have the power to create and monitor generic guidelines.

IV Conclusion

New Zealand needs to change the processes by which we sentence offenders. Drawing upon the Court of Appeal's proclamation, sentencing offenders should achieve justice in every individual case. How socially disadvantaged offenders are sentenced has been analysed and used as justification for the need for development in sentencing practices.

⁹⁹ Section 128.

Zhang v R is platform to support such a claim. Coming out of the Court of Appeal in 2019, the *Zhang v R* judgment took a significant step by finding that addiction can warrant a sentence discount. In doing so, the Court acknowledged that current statutory tools, like ss9 and 27 in the Sentencing Act 2002, do not go far enough. The Court relied upon the logic of rational choice to support their conclusion.

The reasoning in *Zhang v R* can be extended to allow mitigation for all forms social disadvantage for all types of offending. Such a claim can be made because the logic of rational choice also applies to issues like poverty and deprivation. The Court of Appeal was constrained by the context of the appeals before it, which is why its finding is limited to that of addiction in relation to drug offences.

Sentencing theory also justifies this position. Categorical leniency would contend, like *Zhang v R*, that socially disadvantaged offenders are not faced with a rational choice whether to offend or not. Issues like poverty, mental health, addiction or deprivation remove the ability to make that choice. As such, offenders suffering under these circumstances are not morally culpable for the entirety of the harm they have caused. This school of thought pulls away from a classic retributivist approach which argues that an offender should suffer the same degree as the suffering they have caused. Retributivism is less convincing because a socially disadvantaged offender has not rationally chosen to cause all the harm that resulted from their offence. Ultimately, categorical leniency has been utilised to mandate the proposition that social disadvantage should be a mitigating consideration in all sentencing decisions.

For consideration of social disadvantage to properly achieve justice in every individual case, it first needs to be mandatory for a judge to consider at the sentencing stage. Second, social disadvantage must be considered generically across every offence. Both these considerations point to mandatory generic guidelines being the most effective way to implement the purposes that *Zhang v R* and categorical leniency hold for. In this way, social disadvantage is compulsory for every sentencer to consider when it is relevant to the offender before the Court. The success of similar guidelines in the United

Kingdom, so called overarching guidelines, prove that similar success would be seen in New Zealand.

Zhang v R also demonstrates the flaws present in the current mechanism of regulating sentencing. Guideline judgments are ad hoc and restricted by the context of the appeals which come before them. The time delay that *Zhang v R* took in revising its guidelines, cost offenders suffering from addiction the opportunity to have their sentence mitigated to reflect the proper level of moral culpability. The Court of Appeal also lack the resources and time to properly develop comprehensive guidelines that address necessary issues. *Zhang v R* illustrates that guideline judgments do not effectively ensure justice is achieved in individual cases. Another mechanism of regulation is needed if generic guidelines are implemented justly sentence socially disadvantaged offenders.

A comparative approach was then undertaken to conclude that a Sentencing Council, modelled off the Sentencing Council for England and Wales, would fill the gaps created by guideline judgments. The structure would generally involve extra-judicial membership and public consultation, both which go to ensure generic guidelines are comprehensive and informed. The success of the model in the United Kingdom supports the creation of one in New Zealand's jurisdiction.

New Zealand must re-legislate for a Sentencing Council to produce and enforce generic guidelines which address issues of social disadvantage. Doing so would ultimately ensure that not only disadvantaged offenders, but all offenders, could better achieve justice when sentenced.

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