

EQUALITY BEFORE THE LAW AND CRIMINAL JUSTICE

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1 Introduction

In a recent lecture about equality before the criminal law and Māori, I suggested that equality in criminal law involved two basic objectives: recognition of tikanga Māori; and procedural and substantive fairness. I then suggested that the principle of equality mandated all actors within the criminal justice community to positively respond to the over-representation of Māori in prison.

At the end of this lecture I was confronted by a student about this. He postulated, in short, that intervention of this kind is not consistent with the core idea of equality before the law, and that the structure of the law must treat all persons equally, with no special dispensation based on race in criminal justice.

I was, regrettably, dismissive of his point — the argument seemed old, tired and paradoxical in a context where the evidence of structural discrimination was clear. But he deserved a better answer. I have endeavoured previously in informal settings to provide that answer, but this is my first considered attempt at it.

I make two introductory comments. First, I have no idea who the student was. I will call him Tāne te mana taurite. In so doing, I hope to rebut any suggestion of implicit bias, or that he was or is predisposed to any view of how the law should respond, if at all, to the apparent asymmetric representation of Māori in prisons.

Secondly, as will become evident, I draw heavily on three egalitarians, John Rawls, Ronald Dworkin and Jeremy Waldron. I make no apology for this because, I think,

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Tāne would agree that they provide a cogent philosophical starting point for any debate about equality before the law.

Turning then to my lecture proper. Legal philosophers have long spoken of substantive equality in contrast to formal equality. The dichotomy is based on the proposition that social and/or economic equality are essentially political ideals or moral goods, while, by contrast, we value the idea that the architecture of the law should treat all equally, without presumptive favour to any sort of person, as inherently right, or tika, and a fundament of the rule of law.

It is this idea of formal equality, I think, that underpins Tāne's objection to affirmative action in favour of Māori in criminal justice. He says formal equality is non-derogable and precludes any form of Māori-centred action, whether in criminal justice or otherwise.

I agree with him that formal equality is non-derogable in our system of law. But I disagree with his second proposition — I think that formal equality, properly understood, mandates — and is vindicated by — such Māori-centred action.

In this lecture, I will present my argument on this in three Parts. First, I will provide the context for this debate. I will examine the nature and scale of the disproportionate representation of Māori in criminal justice with a view to showing that it reflects intergenerational, systemic, structural and localised asymmetry. Secondly, I am going to define what I mean by “formal equality” and by “substantive inequality”. Finally, I will explain why I think that formal equality provides a normative and prescriptive basis for Māori-centred action in criminal justice.

Overall, it will be my view that, given the deconstruction of constitutional persona caused by a sentence of imprisonment, formal equality mandates a Māori-centred response to the persistent, asymmetric incarceration of Māori. While there may be other reasons to object to this, including limitations prescribed by statute, the principle of formal equality is not one of them.

II The Numbers

The statistics of incarceration in Figure 1 will be well known to you.¹ They show that while only comprising 15 per cent of the general population, Māori have comprised about 50 per cent of the prison population for nearly 30 years. Māori youth have comprised about 50–60 per cent of those charged since 1996. The Waitangi Tribunal also recently reported that 65 per cent of youth in prison are Māori and about 81 per cent of Māori are reconvicted after five years (compared to 67.7 per cent for non-Māori).

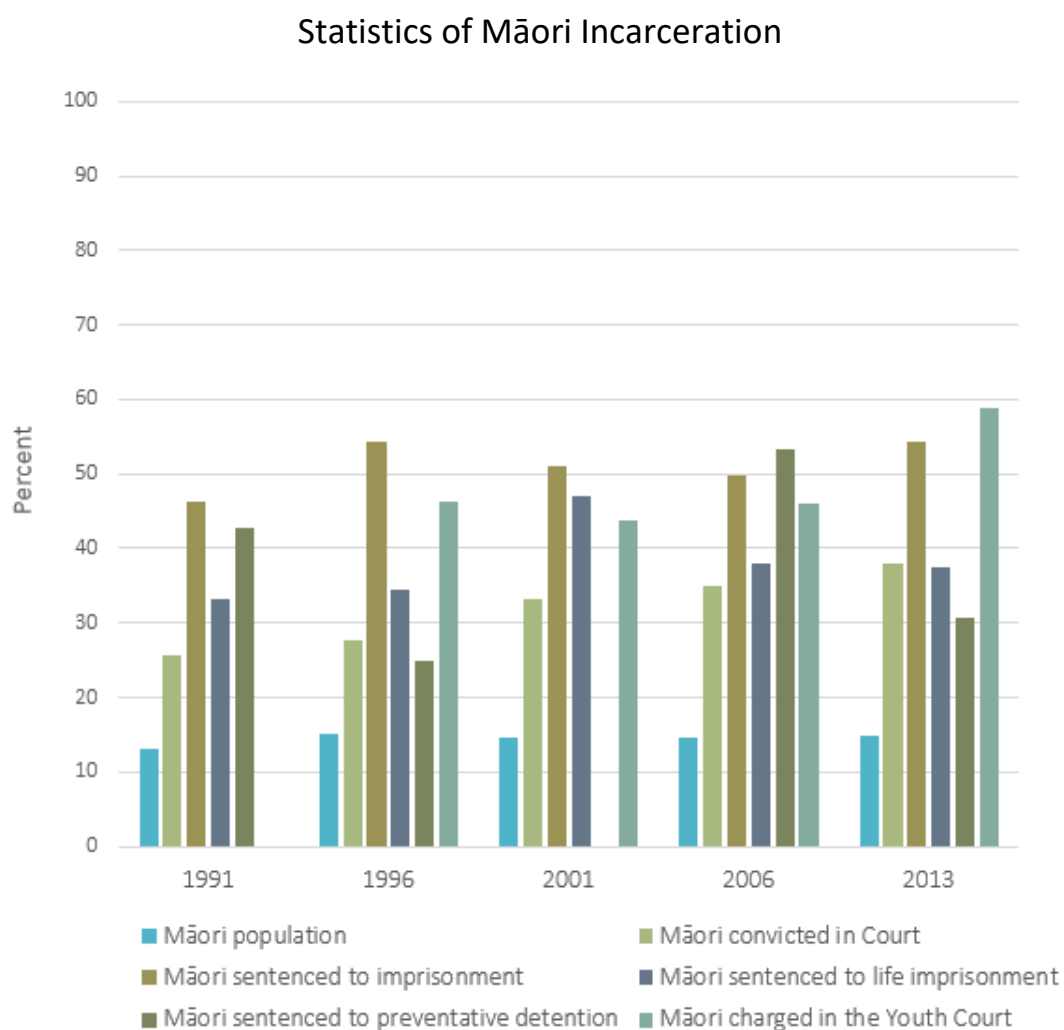


Figure 1. Statistics of Māori incarceration.

1 The statistics in figures 1–4 are based on information supplied by the Department of Corrections, and Statistics New Zealand.

It appears generally accepted that based on these statistics, Māori are about seven times more likely to be imprisoned than persons with a European whakapapa, whom, for ease of reference, I will refer to as Pākehā.

But in some respects, this conclusion is misleading. Māori, and Māori criminality, are not evenly distributed throughout New Zealand.

Māori Incarceration Rates by Proportion of Court Location

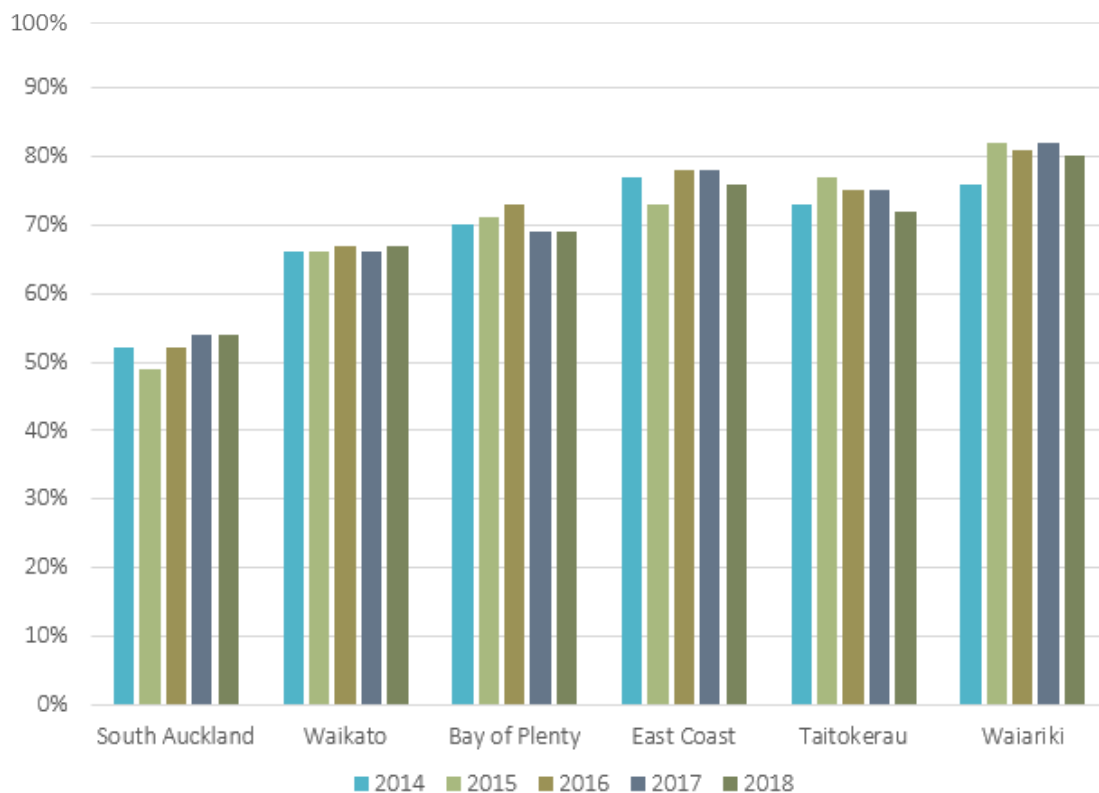


Figure 2. Māori incarceration rates by proportion of court location.

Almost 60 per cent of the Māori prison population was sentenced in just six (of 16) regions — South Auckland, Waikato, Bay of Plenty, East Coast, Taitokerau and Waiariki. In those regions, the incarceration rates have ranged between 49–82 per cent of all persons imprisoned in those regions since 2014. The rates of imprisonment are also very high in these areas — well over 700 per 100,000.

It may be that some of the higher percentage rates can be attributed to a higher percentage of resident Māori in these regions. But closer examination of the rates of incarceration by Police District reveals that the relative disproportionality in these regions remains about the same or even higher.

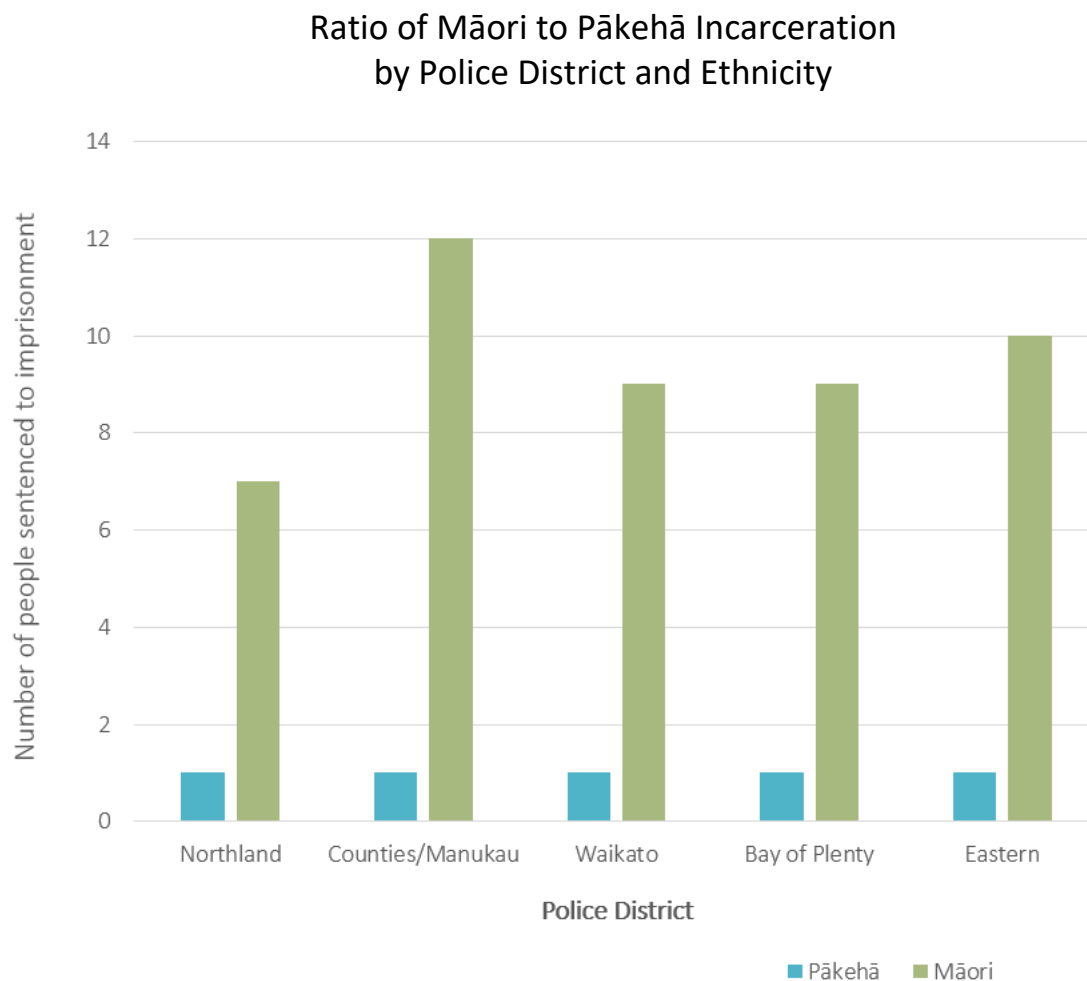


Figure 3. Ratio of Māori to Pākehā incarceration by Police District and ethnicity.

For example, Figure 3 suggests the following ratios of Māori to Pākehā imprisonment:

- in Northland, 6.9 to 1;
- in Counties/Manukau, 12.4 to 1;
- in Waikato, 8.5 to 1;
- in the Bay of Plenty, 8.8 to 1; and
- in Eastern, 10 to 1.

Number of Māori Convicted and Sentenced to Imprisonment by Offence Type

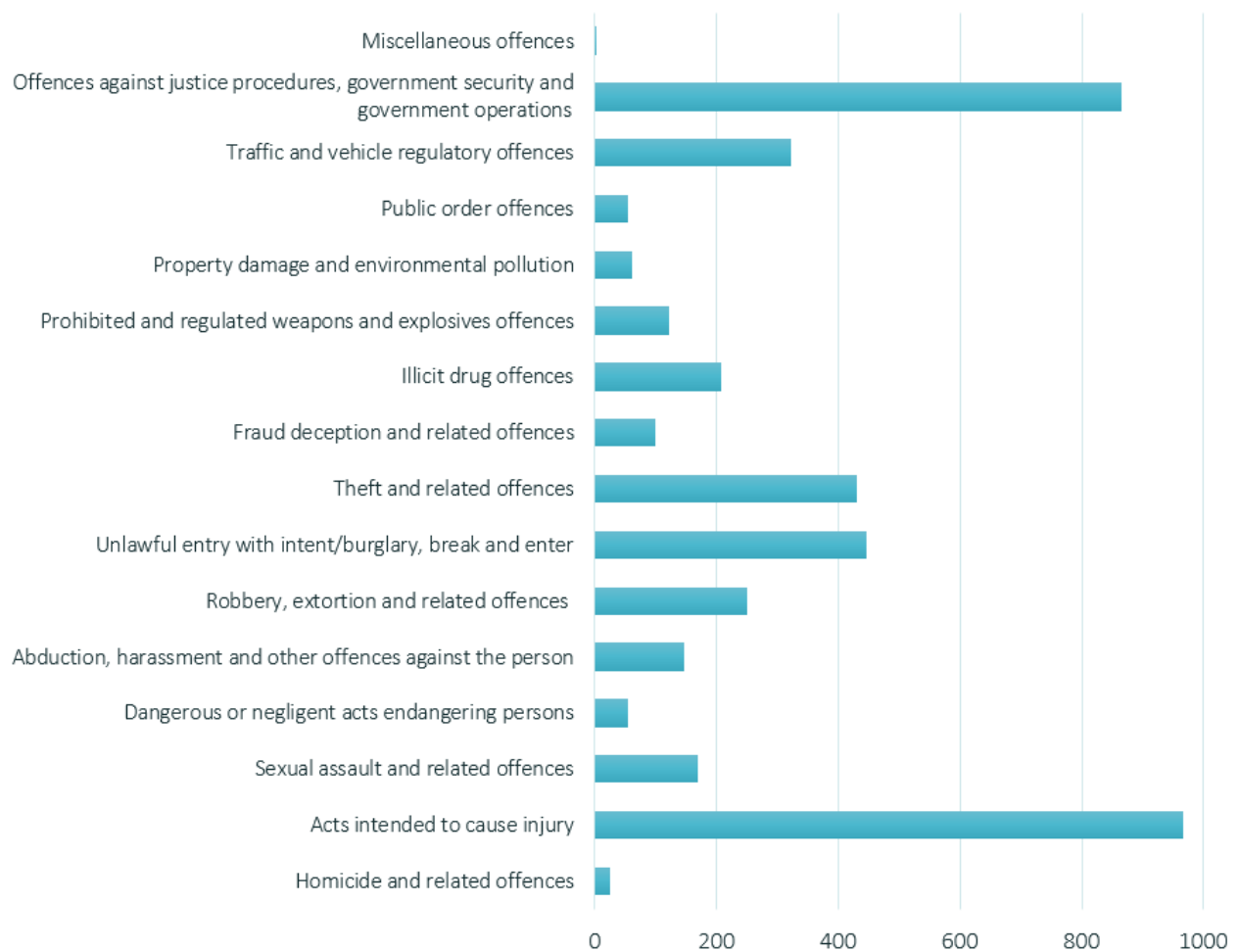


Figure 4. Number of Māori convicted and sentenced to imprisonment by offence type.

One further statistic stands out for mention. 20 per cent of all offences for which Māori are incarcerated are offending against justice procedures, government security and government operations. I doubt government security or operations accounts for a substantial portion of this number. I apprehend that much of it may have something to do with pre-trial detention or breach of parole conditions. As with other offending for which imprisonment may be imposed, the ratio of Māori to non-Māori is broadly the same — with Māori comprising between 57–62 per cent of the prison population for this type of offending.

I think we can make some intuitive conclusions about this data. Māori are grossly over-represented in the prison population and this over representation is systemic in that it is pervasive throughout the criminal justice system. We may also assume it is structural insofar as there are structural features of criminal justice that impact disproportionately on Māori — evident, for example, from the large numbers of Māori incarcerated for offending against justice procedures.

Finally, I think it is tolerably clear that the impacts will be felt most keenly within specific communities where the number of Māori incarcerated are particularly high and the rates of incarceration are particularly entrenched. I think we can also assume that the effect of these rates of incarceration on the affected whānau is likely to be profound. While the rates of incarceration are alarming in several communities, the 12 to one ratio of Māori to Pākehā within Counties Manukau brings home the stark reality for many Māori whānau living within its borders. Any day at the Manukau District Court will regrettably confirm this reality.

III Formal Equality and Substantive Inequality

A Formal Equality

Against this background, I turn to examine Tāne's objection based on equality before the law. One of the benefits of engaging in an essentially hypothetical argument with Tāne is that I get to set the terms of reference. But as my objective is to try to persuade Tāne, and people who share his opinion, I need to find some common ground or premises upon which we can sensibly engage. Fortunately, as Tāne is deploying the principle of equality as his primary objection, I can draw on three giants of egalitarianism — John Rawls, Ronald Dworkin and Jeremy Waldron — for inspiration.

Thus, I think Tāne's conception of equality has three core components, which in combination I call "formal equality":

- the regular and impartial administration of clear laws in accordance with due process — or what John Rawls called *formal justice* or *justice as regularity*;²
- equal basic rights must be assigned to all persons,³ or as Jeremy Waldron put it in his recent book: “in our use of principles of justice (including social justice), basic equality requires of us that all humans be treated as subjects and beneficiaries ... on equal terms”;⁴ and
- equality of this kind is non-derogable.

The first of these components is uncontroversial. Justice as regularity is commonly associated with orthodox ideas of the rule of law.⁵ The second and third components might be said to shift the debate somewhat unfairly in my direction, so I will elaborately briefly on them.

While a good starting point, justice as regularity as conceived by Rawls provides an insufficient normative basis for Tāne’s key objection. Inherently discriminatory laws or practices (affirmative or negative) may be applied impartially, consistently and in accordance with due process but nevertheless violate Tāne’s underlying premise of equality. For example, a statutory exception to criminal prosecution applicable only to Māori for certain offences, applied consistently and impartially, meets the requirements of justice as regularity. There must, therefore, be some other characteristic of the legal architecture which protects equality.

The inculcation of what Waldron calls “basic equality” solves this problem without doing any obvious violence to the first component — and while affirming and giving meaningful content to Tāne’s key point that the law should apply equally to all. As Waldron put it: “In general, basic equality commands our equal considerability

2 John Rawls *A Theory of Justice* (Belknap Press, Cambridge (MA), 1971) at 58–59 and 236–237.

3 At 504.

4 Jeremy Waldron *One Another’s Equals: The Basis of Human Equality* (Belknap Press, Cambridge (MA), 2017) at 47–48 (emphasis added).

5 As AV Dicey conceived it: “that every man, whatever be his rank or condition, is subject to the ordinary law of the realm”. AV Dicey *Introduction to the Study of the Law of the Constitution* (Liberty Fund, Indianapolis, 1982) at 114. See also Jeremy Waldron “One Law for All? The Logic of Cultural Accommodation” (2002) 59 Wash & Lee L Rev 3 at 3.

under moral principles. Everyone is counted for one: that is the prescriptive demand.”⁶ He also says that there must be “no ‘thumb on the scale’ for certain individuals we favour or for the members of some groups (say, groups to which we ourselves belong) as opposed to others”.⁷ I think Tāne would plainly agree with each of these propositions, as do I.

The third component, non-derogability, is grounded in some constitutional fundamentals. Justice as regularity is, as Rawls noted, necessary to preserve the integrity of the judicial process⁸ and, as Ronald Dworkin argued, the protection of individual liberties, equally, is a premise of majoritarian rule.⁹

Waldron also noted that his concept of basic equality closely approximates to the equal protection clause of the Fourteenth Amendment to the United States Constitution.¹⁰ While we have no similar constitutionally-entrenched provision in our law, there can be little doubt we have through the common law process, aided by statute, entrenched the idea of equality and the equal application of the law through, among other things, the strict application of the principle of legality.

Indeed, I think it is difficult to find within the common law a more entrenched idea. As Lord Steyn put it in *Ex parte Pierson*:¹¹

Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantive and procedural.

6 Waldron, above n 4, at 48.

7 At 49.

8 Rawls, above n 2, at 239.

9 Ronald Dworkin *Freedom’s Law: The Moral Reading of the American Constitution* (Harvard University Press, Cambridge (MA), 1996) at 15.

10 Waldron, above n 4, at 52. See also Jeremy Waldron “The Core of the Case Against Judicial Review” (2006) 115 Yale LJ 1346. In this article dealing with substantive judicial review, Waldron identifies four assumptions which, if they hold true, remove the need for substantive judicial review. Each of these assumptions is premised, in my view, on the affirmation of formal equality: the right vote; the rule of law; a commitment to individual and minority rights; and the capacity to disagree about content of such rights. At 1360. See also the discussion of political equality at 1364–1365, 1375, 1388, 1399 and 1405.

11 *R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539 at 591.

In summary, the type of equality that I think Tāne te mana taurite would approve makes the non-derogable demand that the law must be applied consistently and impartially to all of us, as subjects and beneficiaries of justice, on equal terms. That is — everyone is counted for one.

B Substantive Inequality

What then do I mean by substantive inequality? It is necessary to observe that when I speak of substantive inequality, I am not talking only about inequality of outcome. Rawls and Waldron provide some definitional assistance here too. Rawls referred to a second principle of justice, involving the arrangement of social and economic inequalities that are both “expected to be to everyone’s advantage” and “attached to positions and offices open to all”.¹² Put another way, the distribution of wealth and income, and the hierarchies of authority, must be consistent with both the liberties of equal citizenship and equality of opportunity.¹³

Waldron also refers to “surface-level” equality as distinct from basic equality. Surface level equality addresses issues of distribution of wealth and income.¹⁴ But as he explains, how we define “surface level” equality is a matter of significant debate — as he put it, “[s]hould we be aiming for equality of well being, equality of resources, equality of opportunity, equality of primary good or equality in the capabilities that are important for peoples lives”.¹⁵ He also says that some principles that evaluate surface level distributions test them against standards of human dignity.¹⁶

For my part, I locate substantive inequality in that class of surface level inequality involving any distribution which is discordant with this basic principle of equal opportunity and/or breaches the human right to be free from discrimination.

12 Rawls, above n 2, at 60.

13 At 61.

14 Waldron, above n 4, at 35.

15 At 9.

16 At 37.

I want to make a further point. Waldron's distinction between surface level equality and basic equality is important because it is basic equality that guides our assessment about whether inequality or unequal treatment at this surface level is justified or unjustified.¹⁷

I appreciate this is all a little abstract. So, I will use one of Waldron's examples to illustrate the interface between basic equality and surface level equality.¹⁸ He refers to applicants for a job with the fire brigade. He says that employment criteria that discriminate in favour of the physically fit generate distributive inequality of opportunity insofar as the unfit are concerned. But they do not engage the principle of basic equality because the fitness criteria used is justified.¹⁹ However, if the surface level criterion for the job was based on race, for example affirming the identity of white people, we might legitimately argue (Waldron says) that this is surface level inequality which we should abhor.

IV Equal Protection

I turn now to the fourth Part of my lecture. As foreshadowed, I consider that Māori-centred action by criminal justice actors is justified and mandated by what I have called formal equality.

Before I explain my main reasons for this, it is necessary to explain what I mean by Māori-centred action. It has two primary components. The first is recognition of tikanga Māori insofar as it is relevant to explaining the offending or provides guidance in terms of the management and rehabilitation of the offender pre- or post-trial. This is not about cultural exemption per se. Rather it is directed at the underlying objectives of criminal justice, evident in, for example, sentencing principles designed to, among other things, protect the public, achieve proportionate sentences and assist

17 At 14 and 68.

18 At 14 and 68.

19 This reasoning echoes the outcome reached in *Ricci v DeStefano* 557 US 557 (2009).

in rehabilitation. The case law on the potential for recognition remains sparse, but the roots are there.²⁰

The second — perhaps even more controversial — component involves the various decision-makers at each step of the criminal justice process taking cognisance of the parlous statistics of asymmetric representation of Māori in prison and the wider causative factors driving those perverse rates of incarceration.

It is not for me in this context to prescribe how this Māori-centred approach manifests itself in practice. But I will refer to two contexts to illustrate the point. In our bail decisions, we are often confronted with an assessment of risk based on apparently neutral factors. A topical example is in the context of family violence. It is common now to refer to red flags. They are what I would call facially neutral in that they are not based on race. But they refer to such factors as poverty, youth, and alcohol or drug abuse, which are factors that characterise the circumstances of many Māori defendants. The effect of using such facially neutral red flags is to systemically bias the bail decision-making process against young Māori men.

The second context involves sentencing. There has been a longstanding, but, until recently, underutilised statutory provision enabling consideration of, among other things, evidence of systemic deprivation. A Māori-centred approach would involve ensuring that when a Māori offender comes before the court for sentencing, sufficient information about his or her background is tabled before the sentencing judge to enable his or her Honour to make an informed decision about whether there is a proven nexus between, say, systemic deprivation and the offending. As recently affirmed by the Court of Appeal in *Arona v R*,²¹ culpability may be mitigated for sentencing purposes where it has been shown that there is a nexus between systemic deprivation affecting Māori and the offending under scrutiny.

Returning then to the reasons why I think formal equality mandates such Māori-centred action. First, it plainly mandates such action where there is clear evidence of

20 *Keil v R* [2017] NZCA 563.

21 *Arona v R* [2018] NZCA 427.

a breach of s 19 of the New Zealand Bill of Rights Act 1990 (BORA) — the right to be free from discrimination based on race.

A well-known example of the first category involved potential police profiling of a “Polynesian male” and a “dark-skinned male” in the case of *Kearns v R*.²² The Court of Appeal had little trouble in finding that, if proven, any decision by the police to approach a defendant based on such profiling would have unjustifiably breached s 19 of the BORA. The immediate result was a direction to rehear the admissibility of the evidence obtained by a subsequent search. But the broader message was the clear direction by the Court that racial profiling was not to be tolerated and that “a close look at all the evidence relevant to the allegation of breach will be necessary”.²³

However, I accept Tāne is unlikely to quibble much about the court’s response to this type of s 19 discrimination — it directly violates his commitment to equality. So, it does not really advance the debate much.

Much more controversial is whether the statistical evidence of asymmetric representation is evidence of s 19 discrimination. Disparate treatment of this scale has triggered similar equal protection provisions in other jurisdictions, especially outside of the criminal justice context.

Perhaps the clearest expression still of this remains the following statement of the United States Supreme Court in *Griggs v Duke Power Co*:²⁴

Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has — to resort again to the fable — provided that the vessel in which the milk is proffered be one all seekers can use.

22 *Kearns v R* [2017] NZCA 51, [2017] 2 NZLR 835.

23 At [9] and [12].

24 *Griggs v Duke Power Co* 401 US 424 (1971) at 431.

I accept, however, that there are significant hurdles to a claim that the grossly disproportionate representation of Māori in prisons involves actionable racism, though there is evidence of structural bias.²⁵ Selwyn Fraser, in an insightful article, provides a basis for drawing this conclusion, applying orthodox comparator analysis.²⁶ He noted that comparators, Pacifica peoples and young men, appear to be equally disproportionately represented. While I doubt the correctness or efficacy of these comparisons, his analysis reveals the complexity of such an assessment and the problems confronting a claim of systemic discrimination.

Furthermore, the difficulties attached to claims of this kind are also evident from the approach taken to such claims in the United States based on the equal protection clause of the 14th Amendment to the United States Constitution. Michelle Alexander, in her book *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, is particularly scathing of the decisions of the Supreme Court, such as *McCleskey v Kemp*, which she says, in short, undermine the real force of the equal protection clause.²⁷ There has, however, been — at State level at least — recognition of the potential for systemic discrimination in criminal justice.²⁸

The best then that I can say about this, in terms of my debate with Tāne, is that, while difficult to prove, formal equality mandates, via anti-discrimination laws, redress for proven systemic discrimination even within the criminal justice system.

In any event, I now turn to examine my second — and, I think, strongest — justification for Māori-centred action, one that does not require proof of actionable discrimination in criminal justice. Rather, I contend, when the criminal justice system incarcerates Māori at a ratio of 12 to one, over a sustained period, we know there must be something going wrong and/or deeply unfair about this, whatever its cause.

25 *Kearns*, above n 23.

26 Selwyn Fraser “Māori qua what? A Claimant-Group Analysis of *Taylor v Attorney-General*” [2017] NZ L Rev 31.

27 Michelle Alexander *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New Press, New York, 2010). See *McCleskey v Kemp* 481 US 279 (1987).

28 *State v Russell* 477 NW 2d 866 (Minn 1991).

Furthermore, criminalisation directly impacts on the exercise of rights of citizenship and constitutional persona — that is, the right to participate in civil society altogether.

Formal equality is, therefore, engaged in a much more direct and fundamental way in criminal justice — in maintaining the integrity of the justice system and the legitimacy of government. This is a matter of breadth as well of depth. Because, save perhaps for the rules governing the electoral system, nowhere else is the law engaged in deconstructing our constitutional persona more than in criminal justice.

This issue was examined, briefly, in *Ngaronoa v Attorney-General* dealing with the impact of criminalisation of Māori and the right to vote.²⁹ In that case, there was no dispute about asymmetric representation of Māori in prisons. But, the Court of Appeal made two points:

- comparator analysis showed no racial discrimination because both Māori and non-Māori were affected in the same way — both lose the right to vote;³⁰ and
- the number affected was so small that there was, in short, no material discrimination.³¹

The approach and the outcome represent settled law. But, it only indirectly (if at all) dealt with structural discrimination in the criminal justice system because it was focused on the effect of a disenfranchisement provision, not the effect of the criminalisation itself. In this regard, the result of the comparator analysis was inevitable in the absence of clear and compelling evidence of distributive inequality: Māori and non-Māori offenders are treated equally — they both lose the constitutional right to vote in equal measure.

But, when we come to examine the operation of the criminal justice system per se, from an egalitarian perspective, the comparison should take place much earlier. The key issue under scrutiny is not whether Māori and non-Māori both lose the right

29 *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643.

30 At [137] and [140].

31 At [149] and [153].

to vote. The key issue concerns what I would call their “eligibility” for imprisonment and thus loss of liberty, and disenfranchisement, and whether the disproportionate rates of incarceration accord with the requirements of formal equality.

As Waldron might put it — the key question to ask is: are Māori and non-Māori subject to, and the beneficiaries of, criminal justice on equal terms?

I appreciate it is difficult to conceive of “eligibility” in this way.³² That is likely because “eligibility” in criminal justice has, *prima facie*, facially neutral markers — a crime, a fair trial and a sentence fixed by law and impartially handed down together with a strong social justification. But we know facial neutrality and social justification do not necessarily meet the requirements of formal equality.

To illustrate, a right to vote based on property ownership is facially neutral and in the 19th century was socially justified. The fact that more white men than brown women might own property and therefore enjoy the right to vote, is on the Court of Appeal’s reasoning literally applied, not evidence of actionable discrimination — both men and women are equally affected by the impartial application of the eligibility criterion.

But the fact that it is not discriminatory in the result says nothing about whether the criterion for eligibility and disenfranchisement meets the requirements of formal equality. That question is answered by reference to the criterion used to limit or remove the right to vote, not by reference to whether it is enjoyed equally by those who are eligible to vote.

And it is because of the grossly disproportionate deconstructing effect of criminalisation on the constitutional persona of Māori *per se* that we engage the principle of formal equality or equality before the law, as a normative and prescriptive basis for Māori-centred action in criminal justice. The statistical evidence of asymmetric representation of Māori in prisons may well fall short of directly engaging

32 But see Alexander, above n 27.

anti-discrimination laws. But, in my view, it directly and clearly engages the principle of formal equality as a simple matter of fairness.³³

V Conclusion

I want to conclude by bringing this abstract analysis back to the Māori communities most affected by the disparity. I do this to bring into focus the group I think is the true target of formal equality in this context.

The Police District level analysis reveals, in my view, what our experience tells us. We are dealing with entrenched systemic inequality of relatively small (on a national scale) sub-groups of Māori exposed to extraordinary rates of incarceration and with all of the consequences that entails. Imprisonment is, of course, only one part of the picture of grossly disproportionate engagement by the same sub-groups with the criminal justice system. While it is a matter for closer inquiry, the quantitative and qualitative effect of this engagement at the local level — for example in Kaikohe, in Otahuhu, in Kawerau and in Ruatoria — must be, as I have said, profound.

All of this, I think, brings into frame a social dynamic that Waldron accepted might justify substantive judicial review, something which he otherwise deplors. Waldron says systemic disparate treatment of “discrete and insular” minorities might justify such review.³⁴ He cites a footnote in *United States v Carolene Products*, which I think resonates in this context.³⁵

Prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

33 Waldron identified fairness as a necessary criterion for exemption based on culture. Waldron, above n 5, at 33.

34 Waldron, above n 10, at 1403.

35 At 1403. See *United States v Carolene Products* 304 US 144 (1938) at 153, n 4.

In my view, Māori whānau caught in the intergenerational grip of dislocation, poverty, crime and grossly disproportionate rates of imprisonment are such a discrete and insular minority: they are relatively small sub groups of Māori who by dint of their criminality are deeply unpopular.³⁶ And, by reference to all available data, they have not been afforded the benefit of criminal justice on equal terms. Or more accurately, they have been subject to the worst effects of the criminal justice system on grossly unequal terms.

Therefore, in conclusion, I am confident that formal equality mandates a Māori-centred response to this social dynamic, because, in our criminal justice system, not every Māori is counted for one. While, as I have said, there may be statutory limitations to any given response, adherence to formal equality is not otherwise one of them.

36 “Insular”, as Waldron uses it, refers to a group which is unlikely to be represented by elected representatives. See above n 34.