*Megan Beatrice**

CRITICAL RACE THEORY IN THE AUSTRALIAN CARCERAL CONTEXT: THINKING DIFFERENTLY ABOUT OVER-INCARCERATION

Abstract

First Nations people in Australia are among the highest growing carceral populations in the world, and yet countless attempts to reverse the trend have been unsuccessful. This paper contends that notions of race play a foundational role in the over-incarceration of First Nations people, and to that end applies a Critical Race Theory lens to this crisis. By considering the historical and jurisprudential development of Critical Race Theory from its inception in the 1970s and looking at how the lens has been utilised outside of the United States, an opportunity arises to reimagine the problem of over-incarceration. This paper conducts a comparative analysis of two key cases which center race: *Brown v Board of Education* in the United States, and *Mabo v Queensland (No 2)* in Australia, to illustrate the practical limitations of symbolic judgments and how the legacies of these cases contribute to the treatment of racialised people in Western criminal justice systems. These analyses, supported by consideration of Canadian and Australian sentencing decisions, ultimately lead to the conclusion that Critical Race Theory underscores the failure of law to provide justice to racialised people in the criminal justice system.

I Introduction

In 1998, in the Minnesota Supreme Court case *State v Buggs*,[1] Page J, in his dissenting judgment stated that '[i]n part, what makes race a confounding problem and what causes many people to not know what race is, is the view that the problems of race are the problems of the racial minority'.[2] When considering the alleged racially discriminatory reasons for excluding a particular juror in that case, his Honour continued: 'The problems of race belong to all of us, no matter where our ancestors come from, no matter what the color of our skin … *Race is an*

* PhD (Law) candidate at RMIT and Lecturer in Law at Deakin University. The author is grateful to Emeritus Professor Bronwyn Naylor and Dr James Gilchrist Stewart for their critical eye and advice on earlier drafts of this paper.

1 *State v Buggs*, 581 NW 2d 329, 344 (Minn, 1998).

2 Ibid.

issue'.[3] Words like 'race', 'racist', and 'racialised' are, in many ways, confounding. They are employed in a multitude of contexts, they are loaded with inconsistencies and inconsistent intentions, they mean very different things to different groups and individuals.[4] Nevertheless, the 'distinct division' of race as manufacturing the colonised other,[5] is central to an analysis of the over-incarceration of First Nations people in Australia.

Race, its 'fixity',[6] and the distinction and naming of race, is a powerful tool of colonial law in settler-colonial jurisdictions like the United States ('US'), Australia, Canada, and New Zealand. Indeed, some scholars suggest that in jurisdictions like Australia, notions of race are informed by 'the legacy of white colonisation'.[7] This has, seemingly contradictorily, allowed for 'one … to distance oneself from white domination by adhering to a liberal position of universal sameness', a position which 'erases race' and has unique implications for colonial power and violence.[8] Distinctions of race are, however, essential to the legitimisation of the colonial project. The 'truth' of race within colonial structures maintains and perpetuates an othering[9] of First Nations people and reinforces the ongoing power of settler-colonial structures of law and justice. These ideas are reflected in the work of Australian scholars, including Irene Watson's decolonial theory and Maria Giannacopoulos' work on nomocide, which are examined in more detail below.[10] This paper outlines the history and development of Critical Race Theory ('CRT') and considers how this theoretical framework might allow us to think differently about the ways in which race has impacted, and continues to impact, the over-incarceration for First Nations people in Australia.

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3 Ibid (emphasis added).

4 See, e.g., Destiny Peery, '(Re)defining Race: Addressing the Consequences of the Law's Failure to Define Race' (2017) 38(5) *Cardozo Law Review* 1817, 1854–6.

5 Edward Said, *Orientalism* (Vintage Books, 1979) 45.

6 Homi K Bhabha, *The Location of Culture* (Routledge Classics, 2004) 94.

7 Luana Ross, *Inventing the Savage: The Social Construction of Native American Criminality* (University of Texas Press, 1998) 91.

8 Aileen Moreton-Robinson, *Talkin' Up to the White Woman: Indigenous Women and Feminism* (University of Minnesota Press, 2021) 145.

9 See, e.g.: Said (n 5) 206; Frantz Fanon, *Black Skin, White Masks*, tr Richard Philcox (Grove Press, rev ed, 2008); Frantz Fanon, *Wretched of the Earth*, tr Constance Farrington (Penguin Classics, 2002) (Grove Press, 1963) 41. See also for discussion of 'truth', 'knowledge', and the 'other': Jean-Paul Sartre, 'Introduction' in Frantz Fanon, *The Wretched of the Earth*, tr Constance Farrington (Penguin Classics, 2002) 7; Jean-Paul Sartre, *Anti-Semite and the Jew: An Exploration of the Etiology of Hate*, tr George Becker (Knopf US, rev ed, 1995); Michel Foucault, *The History of Sexuality, Volume 1: The Will to Knowledge*, tr Robert Hurley (Penguin Classics, 2020) ('*History of Sexuality*').

10 See, e.g.: Irene Watson, 'Buried Alive' (2002) 13(3) *Law and Critique* 253; Maria Giannacopoulos, 'White Law/Black Deaths: Nomocide and the Foundational Absence of Consent in Australian Law' 46(2) (2022) *Australian Feminist Law Journal* 1.

This paper is broken into five sections. First, this introduction details the concept of race itself, including definitions of race and the ways in which race is understood for different purposes. Second the paper turns to a brief history of CRT, exploring its development and common applications. The third section discusses the key tenets of CRT and how they relate to the Australian context. The fourth section examines the conceptualisation of race as a social construct, allowing for a comparative analysis of the Australian common law which exposes this. The fifth section then considers common critiques of CRT, including the four-point critiques identified by Mari Matsuda: that race does not exist, that it is not unique to people of colour, that it is paranoid and/or separatist, and that it is theoretically unsound.[11]

A critical analysis is then undertaken comparing the US Supreme Court decision of *Brown v Board of Education of Topeka* ('*Brown*'),[12] popularly considered a watershed moment in the development of CRT, and the similarly symbolic High Court of Australia decision in *Mabo v Queensland (No 2)* ('*Mabo*').[13] This section applies Derrick Bell's 'interest-convergence' theory, discussed in more detail in the following sections of this paper, and argues that both *Brown* and *Mabo* are the products of a point in time at which the material and/or psychological interests of the white majority and the racialised other converged, or, at least, were not divergent. Finally, this paper considers how conceptions of race in the Australian criminal justice system influence incarceration. This is achieved by analysing the sentencing practices of Australian courts in the context of *Bugmy v The Queen* ('*Bugmy*').[14] This article ultimately concludes that the CRT lens, despite criticism, offers an invaluable perspective on the over-incarceration of people of colour, particularly First Nations people, which differs from the dominant view.[15]

11 Mari Matsuda, *Where is Your Body? And Other Essays on Race, Gender and the Law* (Beacon Press, 1996) 55.

12 347 US 483 (1954) ('*Brown*').

13 (1992) 175 CLR 1 (*'Mabo'*).

14 (2013) 249 CLR 571 ('*Bugmy*').

15 This methodology, which promotes an alternative view of the crisis of over-incarceration of First Nations people, draws on Michel Foucault's 'Theory of the Present', a methodological framework which is 'patchworked' together from a number of his works, including: Michel Foucault, *The Archaeology of Knowledge*, tr Alan Sheridan (Routledge, 2nd ed, 2002); Michel Foucault, *Discipline and Punish: The Birth of the Prison*, tr Alan Sheridan (Penguin Classics, 2020) ('*Discipline and Punish*'). See also: Friedrich Nietzsche, *On the Genealogy of Morals*, tr Michael Scarpitti (Penguin Classics, 2013); David Garland, 'What Is a "History of the Present"? On Foucault's Genealogies and Their Critical Preconditions' (2014) 16(4) *Punishment & Society* 365; Michael S Roth, 'Foucault's "History of the Present"' (1981) 20(1) *History and Theory* 32.

II What Is Race?

In order to frame the ideas considered in this paper, it is necessary to clarify the concept of race, particularly in the context of this paper. The *Macquarie Dictionary* defines 'race' as follows:

> 1. a group of people sharing genetically determined characteristics such as skin pigmentation or hair texture. 2. the differentiation of people according to genetically determined characteristics: genetic studies of race; discrimination on the grounds of race. 3. a large class of living beings: the human race; the race of fishes. 4. a group of people sharing a language or culture of traditional beliefs or practices: the Scottish race. 5. Zool. a distinctive group within a species; subspecies.[16]

Each of these definitions are markedly physical in nature, focusing on physical characteristics, physical distinctions, and physical groups, reflecting the biological theory of race.[17] The biological theory of race consists of two distinct, but compatible, sub-theories: the typological theory of race is an essentialist lens which relies on systematic classifications of schemes; geographical race, which was developed later, holds that 'race is a geographically localized subdivision of a species'.[18] It is important to note that the biological theory of race has been largely discredited,[19] and as such it is necessary to consider the theoretical interpretations of race relevant to this research.

In outlining his understanding of what race means, Ian Haney Lopez concedes that it is our physical characteristics, including hair, skin, and facial structure, that influence 'whether we are figuratively free or enslaved'.[20] However, Lopez argues that race can be defined not only as physical, which has its roots in biological essentialism, but also as economic, as political, and as fundamental to identity.[21] For Lopez, the 'primitive view' of race — exemplified by the empirical definition set out in *Hudgins v Wright*,[22] where race is determined by having a 'single African

16 *Macquarie Dictionary* (online at 1 April 2025) 'race' (def 4).

17 See, e.g: Robin O Andreasen, 'Race: Biological Reality or Social Construct?' (2000) 67(53) *Philosophy of Science* S653, S663; Robin O Andreasen, 'The Meaning of "Race": Folk Conceptions and the New Biology of Race' (2005) 102(2) *The Journal of Philosophy* 94, 94.

18 Robin O Andreasen, 'Biological Conceptions of Race' in Mohan Matthen and Christopher Stephens (eds), *Philosophy of Biology* (Elsevier, 2007) 455, 460.

19 See, e.g: Andreasen, 'Biological Conceptions of Race' (n 18); Lisa Gannett, 'The Biological Reification of Race' (2004) 55(2) *British Journal of Philosophy and Science* 323; Joseph L Graves, *The Emperor's New Clothes: Biological Theories of Race at the Millennium* (Rutgers University Press, 2001); Andreasen, 'Race: Biological Reality or Social Construct?' (n 17).

20 Ian Haney Lopez, 'The Social Construction of Race' in Julie Rivkin and Michael Ryan (eds), *Literary Theory: An Anthology* (Wiley-Blackwell, 2nd ed, 2004) 965.

21 Ibid.

22 11 Va (1 Hen & M) 134 (Va, 1806).

antecedent', a 'flat nose', or a 'woolly head of hair' — is not sufficient.[23] Race, and the ways in which we define it and it defines us, goes beyond the physical.

This view is consistent with Alain Locke's theory of atavism. Locke's essay, *The New Negro*, marks a 'turning point' in how the associations between race and 'cultural traits' was understood.[24] 'Biological atavisms' refers to the theory that physical characteristics of some animals, including humans, can revert to an earlier evolutionary point, sometimes referred to as a 'throw-back'.[25] As Clarence Walker explains in the context of the *Brown* decision, the environment in the American South which allowed racial segregation was consistent with an atavistic social attitude.[26] For Walker, 'America and the South's atavism *was* segregation'.[27]

Lopez challenges the atavistic view of race, arguing that race, is 'a vast group of people loosely bound together by historically contingent, socially significant elements of their morphology and/or ancestry … a sui generis social phenomenon'.[28] However, Destiny Peery, in her paper identifying the historic and ongoing reluctance of the law to define race, argues that despite the silence of the law on 'race', doing justice frequently relies on constructions of race, making racial classifications both important and necessary.[29] For the purpose of this paper, race is understood consistently with Lopez's definition: as socially constructed distinctions between groups linked by common ancestry. This paper utilises CRT to interrogate the construct of race and its application to the Australian carceral context. While CRT encapsulates a large field of theoretical propositions, it can be represented with a broad approach like Lopez's for the purpose of this paper. In discussing and conducting a critical analysis of First Nations peoples' incarceration through the lens of CRT, this paper demonstrates the ways in which race, as a category of disadvantage in the Australian context, is pervasive.

III History of Critical Race Theory

CRT has its roots in the mobilisation and activism of lawyers and legal scholars in post-civil rights era America, and at least for the moment, remains an undeniably

23 Lopez, 'The Social Construction of Race' (n 20).

24 Leonard Harris, 'Identity: Alain Locke's Atavism' (1988) 24(1) *Transactions of the Charles S. Peirce Society* 65, 65; Alain Locke (ed), *The New Negro: An Interpretation* (Atheneum, 1925).

25 Jerry Bergman, 'The Biological Theory of Atavism: A History and Evaluation' (1992) 29 *Creation Research Society Quarterly* 33, 33.

26 Clarence Walker, 'The Effects of Brown: Personal and Historical Reflections on American Racial Atavism' (2004) 70(2) *The Journal of Southern History* 295.

27 Ibid 300 (emphasis added).

28 Lopez, 'The Social Construction of Race' (n 20) 966.

29 Peery (n 4) 1877.

US-centric lens.[30] As a movement, CRT 'sprang up' in the 1970s as it became apparent that the gains made through the American civil rights movement were deteriorating.[31] Emerging from the foundations of the US Critical Legal Studies ('CLS'),[32] and owing a substantial debt to the work of radical and Black feminism,[33] CRT is characterised by its focus on the 'historical patterns of physical and psychic dispossession' and domination of people of colour, particularly within the law.[34]

For early CRT scholars embedded within the critical legal movements, CLS did not do enough for people of colour.[35] CLS is described by James Gilchrist Stewart as a 'historical movement … concerning fields of legal inquiry that are posed to critique law from a critical position'.[36] While the lower-case, 'broad' CLS encompasses a range of lenses, including CRT and Feminist Legal Theory, 'narrow' CLS constitutes a movement in itself,[37] though it is not without criticism. Through her allegory, *The Brass Ring and the Deep Blue Sea*, Patricia Williams demonstrates the way in which movements like CLS contribute to 'legal strategies which affect — literally from on high — the poor and oppressed'.[38] CLS was, unwittingly or not, reproducing the power imbalance that oppressed minorities experienced, and was not an appropriate forum for what Mari Matsuda calls 'subordinated communities'.[39] The moniker itself, 'Critical Race Theory', was first used by Kimberlé Crenshaw in 1989 to describe the work radical people of colour in legal academia were doing.[40]

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30 Richard Delgado and Jean Stefancic, *Critical Race Theory: An Introduction* (New York University Press, 4th ed, 2023) 4 ('*CRT: An Introduction*').

31 Ibid.

32 Margaret Davies, *Asking the Law Question* (Thomson Reuters, 4th ed, 2017); James Gilchrist Stewart, 'Demystifying CLS: A Critical Legal Studies Family Tree' (2020) 41(1) *Adelaide Law Review* 121. See also Matsuda (n 11).

33 Delgado and Stefancic, *CRT: An Introduction* (n 30) 4–5; Kehinde Andrews, *The New Age of Empire: How Racism and Colonialism Still Rule the World* (Penguin Books, 2021) xx–xxi; Patricia Williams, *The Alchemy of Race and Rights* (Harvard University Press, 1991); bell hooks, *Feminist Theory: From Margin to Center* (Pluto Press, 2nd ed, 2000); bell hooks, *Ain't I a Woman: Black Women and Feminism* (Pluto Press, 1986).

34 Patricia Williams, 'Alchemical Notes: Reconstructing Ideals from Deconstructed Rights' (1987) 22(2) *Harvard Civil Rights-Civil Liberties Law Review* 401, 405.

35 Kimberlé Crenshaw, 'The First Decade: Critical Reflections , or "A Foot in the Closing Door"' (2002) 49 *UCLA Law Review* 1343, 1355; Matsuda (n 11); Williams (n 34).

36 James Gilchrist Stewart, 'Demystifying CLS: A Critical Legal Studies Family Tree' (2020) 41(1) *Adelaide Law Review* 121, 121.

37 Davies (n 32) 191.

38 Williams (n 34) 402–3.

39 Matsuda (n 11) 30.

40 Angela Onwuachi-Willig, 'Celebrating Critical Race Theory at 20' (2009) 94(5) *Iowa Law Review* 1497; Delgado and Stefancic, *CRT: An Introduction* (n 30).

At its most basic form, Matsuda argues that CRT 'uncovers racist structures within the legal system and asks how and whether law is a means to attain justice'.[41] It is a place within the 'critical chorus' for those who seek to study and transform the relationship between race, racism, and power.[42] There are a number of tenets that form the basis of CRT and which are explored in more detail below, but CRT scholars typically embrace Oliver Wendell Holmes' argument that '[t]he life of the law has not been logic: it has been experience'.[43] Instead, as Roy L Brooks argues, the law 'validates the experiences and values of those in control of our society — insiders — who consist of White heterosexual males', and does not support or recognise the experiences of people of colour.[44]

IV Propositions of Critical Race Theory

Despite drawing on the principles of CLS and radical feminism, CRT is unique in its methodology, its characterisation of the law, and its calls for social change.[45] This section engages in some discussion of the key tenets of CRT.

The first of the CRT tenets identifies the omnipresence of racism, positing that racism is pervasive in the lives of people of colour.[46] In her book, *Aboriginal Women, Law and Critical Race Theory*, Nicole Watson argues that 'racism manifests in overt actions and subtle gestures'.[47] While overt actions are often prohibited by laws,[48] there is little protection afforded to First Nations women from 'covert forms of racism, such as institutional racism and microaggression'.[49]

A second key tenet of CRT is the concept of 'white-over-color ascendency', which is instrumental in maintaining both the 'psychic and material' power of the dominant group.[50] This can be exemplified by the power of racial-colonial structures, like the police, to protect the interests of the dominant group at the expense of racialised

41 Matsuda (n 11) 47.

42 Ibid; Delgado and Stefancic, *CRT: An Introduction* (n 30).

43 Oliver Wendell Holmes Jr, *The Common Law* (Harvard University Press, 2009) 3.

44 Roy L Brooks, 'Brown v. Board of Education Fifty Years Later: A Critical Race Theory Perspective' (2004) 47(3) *Howard Law Journal* 581, 582.

45 Delgado and Stefancic, *CRT: An Introduction* (n 30) 4–5; Matsuda (n 11) 51.

46 Delgado and Stefancic, *CRT: An Introduction* (n 30) 8; Nicole Watson, *Aboriginal Women, Law and Critical Race Theory* (Palgrave Macmillan, 2022) 12.

47 Nicole Watson (n 46) 12.

48 Note that in her early work on intersectionality, Crenshaw disputes the effectiveness of anti-discrimination laws. See, e.g.: Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics' (1989) (1) *University of Chicago Legal Forum* 139.

49 Nicole Watson (n 46) 12–13.

50 Delgado and Stefancic, *CRT: An Introduction* (n 30) 8.

First Nations people in Australia.[51] Alex Vitale disputes the conception that the purpose of police is to protect society, arguing:[52]

> The reality is that the police exist primarily as a system for managing and even producing inequality by suppressing social movements and tightly managing the behaviors of poor *and nonwhite people*: Those on the losing end of economic and political arrangements.[53]

This is consistent with 'white-over-color ascendancy' as the dominant class in Australia, those situated within the white, colonial structures, benefit both economically (materially) and psychically (socially, politically) from the maintenance of a particular social order. Vitale goes on to argue that management of minority groups is fundamental to protecting the 'systems of exploitation' which benefit the dominant group.[54] The creation and maintenance of a racial underclass both protects and maintains the interests of the dominant class by ensuring that social, political, and economic upward movement is controlled and minimised.

A third tenet of CRT is grounded in the 'social construction thesis',[55] which characterises racial distinctions as 'products of social thought and relations' based on the theory of biological determinism.[56] Biological determinism is the idea that race is 'biologically extant', and is closely related to the concept of racial essentialism, which holds that traits and characteristics of different races result in 'racially varied social outcomes'.[57] However, the general consensus among the scientific community today is that 'race does not biologically exist' and is, in fact, a social construct.[58] Lopez argues that it is 'human interaction rather than natural differentiation [that] must be seen as the source and continued basis for racial categorization'.[59] CRT resoundingly rejects claims of biological determinism or racial essentialism — for critical race theorists, race is a social construct, which creates and maintains

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51 See: Alex Vitale, *The End of Policing* (Verso, 2017); Chris Cunneen, *Defund the Police* (Bristol University Press, 2023).

52 Vitale (n 51).

53 Ibid 34 (emphasis added).

54 Ibid.

55 Delgado and Stefancic, *CRT: An Introduction* (n 30) 9.

56 Ibid. See W Carson Byrd and Matthew W Hughey, 'Biological Determinism and Racial Essentialism: The Ideological Double Helix of Racial Inequality' (2015) 661(1) *The ANNALS: The American Academy of Political and Social Sciences* 8.

57 Byrd and Hughey (n 56) 9.

58 Ibid 10. See also: Lopez, 'The Social Construction of Race' (n 20); Gannett (n 19); Joseph L Graves Jr, 'Why the Nonexistence of Biological Races Does Not Mean the Nonexistence of Racism' (2015) 59(11) *American Behavioral Scientist* 1474; Audrey Smedley and Brian D Smedley, 'Race as Biology is Fiction, Racism as a Social Problem is Real' (2005) 60(1) *American Psychologist* 16; Neven Sesardic, 'Race: A Social Destruction of a Biological Concept' (2010) 25(2) *Biology & Philosophy* 143.

59 Lopez, 'The Social Construction of Race' (n 20) 968–9.

privileges in the dominant group and disadvantages for those who are subjugated.[60] These structures are explored further later in this paper.

The fourth tenet considered in this section is grounded in Derrick Bell's theory of 'interest convergence'.[61] In his analysis of judicial activity before and after the landmark US case of *Brown*,[62] which declared racial segregation unconstitutional, Bell defines his thesis as follows: 'The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites'.[63] Nicole Watson expands on this theory, arguing that relief will only be granted to people of colour where that relief 'also serves the interests of those at the apex of the racial hierarchy'.[64] This 'interest convergence' thesis is applied later in this paper, in an analysis of both *Brown* and *Mabo*.[65]

V Race and the Social Construction of Guilt

This paper has identified that race ought not be understood as biologically determined but rather as a social construct. The structures of our society, including legal institutions, maintain, and are maintained by this construction.[66] The criminalisation of subjugated populations, particularly those subjugated on racial lines, is necessarily a product of the way crime is defined along these constructions of race.[67] Lopez discusses the ways in which law — and, for the purposes of this paper, primarily the criminal law — plays a role in 'the social production of knowledge', contending that 'categories embedded in law … defines, while seeming only to reflect, a host of social relations', which includes race.[68]

Michel Foucault's knowledge/power dialectic is also useful here.[69] To offer a brief and perhaps simplistic overview of the central theme of this dialectic, Foucault argues that knowledge creates power, that power creates knowledge, and that there cannot be one without the other.[70] This constructed knowledge of race is based in the

60 Nicole Watson (n 46) 13; Stephanie M Wildman and Adrienne D Davis, 'Language and Silence: Making Systems of Privilege Visible' in Richard Delgado and Jean Stefancic (eds) *Critical Race Theory: The Cutting Edge* (Temple University Press, 2000) 657.

61 Derrick A Bell, 'Brown v. Board of Education and the Interest-Convergence Dilemma' (1980) 93(3) *Harvard Law Review* 518.

62 *Brown* (n 12).

63 Bell (n 61) 523.

64 Nicole Watson (n 46) 14.

65 *Brown* (n 12); *Mabo* (n 13).

66 Lopez, 'The Social Construction of Race' (n 20) 965.

67 Ibid 86; Delgado and Stefancic, *CRT: An Introduction* (n 30) 123.

68 Ian Haney Lopez, *White By Law* (New York University Press, 2006) 86–7.

69 Foucault, *Discipline and Punish* (n 15).

70 Foucault, *History of Sexuality* (n 9).

good-bad/innocent-guilty dichotomies: racialised groups are criminalised because of the myth of Black criminality as it stands in opposition to White innocence, or White purity.[71] Lopez identifies a trend in the US whereby Black people who victimise White people are given longer sentences than those who victimise non-Whites, which serves to reinforce these dichotomies.[72]

VI Critical Race Theory and Precedent

Racial lines and the racialisation of the other intersect with law and judicial practice at an interesting point: the use of precedent. The position of CRT on the use and maintenance of precedent requires a brief discussion here. Lopez argues that precedent prevents racial lines from shifting because racial definitions constructed in the past continue to control the outcomes of new cases.[73] In doing so, a 'false historicity' is created, which 'perpetually reclaims the past for the present'.[74]

Lopez gives the example of the 1979 Mashpee Indian case, in which the Mashpee — a First Nations tribal group in the US — were required to prove they qualified as a tribe.[75] The Mashpee people relied on a law from 1790 to support their submissions, while the Supreme Court case defining their status was rendered in 1901. The Mashpee were ultimately unable to prove that they fell within the meaning of 'tribe' to the Court's satisfaction. The law in this case did not reflect the changes in racial grouping, or indeed of identification, that naturally occur over time: by relying on precedent from over a century ago, to apply a law set out over 200 years ago, outdated racial constructs are upheld.

In Australia, this is evident in the requirement for First Nations people to 'prove' their Aboriginality, which may be necessary for anything from access to sentencing to courts, to welfare payments, and child protection.[76] While this proof is intended to allow First Nations people to obtain certain benefits, the difficulty in demonstrating 'proof' to a sufficient degree results in a dissonance between theoretical benefit and practical difficulty. The tripartite test is cumbersome and difficult to satisfy:

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71 Lopez, 'The Social Construction of Race' (n 20) 965.

72 Ibid.

73 Lopez, *White By Law* (n 68) 89.

74 Ibid 114.

75 *Mashpee Tribe v New Seabury Corp* 592 F.2d 575 (1st Cir. 1979).

76 See, e.g: Magistrates Court of Victoria, *Koori Court*, (Web Page, 2024) <https://www.mcv.vic.gov.au/about/koori-court>; Aboriginal Housing Office, *AHO Eligibility for Services Policy*, (Web Page, 2014) <https://www.aho.nsw.gov.au/applicants/confirmation-of-Aboriginality>; *Aboriginal Housing Act 1998* (NSW) s 4; Central Australian Aboriginal Congress, *Application Form — Proof of Aboriginality*, (online)<https://www.caac.org.au/wp-content/uploads/old-files/CAAC-Proof-of-Aboriginality-Form-Template-October-2019.pdf>; Services Australia, *Confirm Your Indigenous Heritage for Our Jobs*, (Web Page, 2022) <https://www.servicesaustralia.gov.au/confirm-your-indigenous-heritage-for-our-jobs?context=1>.

for example, establishing the tripartite test for Aboriginality can be made almost impossible due to the loss of records and the historical and ongoing practices of child removal which operate to render invisible the 'nativeness' of First Nations people.[77] In failing to embrace or integrate the lived experience of First Nations people the law fails to recognise new forms of identity and identification, reinforcing old ideas and constructions of race.[78]

VII Critiques of Critical Race Theory

Critics of CRT, and its storytelling methodology, have become more vocal with the resurgence of CRT in the wake of the Black Lives Matters movement.[79] For CRT scholars, storytelling, or counter-storytelling, serves to challenge the dominant discourses and ideologies around race, at times quite literally giving voice to those in the margins.[80] This section of the paper considers some of the more prominent critiques, including the perceived ineffectiveness of storytelling, that CRT is deterministic, that it is separatist, and that it is, as Richard Posner eloquently describes, 'a lunatic fringe'.[81] This section also addresses some counterarguments to the critiques, including those presented by Richard Delgado and, more recently, Nicole Watson in an Australian context.

Some critical scholars, including Mark Tushnet, argue that storytelling is ineffective, and that it is an 'analytically unsound form of discourse'.[82] Scholars including Randall Kennedy, and Daniel Farber and Suzanna Sherry, are also critical of CRT. Kennedy took issue with CRT claims of discrimination based on the lack of 'voice' given to minority scholars by movements like CLS, arguing that an absence of voice does not necessarily equate to discrimination.[83] Kennedy was also of the view that

77 See, e.g.: Lester Irabinna Rigney, 'Native Title, the Stolen Generation, and Reconciliation' (1998) 1(1) *Interventions* 125; Alison Whittaker, 'White Law, Blak Arbiters, Grey Legal Subjects' (2017) 20(2) *Australian Indigenous Law Review* 4; Michael Dodson, 'The Wentworth Lecture The End in the Beginning: Re(de)fining Aboriginality' (1994)1 *Australian Aboriginal Studies* 1.

78 Lopez, 'The Social Construction of Race' (n 20) 972.

79 See, e.g: Adrienne D Dixson, '"What's Going on?": A Critical Race Theory Perspective on Black Lives Matter and Activism in Education' (2018) 53(2) *Urban Education* 231; Nicholas C Murphy, 'Do Black Lives Matter? Capital Punishment, Critical Race Theory, and the Impact of Empirical Evidence' (2023) 6 *University of Central Florida Department of Legal Studies Law Journal* 39; Angela Onwuachi-Willig, 'The CRT of Black Lives Matter' (2022) 66(4) *Saint Louis University Law Journal* 663.

80 Minerva S. Chávez, 'Autoethnography, a Chicana's Methodological Research Tool: The Role of Storytelling for Those Who Have No Choice but to do Critical Race Theory' (2012) 45(2) *Equity and Excellence in Education* 334, 342.

81 Richard Posner, 'The Skin Trade' (1997) 217(15) *The New Republic* 40, 40.

82 Delgado and Stefancic, *CRT: An Introduction* (n 30) 55.

83 Randall L Kennedy, 'Racial Critiques of Legal Academia' (1989) 102(8) *Harvard Law Review* 1745, 1802; Delgado and Stefancic, *CRT: An Introduction* (n 30) 102.

CRT relies on 'highly charged rhetoric and imagery' and has significant 'empirical weaknesses'.[84] Put simply, as Bennett Capers does, Kennedy accuses critical race theorists of 'playing, and overplaying, the race card'.[85]

Farber and Sherry accused critical race theorists of, as Delgado paraphrases, 'lacking respect for traditional notions of truth and merit', and of being 'anti-Asian and anti-semitic' because CRT implicitly characterises minority groups like Asian and Jewish people, who stereotypically perform well in conventional Western structures, as 'unimaginative mimics and drones' or of cheating to gain advantage.[86] However, it is unlikely that the founding scholars of CRT intended to accuse Jewish and Asian people of being 'mimics and drones'.[87] Rather it seems that early-CRT has used a broad brush to paint the voiceless 'minority' and has over time, failed to account for the successes of individuals from minority backgrounds within the dominant system. This is undoubtedly a limitation of CRT but does not necessarily warrant the accusations made by Farber and Sherry. In her book, *Where is Your Body?*, Matsuda considers the critiques of CRT and distils them into four points:

1. It does not exist;
2. It is not unique to people of colour;
3. It is paranoid and separatist; and
4. It is rosy, superficial, and theoretically wrong.[88]

Matsuda counters these criticisms swiftly, arguing that it is nonsensical to declare that a theory does not exist when 'several writers all come up with related ideas, deeply divergent from mainstream thought, and when the commonality in their life experience is racism'.[89] This is a simple, yet arguably effective response to the claim that CRT is not real: it does exist because people are doing it. Similarly, Matsuda addresses the argument that CRT is not unique by stating that CRT never claimed to be unique — the theory uses appropriate methods in order to uncover experiences of racism in the law that have long been experienced by people of colour.[90] Finally, Matsuda addresses claims of paranoia and separatism, not necessarily arguing against the critics but instead stating the there is, perhaps, 'value in occasional separatism' if it means that subjugated people are given a voice, to communicate, but not to separate.[91]

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84 Kennedy (n 83) 1808–9.

85 Bennett Capers, 'Critical Race Theory and Criminal Justice' (2014) 12(1) *Ohio State Journal of Criminal Law* 1, 5.

86 Daniel A Farber and Suzanna Sherry, 'Beyond All Criticism?' (1999) 83 *Minnesota Law Review* 1735; Delgado and Stefancic, *CRT: An Introduction* (n 30) 102.

87 Farber and Sherry (n 86).

88 Matsuda (n 11) 55.

89 Ibid.

90 Ibid.

91 Ibid 56.

While CRT undoubtedly has limitations and has faced its share of criticism from a broad range of both critical and non-critical scholarship, it is a useful lens and serves a distinct purpose for the research conducted here. The following section of this paper conducts a comparative analysis of the *Brown* and *Mabo* decisions, to determine if, or how, CRT can assist in understanding the experience of subjugated minorities — like African American people in the case of *Brown*, and First Nations people in *Mabo* — within Western legal structures. This will also include consideration of how decisions like *Mabo* and the subsequent operation of native title affect First Nations women differently from First Nations men.

VIII The 'Sterile Symbolism' of Racial Equality in the Law

The preceding section of this paper provided an overview of CRT, providing context for a comparative analysis of two 'watershed' common law decisions concerning 'race' and racial equality. The first, *Brown*,[92] was decided in the US in 1954; the second, *Mabo*,[93] is a 1992 decision of the High Court of Australia, nearly four decades after *Brown*. The purpose of this analysis is to examine the extent to which the tenets of CRT apply beyond the US borders, and to assess the utility of Bell's interest-convergence theory in understanding 'racial equality' as it is itself underpinned by highly racialised ideas and attitudes.[94] This then has some application to the ways in which racial justice in the Australian criminal justice system may be impeded and facilitates discussions on CRT's potential to inform alternative understandings of the over-incarceration of First Nations people in Australia.

A *Brown v Board of Education*

1 *Brown: An Introduction*

The US Supreme Court unanimously decided *Brown* on 17 May 1954, ushering in what would become one of the most significant civil rights movements in modern history. During the course of the late 1960s, civil rights activists like Rosa Parks, Harriet Tubman, Martin Luther King Jr, and Malcolm X would all contributed to a shift of enormous symbolic significance, but as argued, one with limited practical legacy.[95] *Brown* effectively ended the 'separate but equal' doctrine set down in 1896 in the Supreme Court case *Plessy v Ferguson* ('*Plessy*'),[96] in which the court upheld the state of Louisiana's rights to require Black passengers to travel on separate, but 'similar', train cars.[97] The doctrine was held not to be in violation of the Fourteenth

92 *Brown* (n 12).

93 *Mabo* (n 13).

94 Bell (n 61).

95 See, e.g: Bell (n 61); Capers (n 85); Mark Tushnet, 'The Significance of Brown v. Board of Education' (1994) 80(1) *Virginia Law Review* 173.

96 163 US 537 (1896) ('*Plessy*').

97 Ibid.

Amendment of the *United States of America Constitution*, which guarantees equal protection under the law for all citizens, because the facilities, though segregated, were deemed equal.[98] The decision in *Brown* arguably ended the *Plessy* doctrine and heralded the advancement of equal rights for African American people in the US.[99]

Brown centred on the segregation of Black and White students in schools 'solely on the basis of race, pursuant to state laws permitting or requiring such segregation', a practice which denied '[Black] children the equal protection of laws guaranteed by the Fourteenth Amendment'.[100] The Fourteenth Amendment, which was also the subject of judicial consideration in *Plessy*, provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[101]

This means in essence that no State is permitted to make or enforce a law which denies the equal protection of the law to all people, which arguably includes discrimination on the basis of race. *Brown* was an appeal from the US District Court for the District of Kansas, though the cases consolidated in this decision originated from various jurisdictions, including Kansas, South Carolina, Virginia, and Delaware.[102] The common thread was the refusal of the States to admit students to schools on a non-segregated basis, which was consistent with the *Plessy* precedent.[103] The basis of the plaintiff's arguments was the practice of school segregation necessarily meant that it was not possible to create 'equality', that 'public schools are not "equal" and can never be made "equal"'.[104] The Supreme Court in *Brown* determined that the protections of the Fourteenth Amendment extended to education.[105] Chief Justice Warren stated the following in his decision:

> We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.[106]

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98 See Harry E Grovers, 'Separate but Equal: The Doctrine of Plessy v. Ferguson' (1951) 12(1) *Phylon* 66.

99 *Plessy* (n 96).

100 *Brown* (n 12).

101 *United States Constitution* amend XIV.

102 'Brown v. Board of Education (1954)', *National Archives* (Web Page, 18 March 2024) <https://www.archives.gov/milestone-documents/brown-v-board-of-education>.

103 *Plessy* (n 96); *Brown* (n 12) (Warren CJ).

104 *Brown* (n 12) (Warren CJ).

105 Ibid.

106 Ibid 493 (Warren CJ).

Lopez summarises that in effect, *Brown* 'declared … that separate conditions are inherently unequal' and argued that the Court was, in the case of *Brown*, attempting to move from using explicit racial categories as a tool of oppression, to using them to 'ameliorate racial discrimination'.[107] Chief Justice Warren quite consciously wrote the decision in *Brown* such that it could be understood by the average American citizen,[108] symbolically providing access to a legal, and social, shift in the way race was to be understood in the US.

However, some scholars have argued that, despite this 'great triumph of civil rights legislation',[109] little materially changed for the majority of Black Americans.[110] Bell observes that in the current day most Black children in American public schools are 'both racially isolated and inferior … render[ing] further progress in implementing *Brown* impossible'.[111] Drawing on the work of Alexander Bickel, Bell notes that while it is unlikely that *Brown* will be overturned, it may nonetheless 'be headed for — dread word — irrelevance', due to its current lack of practical value for Black children.[112] This descent into 'irrelevance' is a concern levelled similarly against decisions in the Australian context, like *Mabo*, which is discussed in greater detail below.

2 *CRT Critiques of Brown*

The tenets of CRT have much to add to the way cases predicated on race are understood. Bell's interest-convergence theory is particularly informative, as becomes apparent throughout the following sections. The second tenet of CRT discussed above, the principle of 'white-over-colour ascendency', is imperative to the application of interest-convergence theory to cases like *Brown*. The (psychic) interests of poor whites and the (material) interests of wealthy whites are both advanced by 'white-over-colour' ascendency. However, there may be a lack of alignment between sub-groups within the dominant group.[113] For example, Delgado and Jean Stefancic argue that the convergence of Black and White interests in the case of *Brown* was driven more from the elite Whites' self-interest than it was from the desire from either group to 'help' Black people.[114] It is perhaps this fact, that the interests converging to allow for *Brown* were material on the part of Black Americans but only symbolic and self-interested on the part of the dominant white group. This distinction is most important in understanding why the 'prized doctrines

107 Lopez, 'The Social Construction of Race' (n 20) 78.

108 Tushnet (n 95) 177.

109 Delgado and Stefancic, *CRT: An Introduction* (n 30) 9.

110 Nicole Watson (n 46) 11; Delgado and Stefancic, *CRT: An Introduction* (n 30) 49; Tushnet (n 95) 173.

111 Bell (n 61) 518.

112 Ibid; Alexander Bickel, *The Supreme Court and the Idea of Progress* (Harper & Row, 1970) 151.

113 Delgado and Stefancic, *CRT: An Introduction* (n 30).

114 Ibid 9.

and principles' of civil rights victories like *Brown* were revealed to be 'shams — hollow pronouncements issued with great solemnity and fanfare, only to be silently ignored, cut back, or withdrawn when the celebrations die down'.[115]

While Bell's position that no conflict of interest existed between the Black and White populations at the time of *Brown* may be correct, Bell goes on to suggest that later Supreme Court decisions indicated 'a growing divergence … that makes integration less feasible'.[116] Henry Wechsler, a contemporary of Bell at Harvard University, rejected the claims that *Brown* purported to be based on a bar to racial segregation under the Fourteenth Amendment, and considered and rejected too the argument that the decision was a response to the injury segregation caused to Black children.[117] Rather, Wechsler contended that the Supreme Court in *Brown* relied on the view that 'racial segregation is, *in principle*, a denial of equality to the minority against whom it is directed'.[118] Despite Bell's later challenge to this position,[119] Wechsler's focus on the *principle* behind the decision rather than the practical change the decision may or may not usher in is significant as it highlights the practical instability of the foundations upon which the civil rights movement was built.

There is some argument that the ruling in *Brown* is attractive in *theory*, as it is difficult for people, particularly those in the dominant group, to 'recognize that racial segregation is much more than a series of quaint customs that can be remedied … without altering the status of whites.'[120] This is because in order to grant racial equality to Black people, the racially granted privileges bestowed on whites must be revoked.[121] In the case of *Brown*, the law required plaintiffs to prove that alleged acts, policies, or practices of segregation are the result of racial discrimination, 'intentionally and invidiously conducted or authorized' rather than 'naturally foreseeable consequences' of law or policy.[122] Tushnet points to the decision of Judge John Parker one year after *Brown* in the case *Briggs v Elliott*.[123] Barely one year on from the decision in *Brown*, the American courts were looking for ways to step away from the potential practical implications of the decision.[124]

115 Ibid 49.

116 Bell (n 61) 518.

117 Herbert Wechsler, 'Toward Neutral Principles of Constitutional Law' (1959) 73(1) *Harvard Law Review* 1, 32.

118 Ibid 34 (italics in original). See also Tushnet (n 95) 176.

119 Bell (n 61). Note that while Bell did challenge Wechsler's search for a principled basis for the decision, he did acknowledge that Wechsler's critique of the decision was helpful in explaining the ultimate 'disappointment' of *Brown*.

120 Bell (n 61) 522.

121 Ibid 523.

122 Ibid 527.

123 *Briggs v Elliott*, 132 F Supp. 776, 777; Tushnet (n 95) 175.

124 See, e.g., ibid.

The enduring effects of *Brown*, both practical and theoretical, are observable in the present day over-incarceration of racialised people which persists. The practical limitations of the symbolic significance of *Brown* are reflected in what Capers refers to as the 'unsettling' fact that Black Americans are incarcerated at a greater rate now than at the time *Brown* was decided.[125] The increasing interest-divergence and the lack of a solid theoretical basis for the decision in *Brown* mean that the 'triumph' of civil rights so often characterised by *Brown* have not achieved practical change for Black Americans.[126]

The 'rights' plight of First Nations people is well embedded within Australia's highly racialised legal and social structures. The ongoing difficulties First Nations people endure is observable in the context of acquiring land rights under the doctrine of native title despite the symbolic victory of *Mabo*, which is examined through the CRT lens below.

B *Mabo*

1 *Mabo: An Introduction*

The High Court of Australia's decision in *Mabo* marked a turning point in the way the rights of First Nations people were viewed from a legal standpoint: reflecting the popular movement toward racial equality in the decades following World War II.[127] Nicole Watson argues that *Mabo* is Australia's 'equivalent to the *Brown*' decision, in that overturning the doctrine of *terra nullius*, as this section will discuss, symbolically aided in shifting social and legal conceptions of race and the racial hierarchy

125 Capers (n 85) 2.

126 See, e.g: Bell (n 61); Lopez, 'The Social Construction of Race' (n 20); Delgado and Stefancic, *CRT: An Introduction* (n 30); Capers (n 85); Joe R Feagin and Bernice McNair Barnett, 'Success and Failure: How Systemic Racism Trumped the *Brown v. Board of Education* Decision' [2004] (5) *University of Illinois Law Review* 1099; Gerardo R Lopez and Rebeca Burciaga, 'The Troublesome Legacy of *Brown v. Board of Education*' (2014) 50(5) *Educational Administration Quarterly* 796; James T Patterson, *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy* (Oxford University Press, 2001).

127 See generally: Jon Stratton, *Uncertain Lives: Culture, Race and Neoliberalism in Australia* (Cambridge Scholars Publishing, 2011); Will Sanders, 'Destined to Fail: The Hawke Government's Pursuit of Statistical Equality in Employment and Income Status Between Aborigines and Other Australians by the Year 2000 (or, a Cautionary Tale Involving the New Managerialism and Social Justice Strategies)' (1991) 2(2) *Australian Aboriginal Studies* 13; Kevin Dunn, James Forrest, Ian Burnley and Amy McDonald, 'Constructing Racism in Australia' (2004) 39(4) *Australian Journal of Social Issues* 409; Jan Carter, 'Social Equality in Australia' in Peter Saunders and Sheila Shaver (eds), 'Theory and Practice in Australian Social Policy: Rethinking the Fundamentals, Proceedings of the National Social Policy Conference Sydney July 14–16 1993 Volume 1: Plenary Papers' (Working Paper No 111, University of NSW, 1993) 63, 73.

equivalent to *Brown*.[128] This is consistent with Wechsler's emphasis on the 'in principle' effects of *Brown*;[129] in this case, the High Court overturned in principle a documented source of inequality. In practice, the critiques levelled at the *Mabo* bench are similar to those levelled at the court in *Brown*.

Mabo concerned a native title claim by Meriam man Eddie Mabo against the State of Queensland. Native title refers to rights and interests in land held before Crown colonisation, which includes rights to both land and waterways.[130] The Meriam people are the traditional owners of the Murray Islands, a small archipelago in the far east of Torres Strait, and have been in occupation of the land since prior to colonisation.[131] The Murray Islands were annexed to Queensland in 1879, before which they lay outside of the dominion of the Crown, though in his decision, Brennan J notes that the Queensland authorities did appear to exert some 'de facto control' over the islands in the 1880s.[132] John Douglas, who was at the time Premier of the colony, wrote to the Governor of Queensland in 1877 describing this 'de facto' control as being 'a sort of police surveillance … outside our limits' and noting that it would be desirable to 'possess a real authority' over the 'somewhat doubtful characters' who occupied the area.[133]

In its judgement handed down in 1992, the High Court characterised an 'over-simplification' of the chief question before it as whether the incorporation of the Murray Islands into Queensland 'had the effect on 1 August 1879 of vesting in the Crown absolute ownership of, legal possession of and exclusive power to confer title to, all land in the Murray Islands'.[134] The plaintiffs argued that they had a claim over the land in native title, and the defendant argued that the British laws became the law of the colony when the territory is settled and, as such, the Murray Islands fell within the bounds of the colony.[135] In essence, the State of Queensland relied on the doctrine of *terra nullius,* that the land belonged to no one and could therefore be claimed, to justify the validity of colonial acquisition of the Murray Islands.[136] However, Brennan J questioned the fundamental basis of the doctrine, observing that colonial practices as we understand them today 'do not fit the "absence of law"

128 Nicole Watson (n 46) 25.

129 Wechsler (n 117) 32.

130 'Establishing Native Title Rights and Interests', *Australian Law Reform Commission* (Web Page, 27 May 2015) <https://www.alrc.gov.au/publication/connection-to-country-review-of-the-native-title-act-1993-cth-alrc-report-126/4-defining-native-title-2/establishing-native-title-rights-and-interests-2/>); 'What is Native Title?', *Kimberley Land Council* (Web Page) <https://www.klc.org.au/what-is-native-title>.

131 *Mabo* (n 13) 16–17 (Brennan J).

132 Ibid 19 (Brennan J).

133 Ibid 19 (Brennan J).

134 Ibid 25 (Brennan J).

135 Ibid 26 (Brennan J).

136 The doctrine of *terra nullius*, a Latin term which translates to 'land belonging to no one', was used to justify the colonisation of Australia in 1788.

or "barbarian" theory underpinning the colonial reception of the common law of England'.[137] Indeed, his Honour went so far as to argue that:

> These fictions [that customary rights cannot be reconciled with civilised society] denied the possibility of a native title recognized by our laws. But once it is acknowledged that an inhabited territory which became a settled colony *was no more a legal desert than it was* '*desert uninhabited*' in fact, it is necessary to ascertain by evidence the nature and incidents of native title.[138]

Ultimately, the Court unanimously found that the Crown had not acquired absolute ownership of the Murray Islands; instead, the Murray Islands were subject to native title.[139] What is important for the purpose of this paper is the *theoretical* outcome of this case: the doctrine of *terra nullius* was declared to be a fiction.[140] However, while Brennan J acknowledged that the doctrine of *terra nullius* was a legal fiction, the effects of this declaration were limited by the act of state doctrine. His Honour recognised that 'the acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that state'.[141] His Honour further limited the effects of nullifying *terra nullius* by clearly stating that it was not the business of the High Court of Australia to 'canvass the validity of the Crown's acquisition of sovereignty over the [Murray] Islands'.[142] For Irene Watson, this fell short of any meaningful challenge to the doctrine of *terra nullius* as the Court failed to question the legitimacy of the British occupation of Australia, deciding instead that the invasion and the British Crown's acquisition of sovereignty over the Australian colony was an 'act of state' that could not be challenged in any Australian court.[143] This practical passivity served to 'sanction colonialism, dispossession and the disempowerment of Nungas as a legitimate "act of state"'; and so without dismantling the Australian legal system, the legal theory of *terra nullius* remained very much in place.[144]

2 *CRT and Mabo*

This paper now considers the High Court's decision in *Mabo* through a CRT lens to ascertain whether the critiques of *Brown* can be similarly applied. Indeed, it appears that the scholarly consensus is that *Mabo* 'did little to disrupt the impacts of two centuries of dispossession';[145] that *Mabo* was symbolically significant, but

137 *Mabo* (n 13) 39 (Brennan J).

138 Ibid 58 (Brennan J) (italics added).

139 Ibid 76 (Brennan J).

140 Ibid 58.

141 Ibid 30–3.

142 Ibid 32–3.

143 Irene Watson, 'Indigenous Peoples' Law-Ways: Survival Against the Colonial State' (1997) 8 *Australian Feminist Law Journal* 39, 47–8.

144 Ibid.

145 Nicole Watson (n 46) 25.

in practice had little effect on racial equality before the law.[146] This is of course consistent with the critique of scholars including Bell of *Brown*. *Mabo* was followed in 1993 by the *Native Title Act 1993* (Cth), which set out the requirements a plaintiff would be required to meet to establish a claim of native title. The legislation also confers the right to extinguish native title in certain circumstances.[147] A retention of a statutory right to extinguish native title, and the failure of the High Court of Australia to address sovereignty over Australian land mean that some issues *Mabo* aspired to resolve have not, in practice, been resolved. In light of the native title doctrine which emerged from *Mabo*, the case is consistent with Delgado's characterisation of *Brown* as being 'hollow pronouncements … silently ignored, cut back, or withdrawn',[148] as silences around First Nations rights and equality that followed *Mabo* are, arguably, reflected in the comparably persistent crisis of over-incarceration of First Nations people in Australia. The failure of Mabo to resolve First Nations rights and equality is reflected in the present day issue of overincarceration.

Bell's interest-convergence theory is helpful in explaining why, and how, *Mabo* failed to live up to the 'fanfare' of its pronouncement. The High Court bench which decided *Mabo* was sitting at a time of racial and, more broadly social, upheaval in the Australian community.[149] The material and psychic interests of the White community, including those who made up the *Mabo* bench, as in *Brown*, apparently converged with the interests of the First Nations communities who had sought land rights under the law. However, like *Brown*, this convergence was not necessarily consistent across all White sub-groups; indeed, native title was, and continues to be, resisted by some segments of the community, including some pastoralists and mining corporations.[150] Despite these pockets of resistance, the interests of the

146 See, e.g.: ibid; Irene Watson, 'Buried Alive' (n 10); Megan Davis, *Competing Notions of Constitutional 'Recognition': Trust and Justice of Living 'Off the Crumbs that Fall Off the White Australian Tables'* (Papers on Parliament No 62, October 2014); Janice Gray, 'The Mabo Case: A Radical Decision?' (1997) XVII(1) *The Canadian Journal of Native Studies* 33; Michael Mansell, 'Australians and Aborigines and the Mabo Decision: Just Who Needs Whom The Most' (1993) 15(2) *Sydney Law Review* 168.

147 See generally *Native Title Act 1993* (Cth) Divs 2, 3.

148 Delgado and Stefancic, *CRT: An Introduction* (n 30) 49.

149 See, e.g.: Jason L Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (Carolina Academic Press, 2006); Fiona Wheeler and John Williams, '"Restrained Activism" in the High Court of Australia' in Brice Dickson (ed), *Judicial Activism in Common Law Supreme Courts* (Oxford University Press, 2007) 19; Greg Craven, 'Judicial Activism: The Beginning of the End of the Beginning' (2004) 10(16) *Upholding the Australian Constitution* 77; Tanya Josev, 'Twenty Years After the High Court's Wik Decision, How Does the "Judicial Activism" Charge Stand Up?', *The Conversation* (Web Page, 11 April 2016) <https://theconversation.com/twenty-years-after-the-high-courts-wik-decision-how-does-the-judicial-activism-charge-stand-up-56420>.

150 See, e.g.: '25 Years of Native Title Recognition', *National Native Title Tribunal* (online report, 2017) <http://www.nntt.gov.au/Documents/Native%20title%20becomes%20law.pdf>; 'The Destruction of Juukan Gorge', *ANTAR* (Web Page, 14 May 2025) <https://antar.org.au/issues/cultural-heritage/the-destruction-of-juukan-gorge/>;

White elite who were charged with making a decision on the matter and the interests of First Nations people did appear to align, allowing the High Court to overturn the 'fiction' of *terra nullius* and to grant symbolically significant land 'rights' to First Nations people and communities.

Bell's belief that the Supreme Court cases which came after *Brown* reflected not a consistent convergence of interests, but rather a 'growing divergence' between the Black and White populations which operated to prevent integration is worth revisiting here.[151] This divergence has, in recent years, become particularly apparent in the Australian context. In 2023, the Australian public voted on a referendum to include a First Nations 'Voice to Parliament' in the *Constitution*, which would represent the first time First Nations people have been afforded constitutional recognition. However, the referendum was voted down resoundingly: 60.06% of Australian voters rejected constitutional recognition.[152] While this is an act of the people, not of the courts, it does a regression from closer race relations in Australia.[153] There appears to be a 'growing divergence' between racially distinct populations in Australia — as Bell notes in the context of *Brown,* this necessarily has implications for efforts at integration and practical change.[154]

Irene Watson argues that *Mabo* 'created an illusion of doing justice, while also justifying and expanding the "*muldarbi*",[155] into a new form — and life — in its power of extinguishment'. Irene Watson, in arguing *muldarbi* colonialism is 'central to the contemporary condition' of First Nations people and that, therefore, decolonisation presents a healing opportunity, asks whether such decolonisation is possible in the context of the 'one dimensional universal world order' of the Australian State.[156] This question raises the argument that while the Australian State and, more specifically, its systems of law and justice, maintain a 'one dimensional' commitment to universal racial distinctions. Therefore the illusion will continue to be perpetuated as colonial courts cannot possibly account for the experience of First Nations

'Destruction of the Juukan Gorge Highlights Flaws in Native Title', *ANU Reporter* (Web Page, 1 November 2022) <https://reporter.anu.edu.au/all-stories/destruction-of-juukan-gorge-highlights-flaws-in-native-title>.

151 Bell (n 61) 518. See for examples utilised by Bell: *Swann v Charlotte-Mecklenburg Board of Education*, 402 US 1 (1971); *Milliken v Bradley*, 418 US 717 (1974); *Dayton Board of Education v Brinkman*, 443 US 526 (1979).

152 'Referendum', *Australian Electoral Commission* (Web Page, 2023) <https://results.aec.gov.au/29581/Website/ReferendumNationalResults-29581.htm>.

153 See, e.g.: Paul Sharrad, 'History, Culture, Democracy, and the "Voice" Referendum' (2025) 1 *Journal of Literary and Cultural Studies* 12; Shireen Morris, *Broken Heart: A True History of the Voice Referendum* (Black Ink, 2024).

154 Bell (n 61) 518.

155 Irene Watson, 'Buried Alive' (n 10) 259. Note that Watson uses the term 'Muldarbi-coloniser', 'muldarbi' translating to 'demon spirit'.

156 Irene Watson, 'Aboriginality and the Violence of Colonialism' (2009) 8(1) *Overland* 1, 1.

people subjected to a settler-colonial power that is embedded in law.[157] Indeed, Maria Giannacopoulos' theory of nomocide is consistent with this, as she identifies the 'direct link between settler-colonial legal infrastructures … and the violation of Indigenous and black lives'.[158]

For Irene Watson, the colonial power being represented by the Australian Parliament, used the *Mabo* case to expand its power by granting itself the power of extinguishment.[159] At the same time, both the federal Parliament and High Court of Australia positioned themselves as doing justice for a group which are typically disadvantaged and disempowered before the law. According to Irene Watson, *Mabo* and the doctrine of native title are little more than the Australian State persisting in the burial of First Nations people, the 'voiceless amidst the chaos'.[160] Michael Dodson supports this view, arguing that 'the *Mabo* decision does not recognise equality of rights … it recognises the legal validity of Aboriginal title until the white man wants that land … the *Mabo* decision is a belated act of sterile symbolism'.[161] This disconnect between theory and praxis is consistent across the examples discussed in this section. In the US, *Brown* allows for the theoretical, formal, equality of Black and White children in American schools, but in practice Black children are not afforded substantive equality, and Black children, indeed Black communities, are left no better off than they were under the *Plessy* doctrine.[162] For First Nations people in Australia, the practical limitations of the *Native Title Act* perpetuate the racial distinctions between First Nations people and land, and settler-colonial people and land. This distinction then maintains the racialised groupings which result in the subjugation of the racialised other in the context of colonial structures of law and justice.

This may suggest that the interests of the two groups did not in fact converge at the time of *Mabo*, except in an illusory sense, and that the reason for the decision and the legislation that followed it came not from a place of law, but of power.[163] Irene Watson argues that the High Court was given the opportunity to consider their own power, and the power of the colonial structures more broadly, and to determine the freedom and co-existence of First Nations people with the Australian State 'by accepting that Australian sovereignty was based on an "act of state"',[164] an act

157 Ibid. See also: Irene Watson, 'Re-Centring First Nations Knowledge and Places in a Terra Nullius Space' (2014) 10(5) *Alter*native 508 ('Re-Centring'); Irene Watson, *Aboriginal Peoples, Colonialism and International Law* (Routledge, 2014).

158 Giannacopoulos (n 10).

159 See, e.g., Irene Watson, 'Buried Alive' (n 10).

160 Irene Watson, 'Re-Centring' (n 157) 253.

161 Nicole Watson (n 46) 25–6.

162 Bell (n 61) 530.

163 Irene Watson, 'Buried Alive' (n 10). Note that Irene Watson uses the term 'muldarbi' here to denote the coloniser.

164 Ibid 259.

which was not consented to by First Nations people.[165] However, the Court was unwilling to 'fracture' the Australian legal system in this way and ensured that, despite what it may have looked like, 'no radical departure was made' from the status quo.[166] Importantly, Irene Watson identifies a specific racial quality to the decision in *Mabo*:

> The never-ending hopefulness that we will become empowered and recognised for who we are fades post-*Mabo (No. 2)*. When *terra nullius* was identified as the muldarbi [an Indigenous word denoting the coloniser], there was support for change and pulling Nungas from the belly of genocide. Instead we are now left with the illusion of change while the white man of this country breathes out a false belief that a special Aboriginal advantage was created by native title at the expense of white privilege. Similar to the myth of *terra nullius* they have created a racist muldarbi: fear and loathing of a native title right. But the racism exceeds any advantage.[167]

Race is central to this critique, but so, more specifically, is the way in which race is wielded as a weapon of colonial law. For example, the establishment, exercise, and control over First Nations people is, in part, a function of their criminalisation and the criminalisation of 'traditional systems of law … lore, and philosophies'.[168] As noted above, Irene Watson is critical of the ways in which constructs like race function as weapons of colonial law, and that the naming of First Nations people, their traditions, and systems, reinforce racial boundaries.[169]

The decision in *Mabo*, driven by the desire to present an illusion of justice while extending power over the racialised other, also created a racist 'loathing' of First Nations peoples' land rights.[170] In this way, *Mabo* may *appear* consistent with Bell's interest-convergence theory, but in practice the decision was influenced by *and* perpetuated colonial attitudes toward race. The 'triumphs' of common law, like those pronounced in the cases of both *Brown* and *Mabo*, were not the victories they appeared to be;[171] rather, the decisions cloaked a consolidation of power for the dominant group and entrenched racial attitudes in judicial decision-making.

IX CRT and First Nations People in the Australian Criminal Justice System

The analysis above, coupled with the ability of CRT to depict the crisis of over-incarceration differently from the dominant lens, presents potential benefits for

165 Giannacopoulos (n 10).

166 Ibid 259.

167 Ibid 265.

168 Ross (n 7) 12.

169 Irene Watson, *Aboriginal Peoples, Colonialism and International Law* (n 157).

170 Irene Watson, 'Buried Alive' (n 10) 265.

171 Nicole Watson (n 46) 29.

theory, policy, and practice. As such, it is important to ascertain how the preceding analyses might inform a discussion of the present crisis. First Nations people in Australia are catastrophically over-represented in the Australian carceral system. The Australian Bureau of Statistics reports that in 2023, First Nations people accounted for 33% of the Australian prison population,[172] despite only representing 3.8% of the Australian population at the 2021 Census.[173] It is therefore imperative that progressive lenses, like CRT, are utilised to assist in gaining an understanding of the underlying causes of this trend.

This use of symbolic legal change to 'cloak' the advancement of racial-colonial interests is significant in the context of this research: this section engages in discussion of how conceptions of 'race' are 'pervasive', and how the racial undertones of the Australian criminal justice system affect First Nations people. CRT is increasingly utilised in the Australian jurisdiction, with Janet Ransley and Marchetti noting even as early as 2001 in their analysis of *Cubillo v Commonwealth*,[174] that there is a difficulty in 'translating' the symbolic protection of First Nations peoples' rights into something resembling a legitimate cause of action.[175] Nicole Watson argues that whatever gains in equality First Nations people have made, after 'long and arduous campaigns', have gradually lost their significance, such that racism continues to pervade the White, patriarchal, colonial Australian society,[176] even in the face of an allegedly 'colour-blind' criminal justice system.[177] Consistent with traditional notions of intersectionality, it is possible to examine the intersectional disadvantage of First Nations *women* in the colonial criminal justice system. Intersectionality, first articulated by Crenshaw in 1989, originally located intersectional disadvantage at points of race and gender.[178] As noted above, First Nations women, despite accounting for approximately 2% of the adult female population in Australia, make up approximately 33% of the adult female *carceral* population.[179] There has been in recent decades a substantial amount of research into why this might be the case,

172 'Prisoners in Australia', *Australian Bureau of Statistics* (Web Page, 25 January 2024) <https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release>.

173 'Estimates of Aboriginal and Torres Strait Islander Australians', *Australian Bureau of Statistics* (Web Page, 31 August 2023) <https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/estimates-aboriginal-and-torres-strait-islander-australians/30-june-2021>.

174 (2000) 174 ALR 99 ('*Cubillo*').

175 Janet Ransley and Elena Marchetti, 'The Hidden Whiteness of Australian Law: A Case Study' (2001) 1(1) *Griffith Law Review* 139, 150.

176 *Cubillo* (n 174); Nicole Watson (n 46) 21.

177 Michelle Alexander, *The New Jim Crow* (Penguin, 2010) 183.

178 Crenshaw (n 48).

179 See, e.g: Sacha Kendall Jamieson, S Lighton, J Sherwood and Eileen Baldry, 'Incarcerated Aboriginal Women's Experiences of Accessing Healthcare and the Limitations of the 'Equal Treatment' Principle' (2020) 19(1) *International Journal for Equity in Health* 1, 2; Deirdre Howard-Wagner and Chay Brown, 'Increased Incarceration of First Nations Women is Interwoven with the Experience of Violence and

including into the criminogenic factors unique to First Nations women, as well as the ways in which incarceration is itself criminogenic.[180] Indeed, while First Nations people more broadly account for 33% of the Australian prison population, First Nations women represent 37% of the adult female prison population.[181]

Thalia Anthony argues that truly seeing and understanding the ways in which the criminal law impacts those who come into contact with it in a highly racialised manner 'disrupts the "white" moral order' and 'usurps' the white monopoly on criminal law.[182] This is consistent with Bell's interest-convergence theory. To draw an example from the Victorian CLS, laws like the *Bail Act 1977* (Vic) ('*Bail Act*'), highly criticised for casting both a racial and gendered net, and in the same jurisdiction the *Sentencing Act 1991* (Vic), impact First Nations people, and specifically First Nations women, differently to how they affect the state's non-Indigenous population.[183] Following the death in custody of First Nations woman Veronica Nelson in January 2020, Nelson's family and the community more broadly called for reform to address the bail laws that disproportionately affected First Nations women; however, very few of the recommendations made by Coroner McGregor in his report on Nelson's death have been implemented.[184]

The Victorian Aboriginal Legal Service are critical of the reforms passed by the Andrews Government in late-2023, arguing that '*if implemented properly*' the laws should assist in reducing the number of people held on remand, but that the reforms in practice 'fell well short of … the reforms that Veronica's family asked for, but also what the Coroner recommended and what expert reviews have

Trauma', *The Conversation* (online, 6 August 2021) <https://theconversation.com/increased-incarceration-of-first-nations-women-is-interwoven-with-the-experience-of-violence-and-trauma-164773>.

180 See, e.g: Eileen Baldry and Chris Cunneen, 'Imprisoned Indigenous Women and the Shadow of Colonial Patriarchy' (2014) 47(2) *Australian & New Zealand Journal of Criminology* 277; Thalia Anthony and Harry Blagg, 'Biopower of Colonialism in Carceral Contexts: Implications for Aboriginal Deaths in Custody' (2021) 18 *Bioethical Inquiry* 71; Lorana Bartels, 'Painting the Picture of Indigenous Women in Custody in Australia' (2012) 12(2) *QUT Law & Justice* 1; Lily George, Adele N Norris, Antje Deckert and Juan Tauri (eds), *Neocolonial Injustice and the Mass Imprisonment of Indigenous Women* (Palgrave Macmillan, 2020).

181 Howard-Wagner and Brown (n 179); 'Corrective Services, Australia', *Australian Bureau of Statistics* (Web Page, 19 September 2024).

182 Thalia Anthony, 'Moral Panics and Misgivings over Indigenous Punishment: Sentencing Cultural Crimes in Australia's Northern Territory' (2011) 42 *Cambrian Law Review* 91, 104.

183 See, e.g: Coroner Simon McGregor, *Inquest Into the Passing of Veronica Nelson* (Coroner's Report, 30 January 2023); Alfred Allan et al, 'An Observational Study of Bail Decision-Making' (2005) 12(2) *Psychiatry, Psychology and the Law* 319; Marilyn McMahon, *No Bail, More Jail? Breaking the Nexus Between Community Protection and Escalating Pre-Trial Detention* (Research Paper No 3, August 2019).

184 'One Year After Inquest Finding, More Must be Done to Honour Veronica Nelson', *Victorian Aboriginal Legal Service* (Factsheet, 30 January 2024).

recommended for two decades'.[185] The Victorian bail laws are a clear example of the role race plays in the operation of the criminal justice system, and of how CRT can assist in thinking differently about the incarceration of a racialised population like First Nations Australians. There is evidently an inherent divergence between the material and psychic interests of the carceral Australian states and the interests of First Nations people, who are disproportionately impacted by the practice of incarceration until the interests of both groups converge. CRT posits that any change that is implemented is likely to be 'hollow', empty promises with nothing more than symbolic significance.

A *Bugmy and Individualised Sentencing*

The 2013 decision of the High Court of Australia in *Bugmy* further demonstrates the 'same but different' effect of race neutrality in judicial decision-marking.[186] *Bugmy* is particularly relevant to this paper, as it demonstrates how race is implicated in the processes of incarceration. After the majority allowed the appeal, finding that a 'background of deprivation' is a relevant factor when determining an offender's sentence,[187] the Court was required, among other things, to determine the relevance of Bugmy's background of deprivation to sentencing factors.[188]

William Bugmy ('Bugmy'), a First Nations man from the remote New South Wales Town of Wilcannia, had achieved only a low level of education and could neither read nor write, was raised in the context of family violence and alcoholism, and began abusing drugs and alcohol himself at age 13; both he and his partner were alcoholics.[189] As a child, Bugmy was witness to extreme family violence, including watching his mother being stabbed on fifteen separate occasions at the hands of his father.[190] Bugmy spent most of his youth and adult years incarcerated. He has a history of suicide attempts, head trauma, and hallucinations.[191] During a period of incarceration, Bugmy became agitated and ultimately assaulted a correctional officer with a series of pool balls, one of which struck the officer in the eye and caused him to lose sight in that eye.[192]

Bugmy subsequently pleaded guilty to two charges of 'assaulting a correctional officer in the execution of his duty, and one charge of causing grievous bodily harm to a person with intent to cause harm of that kind'.[193] In February 2012, he

185 Ibid (emphasis added).

186 *Bugmy* (n 14).

187 Lucky Jackson, 'Casenote: *Bugmy v R* (2013) 302 ALR 192' (2014) 8(1) *Indigenous Law Bulletin* 27, 27.

188 *Bugmy v R* (2013) 302 ALR 192, [5], [25].

189 *New South Wales v Bugmy* [2017] NSWSC 333, [17] (Adams J).

190 Ibid [12].

191 Ibid [11].

192 Ibid.

193 Jackson (n 187) 27.

was sentenced at the District Court of New South Wales to 'a non-parole period of four years and three months, with a balance of term of two years' for all three offences.[194] In reaching this sentence, the District Court took into account the Fernando principles, set down in the 1992 case of *R v Fernando*,[195] and which require the Court to consider 'an offender's background of social disadvantage — whatever his or her ethnicity may be'.[196] On appeal to the New South Wales Court of Criminal Appeal, the Director of Public Prosecutions submitted that the judge at the first instance had given undue weight to Bugmy's subjective circumstances. Accordingly, Hoeben JA stated in his judgment that 'the effects of a background of deprivation diminish with time',[197] and Bugmy was accordingly resentenced to 'a non-parole period of five years, and a balance of two and a half years'. The case was appealed to the High Court of Australia.

In its determination, the High Court considered and applied two cases decided by the Supreme Court of Canada: *R v Gladue* ('*Gladue*'),[198] and *R v Ipeelee* ('*Ipeelee*').[199] Perhaps the most significant of the two for the purpose this paper, the Canadian Supreme Court in *Gladue* held that 'systemic factors unique to Aboriginal offenders' must be considered 'on an individual basis'.[200] This promotes formal equality, but not necessarily substantive equality, because the underlying criminogenic factors affecting a First Nations person is often different, practically and conceptually, to the factors a non-Indigenous person might experience.

The Canadian Supreme Court subsequently confirmed in *Ipeelee* that *Gladue* applies in every case where the offender is of First Nations descent.[201] Ultimately, the High Court held that the effects of a background of deprivation do not diminish over time; however, significantly, the Court also stated:

> Nonetheless, the appellant's submission that courts should take judicial notice of the systemic background of deprivation of Aboriginal offenders cannot be accepted. It, too, is antithetical to individualised justice. Aboriginal Australians as a group are subject to social and economic disadvantage measured across a range of indices, but to recognise this is to say nothing about a particular Aboriginal offender. In any case in which it is sought to rely on an offender's background of deprivation in mitigation of sentence, it is necessary to point to material tending to establish that background.[202]

194 Ibid 28.

195 (1992) 76 A Crim R 58.

196 Jackson (n 187) 28.

197 *R v Bugmy* [2012] NSWCCA 223, [50]; *Bugmy* (n 14) 120–1 [25]; Jackson (n 187) 28.

198 [1999] 1 SCR 688 ('*Gladue*').

199 [2012] 1 SCR 433 ('*Ipeelee*'). Note that the High Court of Australia in *Bugmy* distinguished the Australian case from the Canadian authorities due to a difference in wording within the relevant statutes.

200 *Gladue* (n 198) [66], [80].

201 *Ipeelee* (n 199) [83].

202 *Bugmy* (n 14) 594 [41].

This approach to sentencing under what would become the *Bugmy* principles is perplexing. While the Court does helpfully acknowledge that the effects of deprivation do not diminish, and must be considered in the context of each offence, and the Court accepts that First Nations people are generally subject to deprivation in a range of ways, the Court then goes on to determine that these deprivations cannot say anything about an individual offender, and does not consider elements of 'deprivation' arising from 'discrimination, exclusion and disempowerment'.[203] In some Australian jurisdictions, judges are required to account for Aboriginality. For example, s 3A of the *Bail Act* requires a bail decision maker to consider a person's Aboriginality, including 'historical and ongoing discriminatory systemic factors',[204] 'the risk of harm and trauma' posed by custody,[205] the importance of supporting a person's connection to culture,[206] and any specific factors relating to 'the person's history, culture or circumstances'.[207] However, it is also noted that the onerous bail provisions, which include a reverse-onus test, require the bail decision maker to refuse bail, 'unless satisfied that exceptional circumstances exist'.[208] In applying this test, the bail decision-maker is required to incorporate Aboriginality into their determination of special circumstances.[209] However, the disproportionate increase in First Nations people incarcerated in Victoria indicates that race-neutrality in 'tough on crime' bail laws is a practical reality.[210]

As Anthony observes, 'direction is applied on a case-by-case basis to determine whether Indigenous factors are relevant to reducing a sentence'.[211] While a commendable exercise, this discretion risks underplaying or ignoring the insidiously racialised hierarchies embedded within judicial decision-making, structures which are exposed by the tenets of CRT. This includes sentencing determinations, where racial hierarchy is so deeply entrenched that justice seemingly invisible.[212] This in turn may contribute to the over-incarceration of First Nations people not only in Australia but also in jurisdictions like the US or Canada, where *Gladue* principles

203 Stephen Rothman, *Disadvantage and Crime: The Impact of Bugmy and Munda on Sentencing Aboriginal and Other Offenders* (Public Defenders Criminal Law Conference, 18 March 2018) 8.

204 *Bail Act 1977* (Vic) s 3A(1)(a).

205 Ibid s 3A(1)(b).

206 Ibid s 3A(1)(c).

207 Ibid s 3A(1)(d).

208 Ibid s 4A(1A).

209 Ibid s 4A(3).

210 'Imprisonment Rates for Aboriginal and Torres Strait Islander People in Victoria', *Sentencing Advisory Council* (Web Page, 8 May 2024) <https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/victorias-indigenous-imprisonment-rates>.

211 Thalia Anthony, 'Indigenising Sentencing? Bugmy v The Queen' (2014) 35(2) *Sydney Law Review* 451, 455.

212 Deborah Bird Rose, 'Land Rights and Deep Colonising: The Erasure of Women' (1996) 3(85) *Aboriginal Law Bulletin* 6, 6.

originated, because judicial decision-making underscored systemic deprivation specific to First Nations people, divorced from the individual.

X Conclusion

This paper has considered the role of CRT; and, in particular, CRT as an analysis of race embedded in the colonial law. This framework and analysis aids legal theorists in understanding the experiences of First Nations people in the Australian criminal justice system. CRT, a US-centric theoretical lens emerging from the perceived failures of the American civil rights movement and which has gained traction with the resurgence of the Black Lives Matter movement in recent years, works to expose racism within the various structures of our legal system. Two key positions of CRT scholars, being: (1) the existence and operation of white-over-colour ascendency; and (2) Bell's interest-convergence theory, are particularly pertinent to the discussions within this paper, as both assist in explaining how existing power structures appear to accommodate race.

This paper has argued that the confluence of two analyses, that of *Brown* and that of *Mabo*, demonstrates the ways in which race is wielded as a symbolic sword by the Sstate; in particular and in the context of Australia specifically, the settler-colonial state. Its ability to signify the other is inherent to its power; race forms the basis of the justification for, and the perpetuation of power and control. In doing so, analyses of race are imperative to understanding how socially constructed distinctions influence the experience of the racialised other within dominant structures of law and justice. Both *Brown* and *Mabo* represent cases in which the material and psychic interests of the dominant (White) group and the interests of the marginalised (Black) group apparently converged. However, the analyses undertaken in this paper demonstrate that in practice there existed a growing divergence in the law and in public opinion around the granting of practical, or substantive, equality, which resulted in those rights which were afforded being primarily 'sterile symbols' in practice.

While *Brown*, a supposedly 'watershed' moment for race in the American legal system, arguably delivered little but 'hollow' promises and has faded into irrelevance, so too does *Mabo* present only an illusion of advancement and equality. However, these analyses do demonstrate the utility of CRT and its tenets in understanding how legal systems outside the US render race invisible under the guise of individualised equality. In its application specifically to the criminal justice system and sentencing behaviour, the principles of white-over-color ascendency and interest-divergence are demonstrated through the case of *Bugmy*; which in turn helps to think differently about how and why, for racialised people, the law is not necessarily a means to achieve justice.

This paper is concerned primarily with a theoretical application of CRT, but it is worth noting the practical benefits of an understanding of over-incarceration that is, perhaps, different from what is commonly accepted. By gaining an understanding of, and appreciation for, the ways in which race is an operative influence on the

creation of a subjugated other, and the way in which racial distinctions enforce and reinforce the discriminatory operation of the Western legal systems, it is possible to identify areas for change and reform. To take Irene Watson's question of whether decolonisation is possible in the context of colonial control of the state and, in particular, its commitment to a 'one dimensional' system: a CRT analysis such as the one undertaken here might suggest that to decolonise, one must recognise and 'name' the ways in which the settler-colonial state, and its systems of law and justice, do damage to First Nations people's lives, culture, and land. In recognising that supposedly watershed moments like *Mabo* are, in practice, little more than 'hollow pronouncements' which in fact serve to entrench discrimination and racial difference, it may be possible to reimagine decolonial solutions. However, more research and practical considerations are required on this point.