A Fair Trial for Whom?

Due Process Given to Indigenous Males in NSW Criminal District Courts

A Thesis Submitted for a degree of Doctor of Philosophy at the Australian National University's National Centre for Indigenous Studies and ANU College of Law

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Declaration of Originality

I, Richard (Rick Emory) McGary, Junior, hereby declare:

1. I submit this thesis to the Australian National University for the degree of Doctor of Philosophy.

2. I am the sole author of this work.

3. My research contained herein is substantively original.

4. The intellectual properties, research, and work products of other persons and/or entities upon which I rely in making my argument, are appropriately cited.

5. I have not previously submitted this thesis, or a substantial portion thereof, for the purpose of seeking a degree, licence, certificate, or credential.

Certified on: 14 May 2023

Richard (Rick Emory) McGary, Junior

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Abstract

This project is a mixed methods, sociolegal inquiry into whether the NSW District Court criminal litigation system negatively impacts and/or potentially racially discriminates against Indigenous males accused of indictable offences. Its primary research questions are: (1) Does race or Indigenous status of Aboriginal defendants, as a class, negatively impact Indigenous accused persons in New South Wales at trial? And (2) If so, do those negative impacts potentially 'racially discriminate' in a general, sociolegal sense of the term?

The project uses a number of interrelated methodological components including: (a) the 'Rombauer Method of (doctrinal) legal research,' (b) statistical anti-discrimination testing using both freely available datasets and datasets purchased from NSW BOCSAR, (c) observational-ethnographic data collection using a single blind random sample of an equal number of matters involving Indigenous and non-Indigenous accused males, (d) practitioner interviews, and (e) multisite photographic analysis. Notably, this methodology won the inaugural Simon Fenwick Award for Indigenous research, and the Simon Fenwick Foundation largely funded fieldwork.

With regards to findings, this research uncovers that statistically, in NSW District Court criminal litigation, an accused's race can be objectively detrimental for Indigenous males. The NSW pre-trial detention system is arguably racially discriminatory, as is how the NSW Office of the Director of Public Prosecutions exercises its non-reviewable prosecutorial discretion to withdraw charges. However, race is a complex social phenomenon, as is racism. In certain instances, this project observed that an accused's race and/or the alleged victim's objective racism can also benefit Indigenous males.

Similarly, other aspects of NSW District Court criminal litigation negatively impact Indigenous males in ways falling outside the scope of present legal understandings of racial discrimination. For example, introducing tendency, propensity, and coincidence evidence using convictions obtained prior to the Royal Commission into Aboriginal Deaths in Custody and Royal Commission into the New South Wales Police Service allows the possibility of extant legal injuries caused by prior events occurring during a demonstrably racist and corrupt period in NSW history. Likewise, colonial era courthouses are more likely to affect compound trauma responses amongst Indigenous accused persons, which overlaps with insufficient judicial infrastructure in western NSW in a manner that disparately impacts Indigenous Australians.

Contents

I.

It Didn't End with the Hougoumont

Introducing ongoing issues of race and Indigeneity in a penal colony

It may seem an odd choice to begin a thesis introduction with a garish analogy to the last known ship transporting convicts from the British Isles who had been sentenced to exile in Australia. However, Australia's settler colonial history arguably begins with the arrival of a British fleet, filled with convict-colonists, in 1788.[1] Considering Australia's present status as a major regional power in the South Pacific, non-Indigenous Australians are understandably proud of this historical narrative. Much like the United States' refugee mythos, the Australian national mythology presents a beautiful macrocosm of the rags to riches children's stories commonly found throughout the Western world.

On the other hand, Indigenous Australia does not share in the rags to riches national mythos of their non-Indigenous compatriots. Rather than viewing convict-colonialism as birthing a nation, Indigenous Australians view 1788 as the beginning of an invasion, and hyperincarceration (mass imprisonment) remains an ongoing aspect of the Indigenous Australian lived experience. In the year this research began (2016), the Aboriginal[2] Australian incarceration rate was 2,346 persons per 100,000 individuals.[3] Putting that number in perspective, the overall imprisonment rate in Australia for the same period was 151 persons per 100,000 individuals,[4] so Aboriginal over-representation in custody was slightly over 15 Indigenous persons incarcerated for every non-Indigenous Australian in

[1] The 'first fleet' also included free settlers, but the Australian national mythology overwhelmingly focuses on the convicts.
[2] This figure does not include Torres Strait Islanders.
[3] *See,* Australian Bureau of Statistics (ABS), *Prisoners in Australia 2016* (Catalogue Number 4517.0, 2016). *But see,* The Australian Law Reform Commission (ALRC) inquiry into indigenous incarceration uses slightly different statistics with 20:1,000 Indigenous Australians incarcerated and 12.5:1 over-representation. However, these stats are presented in a non-standard format (convention for presenting incarceration rates would show 2,000:100,000) that downplays the scale of the problem and calls the figures into question. *See additionally*, ALRC, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report no. 133, 1 December 2017).
[4] Ibid.

detention.[5] Placed into an "oranges to 97-percent-oranges comparison"[6] using similar data, Black American over-representation was 5:1,[7] American Indians[8] 2:1,[9] [10] First Nations Canadians 10:1,[11] Māori peoples 6:1,[12] and Inuk (Greenlanders) roughly 3.5:1[13] when compared to the majority group in their home Westphalian nation-states.

While shocking, Indigenous Australia's over-representation in custody is not a new phenomenon. Neither has it gone unnoticed by the various Australian governments since it was first recorded by the 1991 Royal Commission into Aboriginal Deaths in Custody (RCIADIC).[14] In the three decades following the RCIADIC, the Australian Commonwealth[15] and constituent Australian states/territories launched nearly a dozen inquiries and commissions[16] into various issues surrounding Aboriginal and Torres Strait Islander incarceration. These investigations have ranged from ongoing Indigenous deaths in custody, to the abuse and torture of Aboriginal and Torres Strait Islander children in juvenile detention,[17] to the seemingly ever-rising racial disproportionalities in Australian criminal justice.

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[5] *See,* ABS, *Prisoners in Australia 2016*.

[6] A proper 'apples to apples' comparison is impossible due to variations between nations in statistical methodologies, and the various timelines for releasing national statistics. This type of comparison has been called an 'oranges to 97-percent-oranges comparison' by an unnamed source in a Washington Post article on the subject. *See,* M Lee, 'Yes, U.S. locks people up at a higher rate than any other country' *Washington Post* (7 July 2015).

[7] C Hartney and L Vuong, 'Created Equal: Racial and Ethnic Disparities in the US Criminal Justice System' (Report for the National Council on Crime and Delinquency (US), March 2009).

[8] American Indian (a.k.a Native American) is the US government demographic identifier used to distinguish between the Indigenous peoples of the 48 geographically contiguous United States from the Indigenous peoples of Alaska, Hawaii, US Territories, and the Freely Associated States.

[9] Ibid.

[10] US figures compare ethnic and racial minorities to persons self-identifying as 'white, non-Hispanic.' All other nations in this list compare Indigenous to non-Indigenous persons, regardless of race or ethnic background.

[11] Office of the Correctional Investigator (Canada), *BACKGROUNDER: Aboriginal Offenders – A critical Situation*. (Report for the Office of the Correctional Investigator (Canada), 16 September 2013).

[12] Department of Corrections (New Zealand/Aotearoa), *Prison Facts and Statistics, December 2015*. (Report for the Department of Corrections (New Zealand/Aotearoa), December 2015).

[13] World Prison Brief Data, Denmark (2015) *See Also,* Correctional Service (Greenland), *Kriminalforsorgen i Grønland Årsberetning* [Danish] 'Correctional Service in Greenland Annual Report' (Report for the Correctional Service (Greenland), 2013).

[14] *Royal Commission into Aboriginal Deaths in Custody* (Final Report, 17 November 2017).

[15] Australia's formal term for the national federal polity.

[16] *E.g.*, Royal Commission into Aboriginal Deaths in Custody (1987), Royal Commission into the Protection and Detention of Children in the Northern Territory (2017), Senate Inquiry into Aboriginal and Torres Strait Islander Experiences of Law Enforcement and Justice Services (2015), ALRC Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples (2017).

[17] *Royal Commission into the Protection and Detention of Children in the Northern Territory* (Final Report, 15 April 1991).

Notably, this thesis research began at the same time as the Australian Law Reform Commission (ALRC) Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples.[18] That inquiry was the single largest governmental investigation into Indigenous Australian interactions with Australian criminal justice processes since the 1991 RCIADIC. The Commissioner in charge was an Aboriginal man, Judge Matthew Myers, AM. In a 2017 presentation at the Australian National University College of Law, Judge Myers stated there are no easy solutions to the thorny issue of the Indigenous Australian hyperincarceration, and any current glimmers of hope are both highly localised and personality driven.[19]

Also occurring in 2017, a collective group of Indigenous activists and Elders formed the Uluru Dialogs, leading to the Uluru Convention, which then produced the 'Uluru Statement from the Heart.' The Uluru Statement echoes Judge Myers' comments, it demonstrates a need for ongoing research in this area, and it underscores the population-wide impacts of hyperincarceration on Aboriginal and Torres Strait Islander peoples:

> *Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are aliened from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.* [20]

The poetic plea for justice in the Uluru Statement from the Heart will probably resonate across time.[21] However, if history is any gauge of the foreseeable future, Indigenous Australian over-representation in custody will likely continue trending upwards.[22] While it would be unfair to claim that the various Australian governments have made no attempt to address Indigenous hyperincarceration, most governmental attempts to reduce Aboriginal and Torres Strait Islander incarceration have provided more benefits to non-Indigenous Australians than to Australia's Indigenous peoples.[23] Even in 2023, there are few indications that most of the recent changes to

[18] ALRC (Report no. 133, 2017).

[19] Judge M Meyers, 'ALRC inquiry into the incarceration rates of Aboriginal and Torres Strait Islander people.' (Presentation, The Centre for International and Public Law 7 August 2017).

[20] *2017 National Constitutional Convention* (Final Report of the Referendum Council, 30 June 2017) *Uluru Statement from the Heart* (hereafter '*Uluru Statement From the Heart'*).

[21] For a more in-depth discussion of the Uluru Statement from the Heart, *see,* M Davis and G Williams, *Everything you Need to Know About the Uluru Statement from the Heart* (UNSW Press, 2021).

[22] There are several notable data anomalies over this 30-year period in which Indigenous incarceration briefly declined. However, the overall data trend continues.

[23] H Blagg, *Crime Aboriginality, and the Decolonization of* Justice (2nd ed., Federation Press, 2016) vii.

criminal legislation, policing practice, prosecutorial practice, and criminal procedure will significantly reduce Indigenous incarceration or over-representation in custody long term. With overall Australian incarceration rates on the rise,[24] Indigenous incarceration seems likely to continue increasing as well.

Structure of this Introduction

Having now set the stage by describing the sheer scale of the overarching issue, readers have likely deduced this thesis is an investigation into racial disparities in Australian criminal law. More specifically, however, this thesis is the product of an interdisciplinary inquiry into racial disparities in NSW District Court criminal trials. This section provides the more traditional introductory content than the prior.

The remainder of this chapter is broken up into five sections. The first of those addresses the overarching research questions this thesis seeks to answer and the hypotheses it seeks to test. The second contains a statement of how this particular thesis (and research project) contributes to the wider body of existing research. The third section discusses an overview of the NSW District Court criminal litigation process, the novel design of Australia's multiple coexisting public defender services, and the general manner in which NSW District Court jury trials unfold. The subsequent section is a summation and analysis of the current criminological debates surrounding Indigenous Australian hyperincarceration, which, in turn, leads into a section on the theoretical orientation shaping this research. Afterwards, the fifth and final section lays out a roadmap for the rest of this thesis.

Research Questions and the Concept of Racial Discrimination

Where the previous sections introduced the wider issues of the research subject this thesis wrestles with and set out a framework for the introduction itself, this section lays out the specific research focus, questions, and hypotheses for the remainder of the work. The focus is a thorny topic, and the questions are difficult to answer, thereby necessitating both a dedicated methodology chapter, and additional methods sections in several following chapters.

Likewise, the overarching research questions of this thesis are broad. So broad in fact, the thesis poses a number of subsidiary questions in its search for answers. Whereas the following chapters will

[24] ABS, *Prisoners in Australia 2019*.

each addresses a subsidiary question, this section limits itself to the overarching questions underpinning the holistic work. In so doing, this introductory section establishes the framework of analysis used to assess the subsidiary questions that will come later, before the two primary questions are ultimately answered by the conclusion. Those two primary research questions are:

> *(1) Does race or Indigenous status of Aboriginal defendants as a class negatively impact accused persons in New South Wales (NSW) at trial?*
>
> *(2) If so, do those negative impacts potentially 'racially discriminate' in a general, sociolegal sense of the term?*

As mentioned in the prior paragraph, these questions are broad, and deliberately so. These broad questions allow a wide-ranging investigation into institutional issues in a way narrower questions would not. However, due to their breadth, coming to these particular guiding questions was no simple task. Likewise, due to the data collected, at times these questions required iterative rethinking. Furthermore, by choosing these specific questions, this thesis systematically interrogates racial disproportionalities and racial disparities that adversely impact Indigenous males accused of indictable offences in NSW District Court. The research overtly pivots around the central axis of criminal trials, but also explores the NSW District Court criminal litigation process from the laying of charges to the moment of verdict.

Another consequence of selecting trial-centric research questions is that the thesis rarely touches on sentencing, save for instances where sentencing impacts future criminal litigation or prior convictions are introduced into evidence in extant litigation. However, focusing on the criminal litigation process until the moment of verdict does not downplay the importance of sentencing to the wider social injustice that is Indigenous Australian hyperincarceration. Australian criminal sentencing law has been extensively studied, and the resulting body of academic research has directly facilitated legal reform.[25] For example, NSW has developed an extensive, growing network of Indigenous-centric, restorative justice-based, alternative sentencing courts for both children[26] and adults.[27] Similarly, the High Court[28] and NSW Court of Criminal Appeals[29] have both mandated that Indigenous status *must*

[25] M Rossner and D Tait, 'Contested emotions: adversarial rituals in non-adversarial justice procedure' (2011) 37(1) *Monash Law Review*.
[26] NSW Youth Koori Court.
[27] NSW Circle Sentencing Court and (as of 2022) the Walama List.
[28] *Bugmy v The Queen* [2013] HCA 37.
[29] *R v Fernando* (1992) 76 A Crim R 58.

be taken into account in sentencing – so legal activist groups like 'Deadly Connections' work diligently to ensure those sentencing protections eventuate in practice.[30] The long-term efficacy of Australia's Indigenous-specific sentencing law is matter of public debate,[31] but on account of selecting trial-centric research questions, such debates largely exist beyond the ambit of this thesis. Instead, this work interrogates aspects of the NSW criminal litigation process that may lead to racially disparate conviction rates.

The final consequence of these specific questions is the research testing for racial discrimination in a general, sociolegal sense of the term, rather than racial discrimination in a purely legal sense. At no point does this thesis attempt to declare state actions to be unlawful or otherwise legally actionable. Specific anti-discrimination legislation and international instruments are utilised extensively throughout this work, but the focus of this thesis is diagnostic in nature, rather than an attempt to prove demonstrable legal violations or make out causes of action.

In a similar manner to how the primary research questions repeatedly framed, and even limited the scope of the thesis, the concept of racial discrimination periodically required introspection and iterative reassessment. Racial discrimination is a massive, somewhat amorphous, concept with a number of conflicting definitions requiring an entire chapter building a workable definition and typology from which to operate. Nevertheless, even with an entire chapter devoted to the topic, addressing such a massive concept required continuous tweaking. The concept of racial discrimination evolved repeatedly throughout writing this thesis, and as a result it may seem to conflict or even contradict at times. Where such ideas appear to conflict, readers should keep in mind that the varied conceptions of racial discrimination found in this thesis always relate back to an existing basis found in anti-discrimination law. When investigating issues that cannot be resolved with existing legislation, this work returns to legal first principles and landmark judicial decisions in its quest for alternative solutions. Likewise, each of the various constructs forming the larger meta-construct of racial discrimination are addressed in the typology.

[30] Deadly Connections Community and Justice Services provides *Bugmy* sentencing reports for Indigenous persons convicted in NSW District Court and NSW Supreme Court. *See*, Deadly Connections Community and Justice Services 'Bugmy Justice Project' (online, retrieved 2023).

[31] T Anthony, L Bartels, and A Hopkins, 'Lessons lost in sentencing: welding individualised justice to Indigenous justice' (2015) 39(1) *Melbourne University Law Review* 47.

In accordance with scientific convention, this section closes with a brief statement regarding the overall conclusions of the research. The evidence for, and the reasoning behind, these conclusions will become more apparent later. They are not mentioned here because their complexity, interrelatedness, and length preclude their inclusion in an introduction. However, in summary, both primary research questions are answered *conditionally* in the affirmative. Some aspects of the NSW District Court criminal litigation process do, in fact, negatively impact Indigenous accused males on account of their race and/or Indigenous status. That said, at other times, Indigenous males also benefit from the system. Likewise, some, but not all, of those negative impacts are discriminatory. In particular, this thesis finds demonstrable racial discrimination in both pre-trial detention and prosecutorial discretion using objective, statistical-evidential tests rooted in anti-discrimination law. Other negative impacts on Indigenous males, such as courthouse design and inadequate judicial infrastructure, are not discriminatory under current legal frameworks. Nevertheless, courthouse design and judicial infrastructure negatively impact Indigenous males accused of indictable offences in the NSW District Court.

Contributions of this Work

Every PhD student begins with a project larger than the sky, and this project is no exception. Like every PhD thesis, this project gradually narrowed, but in a way that allows it to keep its breadth of purpose, answer the overarching research questions, and showcase the varied skillset the researcher brought to the project. Likewise, this project brings to bear an unusual viewpoint in Australia due to the author's positionality, upbringing, and education. This unique combination of positionality, viewpoint, and skillset produces a number of interconnected contributions, which intersect the disciplines of law, scientific jurisprudence, legal anthropology, and architectural photography.

The first noteworthy contribution of this work comes in the immediately following chapter. That chapter, The Laws of the Lands, provides a functional typology of racial discrimination in the law. This new typology is subtly different than existing typologies, and exists to serve a specific, diagnostic purpose. It enables future research to spend less time working out the quagmire of definitional issues in the concept of racial discrimination and spend more time engaging with the living, multifaceted, concept itself. The typology contained therein also draws on concepts from multiple jurisdictions, thereby allowing the ideas in this work to be translated in ways that are not always apparent. By doing so, this new typology demonstrates that while two cross-jurisdictional concepts may appear identical, they are at times, merely related.

Following on from the definitional typology, the methodology found in this thesis is, itself, a substantial contribution to the fields of legal anthropology and anti-discrimination praxis. It is novel, multimodal, and an effective means of diagnosing racial discrimination in domestic criminal law and process. Notably, it adapts anti-discrimination statistical analytics from employment litigation and applies those analytics to numerically similar datasets, purchased from the NSW government, in a manner similar to an expert witness testifying in active litigation. By doing so, these methods are able to translate longstanding doctrines of anti-discrimination praxis in ways largely unexplored in Australia's criminal-legal space. Likewise, this project's new methodology enables a more robust investigation into the discriminatory impacts in criminal process than existing research relying on criminological methods. Furthermore, the thesis' ethnographic sampling and observational methods represent a novel data collection system for criminal procedural research, which, unlike much existing research, relies neither on pseudo-randoms nor proxy variables.

The next substantial contribution of this thesis worthy of inclusion in the introduction are the specific findings of the research data discussed in the conclusion. There are a number of ways these arguments can be applied, and using the statistical findings, in particular, could prove fruitful to reformers drafting policy statements or proposing new legislation. A related contribution is found in An Infrastructural Institution, because the NSW Department of Communities and Justice graciously created new records on the NSW District Court's infrastructural capacity when responding to a *Government Information (Public Access) Act 2009* (NSW) request for information. One would hope those new records, alongside the analyses in this thesis, are used to create a central database that will aid the NSW District Court in assigning criminal matters to individual judges and specific courthouses.

The final significant contribution of this thesis worthy of inclusion in the introduction comes in the final appendix,[32] titled The King's Courts. To the author's present knowledge, this appendix (from which another chapter draws data) contains the first complete photographic sample of New South Wales courthouses with District Court criminal sitting dates captured by a single photographer. This researcher has searched widely for another example of a complete photographic sample but did not uncover one. A lack thereof is both surprising and unusual. Across the world, legal practitioners and academics love courthouse architecture; in many places, respected travel photographers sell coffee

[32] *Appendix vii.*

table books, marketed to lawyers, containing large, glossy photographs of courthouses in a particular location and/or jurisdiction. Within NSW, there are many travel blogs, primarily written by lawyers, with several courthouses found in this thesis, yet none appears to contain a complete sample. A complete photographic sample of NSW courthouses with District Court criminal sitting dates, is therefore, itself, a notable contribution. That contribution is not only one of novelty, but also the sociolegal analysis that a complete sample enables. A number of legal academics and social scientists have written on the purpose of NSW courthouse design, but none has personally obtained a complete photographic sample to do so. As such, a complete photographic sample, captured by a single photographer, represents a singular endeavour among those commenting on NSW courthouse architecture and judicial infrastructure.

NSW Criminal Trials and Process

This section summarises the NSW District Court criminal trial process and is intended to provide an overview of the system for readers unfamiliar with the New South Wales criminal litigation process. Beginning with the overall structure, NSW has a three-tiered criminal litigation system, with different offence categories being tried before different courts. Which court an individual offence gets tried in is based on: (a) how 'objectively serious'[33] the NSW Legislative Assembly views particular crimes, and (b) whether the Office of the Director of Public Prosecutions (DPP) deems a lesser offence worthy of prosecuting in a higher court. The lowest level offences, termed summary offences, are usually tried before a magistrate in the Local Court.[34] Summary offence convictions can all be appealed to District Court as a matter of right.[35] However, the DPP may exercise prosecutorial discretion (which cannot be appealed)[36] to try a summary matter in the District Court by indictment. Reciprocally, the DPP can also elect to try certain indictable matters summarily.[37] The District Court hears the majority of indictable matters,[38] all summary matters for which the DPP elects to try by indictment and grants 'new hearings on the evidence'[39] to all appeals from the Local Court. The NSW Supreme Court only tries offences the state Legislative Assembly deems the most egregious: murder, treason, and piracy.[40]

[33] This term is not without issue, but it is the term used in NSW criminal legislation and policy.
[34] *Criminal Procedure Act 1986* (NSW) s7.1.
[35] *Crimes (Appeal and Review) Act 2001* (NSW) s11.
[36] *Maxwell v The Queen* (1996) 184 CLR 501, 534.
[37] *Criminal Procedure Act 1986* (NSW) s 5.2.
[38] *Criminal Procedure Act 1986* (NSW) s 46.2.
[39] A form of de novo review.
[40] *Criminal Procedure Regulation 2017* (NSW) s 5880.

Much like how NSW criminal courts are a series of somewhat overlapping and interconnected entities, every Australian jurisdiction (including NSW) provides legal representation to indigent criminal defendants using two different, somewhat overlapping, government-funded entities. In New South Wales, the larger, general entity, is Legal Aid NSW. Legal Aid was created statutorily by the *Legal Aid Commission Act 1979* (NSW)[41] to provide free or steeply discounted legal representation for those in need. For persons accused of crimes in NSW, Legal Aid applies both a fiscal means[42] and legal merit[43] test to determine eligibility for its services. Indigenous status is not required for a grant of Legal Aid, and as such, Legal Aid represents the bulk of indigent males accused of criminal offences in NSW, including many Indigenous Australians.[44] The second indigent criminal defence service, the Aboriginal Legal Service NSW/ACT, exists solely to provide legal counsel to self-identified Indigenous Australians. The ALS NSW/ACT originally started in 1970 as a law-clinic in the urban Aboriginal community of Redfern, NSW. It is a creature originally born of necessity; the ALS was created by activists and lawyers as a collective response to overtly racist police harassment of Aboriginal Australians living on the 'Redfern Block.'[45] The ALS's services have significantly expanded over the years,[46] and now the organisation provides free legal representation to self-identified Indigenous persons accused of an indictable offence anywhere in NSW and the Australian Capital Territory (ACT).[47]

As for the criminal litigation itself, the criminal cases found in this research are indictable matters committed for trial before the NSW District Court. Such matters begin by either summons or arrest. Indictment functions differently in NSW than in many other common law jurisdictions, most notably the United States. Grand juries no longer exist anywhere in Australia and the accused is usually indicted by the NSW Police. However, the NSW Police do not possess an exclusive power of indictment, and under certain circumstances, the Office of the Director of Public Prosecutions will indict the accused. If the matter begins by summons, the accused will receive service of process from a service agent

[41] *Legal Aid Commission Act 1979* (NSW) s 2.1.
[42] Legal Aid NSW policy 7.1 enabled by *Legal Aid Commission Act 1979* (NSW) s 2.3.5-s10(d).
[43] Legal Aid NSW policy 8.1 enabled by *Legal Aid Commission Act 1979* (NSW) s 2.4.3-s30(3).
[44] Legal Aid often represents an Indigenous accused when the ALS has a conflict of interest. For the ALS, conflicts of interest usually occur when the ALS is representing (or has previously represented) a different Indigenous person with opposing legal interests.
[45] The Redfern Block was a government housing project for Indigenous Australians that was eventually shuttered after becoming a notorious ghetto. A successor project is currently under construction to offer reduced cost Indigenous family housing in a now rapidly gentrifying (but still heavily Indigenous) neighbourhood.
[46] The ALS also offers family law and domestic violence legal services.
[47] ALS NSW/ACT, 'A Short History of the Aboriginal Legal Service' (online, archived 15 Nov 2017).

(usually a police officer). That summons will inform the accused of the charge(s) found in the indictment along with an enforceable command to attend court. Alternatively, if the matter initiates via arrest, the accused will usually be read the charges against them and allegation thereof at the time of arrest. Then, the accused will be formally cautioned and taken into custody. On arrival at the local lockup (jail in many other dialects of English), the accused will either be granted bail by the NSW Police officer administering the lockup or kept in detention until such time as a magistrate is available for a bail hearing. At a bail hearing, bail is either granted or denied pursuant to the *Bail Act 2013* (NSW) before the matter proceeds further. Accused persons remanded to custody are entitled to apply for bail at a later time, although bail is difficult to obtain after an initial refusal. If an accused is granted bail, they are often subject to legally enforceable restrictions. If the accused violates their bail conditions, they become subject to either police arrest, or a DPP court application seeking to revoke bail.

After a bail hearing, there was previously a mandatory committal hearing system for all indictable offences. However, committal hearings were largely done away with in NSW by the Early Appropriate Guilty Plea (EAGP) reforms.[48] In the current EAGP litigation process, committal hearings are usually restricted to a limited number of scenarios. If a committal hearing occurs, the accused (or their legal representative) is allowed to test the merits of the Crown's case before a NSW Local Court magistrate. The magistrate then considers the evidence and determines if the Crown's evidence meets the required minimum legal threshold to progress the matter to trial. If the Crown case is too weak, the magistrate will dismiss the indictment. However, dismissing an indictment does not preclude the accused being charged again at a later date. Conversely, if the magistrate determines the Crown case meets the minimum evidential threshold, they will commit the matter to trial. That said, committal hearings are rare, and when such hearings occur, magistrates almost never dismiss indictments. Today, most matters bypass committal and enter the EAGP mandatory case conferencing process.

Prior to a case conference, the Crown must disclose any and all relevant evidence in their possession to the accused. This disclosure comes in the form of a bundle of material, termed the 'Crown brief of the evidence.' Once the brief of the evidence is provided to the accused, a District Court judge orders a case conference. Prior to that conference, the DPP and the accused must provide a number of required documents to the court. These documents include estimates for the length of the

[48] *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* (NSW).

trial, the Crown's statement of the case, notice of any potential affirmative defences, notice of alibi, and notice of any legal justification defences. Assuming the documents and disclosures are all provided to the court in a timely manner,[49] the conference entails a District Court judge, a legal practitioner from the DPP, the accused, and the accused's legal representative determining how the matter will proceed until trial. Furthermore, at the conference, the Crown is required to offer a *reasonable* plea agreement to the accused. The accused does not have to accept this offer, or any other guilty plea offer, at any time. However, if the accused does accept the offer, there is a statutory sentencing discount for doing so contained in the NSW EAGP legislation.[50]

Post conference, there are usually pre-trial applications (motion play), additional Crown disclosure, and often defence subpoenas (discovery) after which, the matter will be assigned a listing date. The listing date is not a firm trial date but is instead the date when a criminal matter gets placed into a trial assignment pool. That pool, referred to as the court list, is somewhat unwieldy; on any particular listing date, there are always more matters in the court list than the number of judges available to oversee trials. Due to an endemic shortage of District Court judges, the listing system relies on a priority-based assignment process. When assigning matters to trial judges, the list court judge weighs a number of factors, much like a triage nurse in a hospital emergency department. These factors include, inter alia: (a) the age of the matter, (b) whether the accused is in custody or at liberty, (c) the projected length of the trial, and (d) the physical infrastructure required to try particular matters.[51] Every morning, the list court judge will be apprised of judicial capacity and then use that knowledge in assigning the highest priority matters to available judges. Any matters that go unassigned on Monday will return on Tuesday, and any matters remaining in the list after Tuesday's assignments are normally returned to the list. In accordance with the previously listed factors, matters returned to the list are granted elevated priority at their next listing date. Eventually, every matter will be assigned a judge, and (absent a successful application for a judge alone trial) have a jury empanelled.

Insofar as the trials themselves, the New South Wales criminal system is presumptively open. In NSW, '[t]he fundamental rule of the common law is that the administration of justice must take place in open court'[52] where any member of the public can simply waltz in[53] to watch trials occur. The open

[49] Timeliness is a significant assumption and delays are commonplace.
[50] *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* (NSW).
[51] These requirements are also discussed in the final substantive chapter of this text, An Infrastructural Institution.
[52] *John Fairfax & Sons Limited v Police Tribunal of NSW* (1986) 5 NSWLR 465 (McHugh and Glass JJA agreeing at 476–477).
[53] *See generally,* S Dusty, *Waltzing Matilda* ('A-side' 7" 45RPM single, Columbia Records Australia, 1960).

courts principle is used every single day in NSW criminal courts, and seemingly endless streams of schoolchildren enter and leave courtrooms at regular intervals. However, NSW law allows, and sometimes even requires, judges to issue non-publication orders limiting what media and researchers may record in court. Likewise, under certain conditions, judges may, and sometimes must, go a step further by closing proceedings to the public.[54] Judges usually close the court to protect legally vulnerable categories of victims, such as child sexual abuse survivors, disabled persons, and victims of certain types of family violence. However, courts are also closed when the accused is under the age of majority, or if the accused is in a particularly high-risk category.

As for NSW District Court courtrooms, they are laid out in a variation of the traditional English common law structure. The accused is/are kept in a dock, which is usually stationed directly opposite the jury box. Certain NSW courtrooms contain a 'secure dock.' In a modern courtroom, a secure dock is a cell of sorts, with a shatter-resistant, glass front and electronic communication equipment through which the accused participates in proceedings. For trials involving multiple accused parties who pose a risk of violence towards one another, a courtroom with two secure docks is used. Such courtrooms are designed for situations where one of the jointly accused parties turns Crown witness at trial or for jointly trying rival factions of an organised criminal enterprise. Such docks are not universal; for reasons of procedural fairness, unsecured docks remain the norm in NSW. An unsecured dock is not a cell, but an elevated, (usually) wooden platform contained within a half-height wall. That wall is at times a solid, though is still frequently comprised of wooden slats as an architectural homage to the original caged docks first used during the English Peasants' Revolt.[55] From their seat in the dock, the accused is obliged to stand whenever the jury enters and exits, as a sign of respect to the finders of fact.

Likewise, in the NSW courtrooms, there are usually two or three bar tables, the front of which is usually shared by lead counsel for all parties. The rear bar tables are often (but not always) separated to allow access. On one side sits the defence instructing solicitor or paralegal, and at the other will be the junior/instructing Crown. While NSW has a bifurcated legal profession, lead trial counsel need not be a barrister. Instead, lead trial counsel may be a solicitor advocate or a barrister, whereas the instructing will always be a solicitor or paralegal. Notably, unlike many other common law jurisdictions,

[54] *See generally, Court Suppression and Non-Publication Orders Act 2010* (NSW).

[55] There are several additional historical theories about the origins of the dock. *See*, M Rossner, D Tait, B McKimmie, and R Sarre, 'The dock on trial: courtroom design and the presumption of innocence' (2017) 44 (3) *Journal of Law and Society* 317.

Australian 'paralegals' are not licensed professionals, but are overwhelmingly students in the later years of their university legal studies. In front of the bar will always be a public gallery, even in secure courtrooms. The public sits here, as does the lead police investigator in the matter and witnesses who have finished testifying and are not subject to recall. Witnesses yet to testify are not allowed in court, and, unlike some jurisdictions, 'the rule' against their presence does not require invocation.

Continuing with the layout of the courts and persons therein, the judge sits alone at an elevated bench. Behind the bench is always a governmental seal, and, interestingly, one no longer sees pictures of the reigning monarch in NSW courtrooms. The judge's associate (usually a recent law school graduate) sits below the judge, as does the technician monitoring the courtroom audio recording. The NSW District Court does not utilise stenographers or a court reporter, which is the norm in some other jurisdictions including the NSW Supreme Court. There is always a sheriff who ensures order in the courtroom, and at least one court officer who fulfils the duties traditionally assigned to a bailiff in the English system. Unsurprisingly, it is the court officer who sounds the entry knock and calls 'all rise.' Strikingly, because there is no gavel in NSW courts, there is a fair degree of variation in how court officers sound the entry knock in NSW and this researcher personally observed court officers deploy differing methods. Some court officers used a closed-fist, traditional door knock, others used blunt objects like a pen/highlighter/texta, and one court officer went so far as to wear an unusually heavy wedding band, specifically to sound the entry knock. As such, the court officers' choices are an interestingly individualistic and stylistic decision left entirely to personal discretion in an otherwise highly formalised structural process.

All recently constructed or recently renovated NSW courthouses with District Court criminal sitting dates will have certain technologies at their disposal. One of those technologies is an audio-visual link system. These 'AVL' systems are used to allow an accused in custody to be virtually present, for offsite witness testimony, and for vulnerable witness testimony. Vulnerable witnesses in NSW are usually kept in a remote location within (or relatively near to) the courthouse in order to facilitate their feelings of safety whilst they testify. This category of 'vulnerable witnesses,' includes, inter alia, sexual assault complainants, child witnesses, and family violence complainants. As part of the AVL system, there are monitors for this system throughout the courtroom. These monitors tend to be in front of the jury box (or above the dock), at the bench, at the bar tables (or above the bench), and behind the jury box (or in front of the dock). Additionally, those same monitors are also used to display other AV content, such as digital evidence, during the trial process.

As mentioned previously, after any pre-trial applications (termed 'motions' in some jurisdictions), trials in NSW begin either with a jury being empanelled or a party making an application for a judge alone trial. A jury trial is both preferred and presumed; it does not have to be demanded. Due to this legal presumption, the party seeking a judge alone trial must show why a jury is inappropriate or unfair in a particular matter.[56] If a jury is empanelled, that jury must be comprised of: (a) Australian citizens, (b) with good character, (c) not employed in prohibited sectors, (d) fluent and literate in the English language, (e) drawn from the local population.[57] There is no legal requirement for a diverse jury in NSW law, but the national *Racial Discrimination Act 1975* (Cth) applies to the NSW legislation creating the pool of (usually 40 or so) potential jury members.[58] At the beginning of empanelment, the judge explains the role of the jury to the pool, lists the parties and witnesses, and then asks the pool if any persons have legitimate reasons for which they should be excused. Members of the jury pool wishing to be excused then approach the bench and request such. Whenever judge sees fit to do so, the judge excuses potential jurors from the pool. The remaining members of the pool then proceed to jury selection. In NSW, potential jurors cannot be questioned by the parties, and are selected at random. During this random selection process, each party is allowed six challenges, without cause, as a matter of right. Notably, in this project, it appeared parties primarily used challenges to diversify juries. The final jury is made up of twelve persons, and at the judge's discretion, alternates.[59] After selection, the jury is sworn in, sworn to secrecy, instructed of their duties by the judge and instructed to select a foreperson.

At the conclusion of these formalities, jury is immediately excused to familiarise themselves with the jury room. While the jury is out, the Crown prepares an opening. On the jury's return, the Crown presents said opening, and absent an application to reserve their opening until the Crown rests its case in chief, the defence presents their own. The end of opening statements usually coincides with the end of the first day of trial (which, in NSW almost inevitably runs from 10:00 to 13:00 with a break for tea halfway through, followed by lunch from 13:00 to 14:00, and further proceedings from 14:00 to 16:30). The jury is never sequestered, and the members thereof return to their private domiciles every night.

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[56] The reasons a judge may grant such applications are discussed by *Criminal Trial Courts Bench Book* (NSW) s 132 – *Orders for a judge-alone trial.*

[57] *See, Jury Act 1977* (NSW); *Jury Regulation 2022* (NSW) sch. 1.

[58] The general applicability of the *Racial Discrimination Act 1975* (Cth) to Australian constituent state criminal legislation is addressed in depth in chapters four and five of this thesis. *See, Maloney V The Queen* [2013] HCA 28; *Gerhardy v Brown* [1985] HCA 11.

[59] *Jury Act 1977* (NSW) s 19.

Judges are required to inform the jury not to engage in outside research while they are away from court. If a juror does engage in outside research, it is considered juror misconduct, which causes a mistrial.[60]

Crown witness testimony usually begins on the second day of trial; it occurs similarly to most common law jurisdictions. Evidence begins with direct examination, cross examination follows, itself followed by re-examination et cetera. Every witness is required to take either a religious oath or give a secular affirmation placing them under penalty of perjury. Likewise, objections to testimony largely function as they do in all common law jurisdictions, as do most rules of evidence. Moving forward, at the conclusion of the Crown case in chief, the defence is allowed to bring an application for a directed verdict. Bringing such applications is rare in NSW and seeing such an application succeed even more so. Absent a directed verdict, the defence will present their case in the same format as the Crown, using witness testimony. In NSW, the accused is allowed to testify on their own behalf but cannot be compelled to do so. When an accused elects not to do testify, the judge informs the jury of the common law right not to testify in one's own defence and formally instructs the jury that choice cannot be used against the accused when coming to a verdict (absent a statutory exception).[61]

After all witnesses are called, closing arguments follow. Following those closing arguments, the jury is excused, and the parties advocate jury instructions to the judge. Once the judge determines the appropriate jury instructions, the jury is summoned to return, at which time the judge presents their summation to the jury. In this summation, the judge reiterates the questions of fact the jury must assess, states the relevant issues of law, lists the elements of any charged offences, informs the jury of their duties, and states any other legally required materials. Some judges do this in their own fashion, but most opt to use the terminology found within the judicial 'bench book' (a guidebook for judges in NSW) to avoid improper jury instructions being overturned on appeal. The jury is then excused to deliberate.

During deliberations, the jury is allowed to ask the court formal questions. Parties are entitled to make arguments as to what those answers should be, but it is the Judge who ultimately responds

[60] A particularly infamous Australian example of juror misconduct occurred in the trial of Bruce Lehrmann. In that matter, a juror brought an academic research paper that was not in evidence into the jury room during deliberations. *See* F Hunt, 'Lehrmann trial discharged due to jury misconduct' *Law Society of NSW Journal* (online, 27 October 2022).

[61] *Evidence Act 1995* (NSW) s 89A.

thereto. Likewise, the jury must be initially instructed to seek a unanimous verdict. If the jury cannot do so, the judge is allowed, at their discretion, to instruct the jury they may reach an 11-1 majority verdict. If the jury still cannot reach a verdict, a mistrial is declared. Hung juries are relatively infrequent; the vast majority either convict or acquit the accused. At the end of deliberations, the jury will return to the courtroom, at which time the spokesperson delivers the verdict. The judge then thanks the jury for their service, instructs them of their ongoing duty of confidentiality, and releases them from service. After excusing the jury, the judge does one of the following: (a) arranges for sentencing, (b) sentences the accused immediately, (c) allows an accused at liberty to leave the courthouse freely, (d) returns an accused in custody to their prior place of pre-trial incarceration so they may collect their belongings before being discharged from custody, or (e) returns an accused who cannot be released for other reasons to custody while having been cleared of the charges at issue in that trial.[62]

Thus concludes the District Court criminal trial in NSW.

Existing Literature on Indigenous Hyperincarceration in Australia

Now having described the criminal trial system being investigated, this section turns towards the pre-existing academic literature this thesis' specific research space. Indigenous over-representation in criminal detention has remained a constantly discussed, national-level debate since the 1991 Royal Commission into Aboriginal Deaths in Custody (RCIADIC) found the primary cause thereof, was Indigenous Australians' disproportionate incarceration.[63] One might think the situation would have improved over the past three decades, yet the problem keeps exacerbating. Unsurprisingly, Australian Indigenous hyperincarceration is a constant topic of political debate, legal argument, and academic research, Australia-wide. This section sets out some of the more well-developed academic debates and illustrates their current status.

Much like the thesis itself, this introductory section focuses heavily on the criminological literature, containing the primary debate in which the researcher partakes. Nevertheless, research into Indigenous incarceration is in no way limited to criminology, and several other disciplines produce

[62] (e) occurs in situations where the accused is already lawfully imprisoned for other offences or is still facing other charges for which they are remanded.

[63] *Royal Commission into Aboriginal Deaths in Custody* (Final Report, 15 April 1991).

relevant academic research one could use to situate similar inquiries. However, this thesis most frequently refers to the criminological literature for two reasons: (1) the Australian criminological literature states the public debate more clearly than other disciplines; (2) the NSW Department of Communities and Justice employs several leading Australian criminologists, so the criminological literature frequently intersects with political discourse. In discussing the academic literature, it is worth stating that Australian criminology, like the parallel Australian political discourse, largely falls into two competing camps. One of those camps is the more traditionalist school of criminological thought, which relies on methods and theories many laypeople commonly associate with criminology. On the other side of the academic debate, are the critical criminologists. Critical criminology, as a theoretical orientation, is geared towards critiquing traditional criminology. In so doing, Australian critical criminology overtly problematises the criminal justice system rather than purely focusing on crime or 'criminals.' Mirroring the wider Australian public discourse, these two schools of academic thought are almost as political as they are intellectual, so the camps rarely agree on much of anything. Unusually for academic debates, the Australian criminological literature on issues relating to Indigenous incarceration frequently gets personal, and heated political issues bleed into academic publications.

The New South Wales Bureau of Crime Statistics and Research, BOCSAR, anchors the traditionalist side of the academic debate. BOCSAR is a division of the NSW Department of Communities and Justice previously headed by Don Weatherburn,[64] and is now led by Jackie Fitzgerald.[65] Alternatively, the critical criminologists in Australia are largely housed within the academy, with the academic figures most frequently cited in this thesis being Thalia Anthony,[66] Harry Blagg,[67] and Chris Cunneen.[68] In 2006, Cunneen dubbed the traditionalist camp's viewpoint the 'Weatherburn Thesis,'[69] although Weatherburn never refers to his own work in such terms. Nomenclature aside, the ensuing Weatherburn-Cunneen debate[70] forms the epicentre of modern

[64] D Weatherburn and J Fitzgerald, 'Reducing aboriginal over-representation in prison: A rejoinder to Chris Cunneen' (2006) 18(2) *Current Issues in Criminal Justice* 366.

[65] It is worth noting that Fitzgerald's (the current head of BOCSAR) work more quickly developed additional nuance than that of Weatherburn. *See,* J Fitzgerald, *Why are Indigenous Imprisonment Rates Rising?* (Report for NSW Bureau of Crime Statistics and Research. Report no. 41, August 2009).

[66] T Anthony and C Cunneen, 'Introduction' in *The Critical Criminology Companion* C Cunneen and T Anthony (ed.s) (Hawkins Press, 2008).

[67] Blagg (2016).

[68] C Cunneen, 'Racism, Discrimination and the Over-Representation of Indigenous People in the Criminal Justice System: Some Conceptual and Explanatory Issues' (2006) 17(3) *Current Issues in Criminal* Justice 329.

[69] Ibid.

[70] Weatherburn and Fitzgerald (2006).

Australian criminological discourse on Indigenous hyperincarceration and has shaped the state of academic and political arguments for nearly two decades.

The traditionalist viewpoint is most clearly stated in Weatherburn's 2014 book, *Arresting Incarceration: Pathways Out of Indigenous Imprisonment*[71] which remains one of the most thorough texts on Australian Indigenous hyperincarceration to date.[72] *Arresting Incarceration* is indisputably well-researched and in depth; it contains many arguments of substantial merit. That said, Weatherburn's book has always been highly controversial due to the author's stance regarding potential 'solutions.' Specifically, the proffered solutions overwhelmingly target mechanisms to reduce Indigenous offending rates, and largely gloss over institutional racism despite Australia's formalistically racist constitution.[73] Still, Weatherburn presents numerous valid points on a wide range of topics, notwithstanding his rejection of the possibility that systemic racial bias or institutional discrimination meaningfully impact Indigenous incarceration rates.[74] There is, indeed, a scientifically provable, elevated offending rate among Indigenous Australians. Few academics in the field would argue against the existence of an elevated offending rate, and elevated offending rates are not, themselves, a matter of contention. Instead, critiques of the Weatherburn Thesis focus on issues of scale and proportion; Indigenous offending rates are not demonstrably 15 times higher than their non-Indigenous peers. Causality, not phenomenology, therefore remains the central issue in dispute in an ongoing debate spanning across the public discourse[75] and criminological literature. Distilling issues yet further, traditionalist criminologists assert that elevated offending rates are the root cause of Indigenous over-representation in custody, whereas critical criminologists assert that something must *also* be wrong with the system.

Across the academic and political discourse, there are limited degrees of infrequent agreement between the two camps. For example, Fitzgerald found that offending rates were not the only causal factor driving rising Indigenous incarceration in 2009,[76] although it would take eight more years before

[71] D Weatherburn, *Arresting Incarceration: Pathways out of Indigenous Imprisonment* (Aboriginal Studies Press, 2014).
[72] ALRC (2017).
[73] *See*, Aust. Const. s 51(xxvii). *See also*, J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson 1901). *See additionally,* G Williams, 'Race and the Australian Constitution: From Federation to Reconciliation' (2000) 38(4) *Osgoode Hall Law Journal* 643; J Williams and J Bradsen, 'The Perils of Inclusion: The Constitution and the Race Power' (1997) 19(1) *Adelaide Law Review* 95.
[74] Cunneen (2006).
[75] M Koziol, 'We have atoning to do but not for Indigenous incarceration: Abbott' *Sydney Morning Herald* (14 June 2020).
[76] Fitzgerald (2009).

Weatherburn and Holmes[77] conceded that in specific instances, changes to enforcement patterns, not Indigenous behaviour, likely increased Indigenous incarceration (for specific offence categories). Likewise, the critical criminologists generally concede the existence of elevated Indigenous offending rates. Nevertheless, the weight each camp gives these twin factors of: (a) enforcement patterns, versus, (b) offending rates, separates the traditionalists from the critical criminologists. That core disagreement is both fundamental and foundational to each camp in the criminological debate, so the academic literature is unlikely to reach scientific consensus in the foreseeable future. As will become clearer in the following section, this author leans towards the critical criminology side of the debate, because the statistical data showing elevated Indigenous Australian offending rates fails to scientifically explain Blak Australia's extreme hyperincarceration. Resultantly, this project is premised on an Aristotelian, syllogistic logical postulate that something beyond elevated offending patterns is occurring in New South Wales. This thesis, therefore, explores several particularities and peculiarities of the NSW criminal legal system, searching for additional causal factors.

It is worth closing this section with two brief notes on the literature as it relates to the holistic research project: (1) The somewhat atypical structure of this thesis requires conducting an introductory literature review at a bird's-eye level. Later chapters repeatedly return to the literature in a more targeted manner. (2) Notwithstanding that individual researchers, including this author, usually lean traditionalist or critical, the ideas and solutions proffered by both schools of thought are included in the ALRC report, *Pathways to Justice*.[78] That Australian Law Reform Commission report is the single most in-depth investigation into Indigenous incarceration since the Australian Royal Commission into Aboriginal Deaths in Custody, and was both researched and produced in the early years of this project. This researcher was peripherally involved in the ALRC's process, is listed by name in the final report's consultations,[79] and one of this project's earliest outputs was cited by Thalia Anthony in a formal submission to the Inquiry. Additionally, this researcher tutored one of the ALRC report's Indigenous authors, and shared office space with (then FCC now FCCFCA) Judge Myers during fieldwork. Thus, the creation and publication of the *Pathways* report played as much of a role in shaping the thesis as any academic literature.

[77] D Weatherburn and J Holmes, *Indigenous Imprisonment in NSW: A closer look at the trend* (Report for NSW Bureau of Crime Statistics and Research. Report no. 126, June 2017).
[78] ALRC (2017).
[79] Ibid 514.

Theoretical Orientation, Framing, and the Author's Positionality

Theoretical Framing

Much like the previous section, this section also deals with existing theoretical constructs. However, this section uses those theories and constructs to establish and explain the researcher's theoretical orientation, which, in turn, sets out the specific theoretical framing of the thesis. Importantly, this thesis attempts to preference theories and works by people of colour wherever doing so is feasible. One of the fundamental problems with research produced by outsiders working with historically oppressed minority populations is an overreliance on white, imperial, and settler colonial theorists. Resultingly, this thesis seeks to address such injustice by intentionally engaging with theorists of colour who either: (a) fought against oppression, or (b) experienced oppression first-hand.

This work does not fit neatly into a particular disciplinary or theoretical box. Instead, the research uses methods and theories drawn from several convergent areas, all of which focus on the problem at issue: racial disproportionalities in criminal law and process. It is neither an exercise in social science nor in law, whilst simultaneously being both. The most apt description of such research is anti-discrimination praxis. Throughout the thesis, methods from the social sciences provide empirical evidence as if an expert witness were introducing such evidence in court. Due to the hybrid nature of the research, evidence cannot be analysed the same way as evidence is assessed in a purely scientific work. Instead, the thesis deploys social science to answer legal questions, using legal reasoning, and tests evidence using legal burdens of proof. Likewise, in every chapter, this thesis always returns to the law. This project is rooted in sociolegal anti-discrimination principles; it seeks to answer sociolegal questions with the overt objective of ensuring that every resident of NSW, regardless of their race or Indigenous status, receives functionally equal treatment before a criminal court. Such is the nature of praxis.

Moving to a specific theorist, this author is theoretically inspired by a scholar and theorist of colour from the southern United States, WEB DuBois. He is rarely mentioned in Australia and DuBois' importance to modern social science, particularly on issues of race, is largely overlooked. Even in his homeland, DuBois, and the Atlanta School of sociology he founded are often understated; the literature all too often preferences his white contemporaries, like George Herbert Mead at the Chicago

School. Contrary to mainstream teaching, WEB DuBois' 1899 work, 'The Negro Criminal,'[80] is probably the first fully formed example of scientific, ethnographic, deviant sociology. Likewise, the methods pioneered by DuBois in *The Philadelphia Negro* paved the way for modern scientific, ethnographic, criminological research. *The Scholar Denied*, by Aldon Morris,[81] details DuBois' contributions at great length. Morris chronicles how the numerous achievements of the Atlanta School of sociology all too often predate similar work at Mead's Chicago School, without receiving credit. According to Morris, DuBois, not Mead, pioneered the methods and scientific thinking underpinning modern academic investigations into criminal justice systems – including this thesis. As such, it pays to mention DuBois in the introduction.

Secondly, this thesis, without overtly stating so elsewhere, is steeped in critical race theory. In developing this work, a few white Australians (usually males but not exclusively so) remarked that it would be unfair to assume institutional racism exists in Australia, and that one would logically err by doing so, because institutional racism is an American phenomenon.[82] After taking such comments on board and pondering them throughout fieldwork, the researcher eventually rejected such claims in their entirety. Structural racism in 1980s and 1990s Texas, was, of course, qualitatively different to what this project observed in 2010s NSW. Notwithstanding such qualitative distinctions, they do not preclude institutional racism in Australia, nor can existing data support a conclusion that Australian institutions are somehow *less* racist than Texan or American institutions. On the contrary, the Westphalian state[83] of Australia retains more formalistic, legally enshrined racism than several of its settler colonial peers (including Texas and/or the American South). In both 1997[84] and 2007[85] the Commonwealth Parliament suspended the RDA to pass overtly discriminatory legislation using s 51(xxvi) of the Commonwealth Constitution. Section 51(xxvi) is more commonly called the 'race power,' and may only be deployed discriminatorily, as a matter of Australian constitutional law. [86] Similarly, the scientifically established, elevated offending rate among self-identified Indigenous

[80] WEB DuBois, 'The Negro Criminal' in *The Philadelphia Negro* (University of Philadelphia Press, 1899).
[81] A Morris, *The Scholar Denied: WEB DuBois and the Birth of Modern Sociology* (University of California Press, 2017).
[82] Please note this position's similarity to the Weatherburn Thesis.
[83] As will be discussed in the following subsection, Westphalian states are the organisational entities of modern international law and international community of nations.
[84] *Hindmarsh Island Bridge Act 1997* (Cth).
[85] *Northern Territory National Emergency Response Act 2007* (Cth).
[86] Aust. Const. s 51(xxvi) was originally written purely to enable negative discrimination, but current HCA jurisprudence also allows positive discrimination. However, s 51(xxvi) cannot be used to forbid discrimination generally, and despite Murphy J's dissent, there is no legal prohibition against the Commonwealth using s 51(xxvi) to negatively discriminate. *See, Koowarta v Bjelke-Peterson* [1982] HCA 27 (Stephen J at 642).

Australians is *not* 15:1 and rising. Such questions of formalistic racism and extreme racial disproportionalities are both amenable to critical race analysis, even though NSW's legislature meets 15,650 km[87] from that of the former Confederated States.[88]

Next, this thesis draws its photographic methods in The King's Courts from legal anthropology,[89] and the framework of analysis used in An Infrastructural Institution takes ideas from critical criminology, sociology, economics, and population health studies. The wider ethnographic and statistical methods, on the other hand, are adapted from three convergent fields of research, all of which fall under the broad label of sociolegal studies. The applied statistical tests found in several following chapters are adapted from experimental jurisprudence and organisational psychology, which frequently interface with law. The observational methods, also found throughout the text, again draw on experimental jurisprudence, but were initially inspired by some of the earliest publications in 'pure sociology.'[90] All of these theoretical-disciplinary perspectives helped shape the work, and as such, publications therefrom are cited throughout the thesis.

Despite having already mentioned Australian critical criminology, it bears mentioning its theoretical influence on this text. Critical criminology exists as a wider concept across the globe. However, in Australia, the sub-discipline has developed a unique theoretical and analytical perspective specifically tailored to address the extreme over-representation of Indigenous Australians in government custody. Readers will notice that critical criminologists are among the most frequently cited authors throughout the thesis, and the arguments in this thesis heavily intertwine with arguments in criminological circles. So, while noting this thesis is best labelled anti-discrimination praxis, it unavoidably exists within the critical criminology research space and engages with the criminological discourse. Some of the methods in this project, namely the statistics, are different than anything yet produced in Australian critical criminology. That said, there are also methodological overlaps; Australian critical criminology leans heavily into ethnographic methods. This thesis does

[87] Data obtained from Google Maps.
[88] The Confederated States of America never constructed a permanent capitol, but the 'interim' capital was primarily in Richmond Virginia.
[89] Particularly out of conversations with SE Merry.
[90] Including several email exchanges with Donald Black and Maureen Mileski (who no longer goes by that name and currently works in as a Hollywood cinema executive).

likewise, albethey drawn from DuBoisian sociology and Historical Particularism[91] rather than criminological research.

Terminology

As a theoretical position unto itself, this thesis deliberately deploys language in a manner that decolonises discourse. This subsection is therefore necessary to describe and label several recurring terms that may otherwise be confusing or contested. It also contains a brief note regarding non-English texts, and translations thereof.

Blak/Blakfellas

In Australian Indigenous rights and antiracist vernacular English, the term Blak or Blakfella (pl. Blakfellas) refers to Australia's First Nations. Having originally formed as an endonym in northern Australian mainland Aboriginal English, it is now used as a political term of empowerment when referencing Aboriginal and Torres Strait Islander peoples.

Race

The concept of 'race' varies definitionally across the world, as does how one determines an individual's membership in a racial minority group. In Australia, race includes Indigeneity. Indigenous status is primarily determined by individual self-identification;[92] any descendant of the precolonial Aboriginal and Torres Strait Islander peoples, who chooses to embrace their heritage, and is accepted as such by others who choose to do the same, is considered Indigenous, regardless of physical appearance.

State

This thesis uses the term 'state' in multiple contexts, often labelling which definition the word has in a specific instance. Like many terms, the word 'state' has many meanings. Throughout this text, the term state is used in three primary contexts, each of which draws upon a different theoretical perspective. When this thesis deploys the words 'the state of New South Wales,' 'federal states' or 'constituent states,' the term refers to the subsidiary political polities jointly forming the national polity

[91] The US 'four fields' school of anthropological thought founded by Franz Boas that rejected unilineal evolutionism.

[92] There are a few exceptions to the general rule favouring self-identification. For one such exception relevant to the criminal law, *see,* K Slack and A Hartnett, 'Case note: Reflections on the High Court decision in Love v Commonwealth of Australia [2020] HCA 3: The Constitution, Indigenous rights and immigration law' (2020) 159 *Precedent* 47.

of the Commonwealth of Australia. [93] This is the most common use of the term 'state' in colloquial Australian English, but there are others.[94]

The other two uses of the term 'state' found in this thesis are 'Westphalian state' and 'Weberian state.' Having already been used within this section, the term Westphalian state comes from the Westphalian state system, the current organisational structure of modern international law. Taking its name from the Treaty of Westphalia, a Westphalian state is an internationally recognised political polity (an independent nation-state) capable of ratifying treaties and otherwise engaging in the international community of nations.

Similarly, when this thesis discusses the 'Weberian state' it labels the Australian non-Indigenous polity as the political entity possessing what Weber describes as '*das Gewaltmonopol des Staates,'* (or, in English) a state's exclusive monopoly over the 'legitimate' use of violent force in a particular location.[95] In a settler colony like Australia, this term references the inability of First Nations to exercise exclusive control over their own territory, and the non-Indigenous government's ability to impose an inherently foreign system upon those First Nations.

Translations

Unless stated otherwise, when this author cites a non-English source in the original, they are dealing with an untranslated text using a personal, working knowledge of the original language.

My Positionality

After laying out the general social scientific and legal theories in use, it now becomes appropriate to discuss my own positionality in this research using the ethnographically customary first person.[96] This is included as a subsection, instead of as a section, because of the inextricable relationship between theory and the researcher's lived experience in any ethnographic endeavour. Like every social scientific inquiry, who I am, where I come from, and my own life story plays a major

[93] While this thesis investigates an Australian state's criminal law and process, the Commonwealth of Australia is comprised of both states and territories. In said territories, the Commonwealth Parliament retains plenary legislative powers. *See* Aust. Const. s 122.

[94] For a commonly used, alternative colloquial definition of the term 'state' in Australia, *see, Eligibility Rules 2012* (Australian Rugby League Commission) relating to 'who' is from 'where' for the 'State of Origin.'

[95] M Weber, *Politik als Beruf* [High German] 'Politics as a Vocation' (1919).

[96] There are three occasions where this thesis shifts to first person narrative format, all of which are done in accordance with ethnographic convention. The other two occasions are in Ch. VII and *Appendix vii*.

role in how research unfolds. Because I am the singular researcher in this project, my sense of self is unavoidably imparted on the work, no matter how strongly I may attempt to avoid doing so.

With regards to my self-identity, I am an 'unregistered' Cherokee/Aniyvwiya 'descendant' (to use the US federal government's terminology), and I can trace my lineage to the Guion-Miller Roll[97] through my mother's father. My mother's mother also descended from The Five Tribes,[98] but due to the circumstances of her youth,[99] she rarely spoke of her ancestry. Usually, my grandmother referenced her Indigeneity in veiled, white-passing language like, 'well yes, we're Native, but back then not everybody told.' Additionally, I am an open, out member of the queer community, and I am confusingly also an ethnic, religiously observant member of Kol Israel, the Jewish peoplehood. More importantly, I am proudly the third consecutive generation of legally trained, human rights advocates on the Wolfram side of my family. My mother's father, Walter Wolfram, tried Texas school desegregation cases in the 1960s for the National Association for the Advancement of Colored People's Legal Defence Fund[100] and the organisation that would eventually become the League of United Latin American Citizens.[101] My mother, Carol Lynn Wolfram, trains lawyers in Rwanda on a yearly basis and maintains a side stream in her law practice doing guardianship work for the mentally ill and intellectually disabled. I cut my own legal teeth with The Innocence Project of Texas and have advocated for minority rights across The United States, Latin America, Scandinavia, East Africa, and Australia. Nevertheless, I have spent the bulk of my life employed by various incarnations of the family firm. Like many children of small business owners, my first 'job' began at the age of seven, when my mother tasked me with folding documents for court proceedings over school holidays because my labour was less expensive than a mechanised folding machine. At seven, my mother paid me with all the soda-pop I could drink, and while times have changed after 30 years (I am now paid in US dollars), I still consult for the various family firms.

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[97] United States National Archives ID: 300329 (33931-1911-053 Cherokee Nation).

[98] The Five Tribes is the modern term used for the Cherokee (including Delaware), Choctaw, Chickasaw, Seminole, and (Muskogee) Creek Nations, all of whom were exiled to what is now the US constituent state of Oklahoma by the *Indian Relocation Act of 1830* (US). That branch of my family illegally went 'off the reservation' and escaped into Texas after the Texas-Cherokee War of 1839.

[99] *See Generally*, T Perdue, 'The Legacy of Indian Removal' (2017) Feb *J Southern History* 13.

[100] The NAACP-LDF is the legal advocacy arm of the NAACP that funded Justice Thurgood Marshal during *Brown v Board of Education of Topeka*, 347 U.S. 483 (1954).

[101] The League of United Latin American Citizens is a US-based, Latiné rights organisation similar in purpose and scope to the NAACP.

Similar to many Indigenous people born in the aftermath of colonisation, it was through my family's living memory, not my education, that I learned to care about 'the other.' And, more significantly, it was through my family that I learned to care about my 'own.' My grandfather and mother taught me to fight for the rights of my Native kin and other Indigenous peoples who have been similarly colonised. Importantly, my mother went to a segregated school, but I did not, because lawyers like my grandfather and his contemporaries ended American apartheid using the power of the law. The law is a powerful social force, and my mother and grandfather taught me how to harness that legal power when striving for greater equality. This thesis follows in their footsteps, and I would err were I not to openly disclose such.

A Roadmap for this Thesis

This final section of this introduction is a roadmap for the holistic work. It first lays out the overall structure of the remaining chapters and then summarises those upcoming chapters to provide readers with an idea of what to expect throughout the thesis. With regards to the overall structure of the text, the following chapters evolve somewhat naturally and flow with the concepts and constructs each chapter raises in turn.

The immediately following chapter lays out the concept of racial discrimination itself, and the one after that puts forward the methodology used throughout the remainder of the thesis. Using that methodology, the next two chapters demonstrate particular aspects of the NSW criminal process racially discriminate, which leads into a chapter discussing recent changes in NSW criminal legislation likely to adversely impact Indigenous male accused persons in the future. After assessing the law, itself, the thesis takes a step outward in order to tell the overarching story that the social construct of 'race' has within NSW criminal trials. Flowing naturally onward, the thesis takes yet another step outwards to assess courthouse designs and judicial infrastructure as they relate the wider story of race within the NSW District Court as a social institution. This, in turn leads into the conclusion, where the thesis finally makes its ultimate claims about racial discrimination in NSW criminal litigation. A summary of each remaining chapter, and the final appendix, follows under the relevant subheading.

The Laws of the Lands

This chapter is largely one of doctrinal legal research and (unusually for this thesis) contains no methods section of its own. The placement of this chapter is fit for its purpose: to define and typologize racial discrimination as a legal concept in a manner suited for diagnostic purposes. It addresses both positive and negative discrimination, breaks both into subtypes, and then discusses

the various legal frameworks of each subtype, thereby enabling their diagnosis. This typology is used throughout the entire the thesis, so readers are likely to benefit from referring to the graphical flowchart of racial discrimination in the law when reading later chapters.

Testing for Inequity

The second substantive chapter is the primary methodological framework for the thesis and sets out of the methods used therein. This project uses a hybrid of methods including: (a) courtroom observation, (b) interviews, (c) doctrinal legal research, and (d) anti-discrimination statistical analysis. Each method is addressed, in turn, as is the manner in which they are interwoven to create a unique methodology. Likewise, the chapter demonstrates how this unique methodology enables a targeted assessment of a massive process that would otherwise prove unconducive to holistic evaluation. As a function of the way this thesis interweaves methods, the 'Testing for Inequity' chapter necessarily addresses methods in the abstract; therefore, applied methods sections containing more specificity are found in several other chapters. Similarly, the methodological chapter explains the interrelationship between the unique photographic methods in the Kings Courts and the wider methodology, but the explicit photographic methods themselves are found in that appendix.

The Racism of Remand

This chapter applies existing indirect discrimination (disparate impact) tests to NSW pre-trial detention. Specifically, this chapter expands on the statistical tests initially mentioned in the methodology and applies those tests to comparative (Indigenous v non-Indigenous) pre-trial release rates in New South Wales. The legal reasoning behind doing so is establishing that, beyond a certain threshold, extreme discrepancies in pre-trial detention racially discriminate. As the chapter shows in detail, that boundary *has* been crossed in NSW, which creates extreme flow-on effects throughout the criminal legal process.

The Oppression in Discretion

This chapter uses the same statistical analysis as the previous, and couples them to qualitative methods in assessing NSW prosecutorial discretion. In making its direct discrimination argument, the chapter relies on both Australian and UK case law allowing statistical proofs to demonstrate intent. After applying those statistical tests, the chapter engages with a courtroom observational dataset and interview responses to rule out potential confounding factors in the statistical data. Following along from a sociolegal analysis, the chapter finds the NSW Office of the Director of Public Prosecutions directly discriminates against Aboriginal male accused persons in the laying and withdrawing of

criminal charges. Notably, the chapter does not lay blame at the feet of individual prosecutors, and instead, argues the discrimination appears to be institutional in nature.

A Troublesome Tendency

This chapter argues negative outcomes for Indigenous Australian males will continue growing in a disproportionate manner as part of a wider social trend of legally abolishing existing protections for the criminally accused. Among those recently limited or abolished protections are (a) the right to a jury, (b) the presumption of bail, (c) the right to silence, and (d) the prohibition against evidence of bad character. This chapter does not make an argument that these sweeping new changes are racially motivated or that all such changes are discriminatory. Instead, the main thrust of this chapter's argument focuses on a long term, multiyear trend in which increased Indigenous incarceration correlates with another long term, multiyear political-legal trend of restricting an accused's rights through a series of reforms. After establishing that correlation, this chapter closes by arguing that a lack of meaningful, enforceable protections for accused persons generally, will allow Indigenous hyperincarceration to continue spiralling further out of control.

Racial Realities

This chapter provides context and subtlety not found earlier in the thesis. Being entirely ethnographic in nature, it again touches on methods initially found in the methodology as they apply to the specific issues at hand. Likewise, it mentions that while sample size used in this thesis is far too small to generate a statistically significant sample, the sample size is plainly sufficient to substantiate ethnographic findings. Then, by using this ethnographic sample of cases, the chapter provides compelling evidence that race can be an influential or even decisive factor in NSW District Court proceedings. Additionally, the chapter finds that while race is plainly a factor in NSW criminal litigation, courts appear to ameliorate and/or mitigate the worst miscarriages of justice for Indigenous males. Further findings include that the accused's counsel more frequently raised issue of race than the Office of the Director of Public Prosecutions, and in multiple matters, racial and cultural defences proved successful. After discussing the research and findings, the chapter closes with a call for larger scale research in order to determine whether or not the findings in this chapter might apply more generally.

An Infrastructural Institution

This chapter serves to demonstrate the limits of current, ICERD/RDA-based anti-discrimination legislation in Australia and highlights infrastructural and economic decisions negatively impacting Indigenous males accused of indictable offences. While having grown out of a photographic gallery

show appended to this thesis, the chapter, itself, primarily a social scientific inquiry coupled to a brief overview of macro-level forces shaping the state's imperial legal structures from a First Nation's rights perspective. By focusing on economics, infrastructure, distance, and ongoing traumatic stressors, this chapter shows how colonial courthouse designs and disparate judicial infrastructure adversely impact Indigenous Australian males accused of indictable offences in ways largely beyond the scope of anti-discrimination legislation. While interrogating these issues using a mixed methods analysis, the chapter repeatedly states such governmental choices do not call within existing legal understandings of racial discrimination and can only be corrected by the democratic branches of government.

Applying Science to Law

The concluding chapter of this text, as is to be expected, ties the entire thesis together. In doing so, this chapter makes the case for the overall research findings of the thesis. The chapter argues that certain aspects of NSW criminal law and procedure negatively impact Indigenous Australians and further argues a subset of those discriminatory aspects are racially discriminatory in a general sociolegal sense. Additionally, the conclusion argues Indigenous over-representation in custody will continue trending upwards unless the Australian people demand a wider socio-political change away from tough on crime policies like those in NSW. Finally, after calling for legislative reform and further research, the conclusion brings the thesis full circle. Fittingly, this thesis will eventually close almost exactly where it begins: with words of the Elders contained in the Uluru Statement from the Heart.

The King's Courts

Despite being presented after the conclusion, this final appendix remains part of the thesis as a whole. In part, this is done for the sake of readability since An Infrastructural Institution draws upon The King's Courts for data, yet this gallery show also forms part of an overarching story this work seeks to tell. Furthermore, it is in The King's Courts the author establishes their claim to ethnographic authority and demonstrates having travelled to every single NSW courthouse with District Court criminal sitting dates. So, while this gallery show relies on separate photographic methods, and is, in some ways, a separate artistic endeavour, it remains an integral part of the thesis as a holistic work. Its structure is intrinsically different than any chapter, in that its first-person narrative style enables readers to become viewers, and presents them with an open invitation to join the artist-ethnographer on their journeys to each and every courthouse where this research took place. Nevertheless, the captions to those photographs repeatedly harken back to ideas of racial equality before the organs of justice as if it were a chapter unto itself.

En Somme

At this point, at the end of the introduction, readers now understand: (a) the problems at issue, (b) the academic debate in which this thesis sits, (c) the theories in use, and (d) where the thesis is going. This introduction has now laid the foundation stones for readers of this work. It began with a startling assertion that Indigenous Australians still live in a penal colony, before laying out the structure for the rest of this introduction and posing the primary research questions. This introductory chapter moved on by briefly mentioning some of the contributions of this work, providing a summary structure of the NSW criminal trial process and outlining, at a bird's-eye level, the criminological arguments regarding Indigenous incarceration in Australia. Following from the existing literature was a discussion of the theories and theorists underpinning this work coupled to a statement of the author's positionality in the research. After that framework was completed, this introduction closed by providing a roadmap for the remainder of the thesis. Having now brought the introduction itself to a close, the following chapter lays out a framework of sociolegal analysis used in determining what is and what is not racial discrimination throughout the remainder of this holistic work.

II.

The Laws of the Lands

A functional, diagnostic typology of racial discrimination in the law

Purpose and Scope

The prior chapter in this thesis set the stage and described the path the thesis takes. Later chapters will address various forms of racial discrimination and the methods to test therefor. This chapter, on the other hand, differs significantly in that it is not in and of itself testing for racial discrimination but instead lays out an applied, functional, diagnostic typology underpinning the other chapters of this thesis primarily using international instruments and landmark judicial decisions. The research method employed in this specific chapter is termed 'The Rombauer Method of Legal Research,' which is a commonly used method of doctrinal legal research discussed in depth by the next chapter. Nevertheless, this chapter must come first, since it lays out a diagnostic, typological classification system used throughout the holistic work.

As mentioned in the introduction, the concept of racial discrimination evolved throughout the researching and writing of this thesis. This chapter thereby represents the end result of an iterative process in refining the concept of racial discrimination for use in an applied, sociolegal praxis setting. It grew out of the researcher's need to address the incomplete nature of existing definitions of racial discrimination as well as a lack of clarity among existing typologies and classification systems thereof. Furthermore, the existing academic literature is often contradictory because racial discrimination simultaneously exists as both a concrete legal construct and an indefinite social power dynamic personally experienced by individual human beings.

Initially, the chapter proffers a definition of racial discrimination for use in this research before then applying that definition to create a functional, diagnostic typology for assessing Westphalian state actions. The sources it draws upon are varied in nature. Some come from the existing social scientific literature, whereas others are drawn from international instruments and a comparative sampling of domestic anti-discrimination law across a number of jurisdictions. Doing so is necessary to achieve the end goal of both this chapter and the chapter immediately following: creating a definition and methodology to assess Westphalian state actions for racial discrimination against minority peoples.

Defining Racial Discrimination

Defining racial discrimination is no simple task. Definitions vary by jurisdiction, and at times those definitions conflict. Furthermore, there is additional complexity defining racial discrimination because certain colloquial and social scientific uses of the term can be fundamentally at odds with the legal definitions thereof. Likewise, even some legal definitions become mutually exclusive, depending on their context. This section, therefore, discusses existing definitions and typologies of racial discrimination as a legal and social scientific concept, before proffering the sociolegal definition of racial discrimination used by this project.

According to *Black's Law Dictionary* (9th edition), discrimination is defined as:

> *[d]ifferential treatment; especially, a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored.*[1]

Black's definition of discrimination is widely accepted. However, discrimination is a more nuanced concept with far more types and forms than the simplistic definition *Black's Law Dictionary* (9th Edition) accounts for. An alternate, and significantly broader, definition is found in international human rights law. Take, for example, the definition offered by the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD):

> *1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.* [2]

While the ICERD definition is both useful and functional, it also shares some of the failings of the Black's Law Dictionary definition. Both the ICERD and *Black's Law Dictionary* (9th edition) operate on the assumption that all forms of discrimination are necessarily harmful and unlawful. This assumption is widely shared. For example, according to *The Laws of Australia*, there are three primary

[1] West, *Black's Law Dictionary* (9th ed., West, 2009).
[2] ICERD art. 1.1.

forms of discrimination key to legal analysis: (1) direct, (2) indirect, and (3) systemic.[3] However, other sources do not make this same assumption, as noted by Justice Katzman in a 2012 Federal Court of Australia judgement:

> *Discrimination may be positive or negative . . . . . [P]ositive discrimination connotes conferring a favour, advantage or benefit, negative discrimination carries with it the imposition of a detriment or disadvantage.*[4]

Thus, in the law, sometimes drawing a legal distinction on the basis of race (i.e., legally discriminating) is done to benefit minorities or otherwise disadvantaged people groups. As Justice Katzman states, this beneficial form of discrimination is termed 'positive discrimination' whereas the definitions used by the ICERD and Black's Law Dictionary are termed 'negative discrimination.' Typologically, drawing a distinction between positive and negative discrimination makes sense, but, as the previous definitions of racial discrimination show, there is a fair bit of confusion around the matter definitionally.

The Australian Human Rights Commission (AHRC) addresses the confusing nature of positive discrimination by showing that positive discrimination goes by many names:

> *The term 'positive discrimination' is sometimes used to refer to 'positive measures' or 'special measures'. Special measures aim to foster greater equality by supporting groups of people who face, or have faced, entrenched discrimination so they can have similar access to opportunities as others in the community.*

The AHRC demonstrates that while some of the legal instruments restrict their definitions of racial discrimination to negative discrimination, many of those instruments still engage with positive discrimination as a concept. *The International Convention on the Elimination of All Forms of Racial Discrimination* is one such instrument. In the ICERD, positive discrimination is directly addressed in Art 2.2:

> *2.2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for*

[3] Thomson Reuters, *The Laws of Australia* (at 15 April 2018) 2 Equality and Rule of Law, '21.10. Equality and the Rule of Law' [21.10.230].

[4] *Australian Building and Construction Commissioner v McConnell Dowell Constructors (Aust) Pty Ltd*. [2012] FCA 203 FCR 345, 369 *citing*, *Street v Queensland Bar Association* [1989] HCA 168 CLR 461 (Brennan J at 506).

different racial groups after the objectives for which they were taken have been achieved.[5]

So, while some legal definitions of discrimination may not address positive discrimination semantically, positive discrimination usually still exists in some practical sense within such frameworks. Therefore, for a typology to work as a functional diagnostic tool, it must address both the positive *and* negative discrimination in the law regardless of whether positive discrimination is referred to in the express wording.

Next, before proffering the definition used by this project, it is worth briefly branching beyond international legal sources into the social sciences where alternate definitions of racial discrimination exist. This is especially true for disciplines interfacing directly with historically and/or presently discriminatory legal institutions, like criminology. The critical criminologist Chris Cunneen writes:

Defining crime, criminals and crime problems are susceptible to these issues of construction and representation, and the consequences can be particularly problematic in maters where crime is aligned with notions of 'race.'[6]

According to Cunneen, '[it] would seem reasonable that criminologists research [racial discrimination] given that their trade is the study of unlawful behaviour.'[7] Cunneen does not offer a definition of racial discrimination in this work, but he does offer a useful typology thereof that separates racial discrimination into: (a) systemic bias, (b) institutional racism, (c) direct racial discrimination and (d) indirect racial discrimination. That said, Cunneen's typology leaves out some important concepts relevant to racial discrimination as a legal construction: namely positive discrimination and facial[8] (per se, textually explicit) discrimination. Resultantly, this research requires a definition capable of building a functional, diagnostic typology for this hybrid exercise in both legal and scientific research.

This ultimate objective of this research project is diagnosing the presence of a Westphalian state's racial discrimination in its domestic criminal justice system. That discrimination can be positive

[5] ICERD art. 2.2

[6] C Cunneen, 'Racism, Discrimination and the Over-Representation of Indigenous People in the Criminal Justice System: Some Conceptual and Explanatory Issues' (2006) 17(3) *Current Issues in Criminal Justice* 329.

[7] Ibid.

[8] The modern usage and development of the term 'facial discrimination' in the United States is addressed by the majority in *Community Services, Inc. v Wind Gap Mun. Authority*, 421 F.3d 170 (2005). For a discussion of a related term, 'facially neutral,' within the context of a comparative assessment of Canadian and EU anti-discrimination law, *see* EPRS *The Principles of Equality and non-Discrimination, A Comparative Law Perspective: Canada*. (Report for the European Parliamentary Research Service Comparative Law Library Unit. Report no. PE 6959.362, November 2020).

or negative, and as this chapter illustrates, both larger forms present themselves in various subsidiary forms. These forms can be indirect or direct, as written or as applied. Trying to place all these items into a single definition is challenging, and as previously mentioned, many existing definitions lack the diagnostic capability this research project requires. So, while any proposed definition is arguably imperfect, it is still necessary to attempt defining racial discrimination as a term. Doing so is an appropriate first step in building a typology to investigate any complex legal and social scientific phenomenon. That proposed definition follows:

> *Racial discrimination is any Westphalian state or other institutional actions drawing any form of distinction on the basis of race. Such distinctions can be intentional or unintentional, and can appear either in the wording of a binding text or occur the application thereof.*

This remainder of this chapter now uses this definition in building a functional, *diagnostic* typology of racial discrimination in the law that elaborates on the underlying concept of 'drawing any form of distinction on the basis of race.'

Discrimination Outside the Scope of this Typology

As with any typological endeavour, this typology necessarily includes certain forms and uses of the term 'racial discrimination.' Likewise, this typology also necessarily excludes other forms and uses of the same term. This section addresses that which is excluded and provides reasons for doing so. As a threshold issue, in determining the criterion for inclusion, one must take into account the fundamental purpose and scope of such a typology. This typology is targeted at determining what is permissible and what is impermissible for a Westphalian state to do on the basis of race in relation to state actions. Furthermore, the ultimate objective thereof is determining whether or not a particular state action falls within the limits of permissible behaviour under current international legal norms.

Firstly, the typology is limited to the actions of Westphalian States. It cannot, by its nature, account for the actions of individuals or entities that exist within a state but are not part of the state. As such, this typology does not, in and of itself, address the particular criminal statutes that state parties to the *International Convention on the Elimination of All Forms of Racial Discrimination* are required to pass that regulate non-state actors. This, of course, includes the ICERD mandate that state parties criminalise racial vilification. The text of the ICERD on this matter follows:

> . . . .
>
> *(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts*

of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;[9]

As one can see from the text, the ICERD art. 4(a-b) mandate to criminalise racial vilification is an essential aspect of modern racial anti-discrimination law. However, for this typology, it is a sui generis issue under the convention. art. 4(a-b) is targeted at preventing public acts of racial hatred, whereas this typology targets whether a state's actions interfere with the functional equal enjoyment of ICERD art. 5 rights. That said, excluding such legislation from this typology does not downplay the importance of art. 4(a-b) compliance when assessing state actions. A state's compliance with art. 4 helps in determining the character of a state's overall compliance with the ICERD, and ratifying nation-states without an applicable reservation cannot claim they are complying with their treaty obligations in good faith. However, the existence or absence of required art. 4(a-b) criminal statutes prohibiting racial vilification does not assist diagnostically determining whether other state actions beyond the art. 4(a-b) mandate violate anti-discrimination law.

Likewise, acts of racism colloquially or social scientifically referred to as racially discriminatory but are not legally discriminatory fall outside the scope of this typology. Such actions may still racially discriminate, damage, or hurt; they may, or may not, impede an oppressed people's ability to obtain functional equality in the nation-state(s) in which they reside. Recently, this issue played out in a large-scale, public debate across the United States. Specifically, many of the national polity's constituent federal states with long, well documented histories of legally enshrined racial discrimination and apartheid, prohibited teaching critical race theory.[10] American social scientists and activists presented compelling arguments that these state policies, and the federal tolerance thereof, are both institutionally racist and racially discriminatory.[11] However, such social scientific and colloquial

[9] ICERD art. 4(a-b).
[10] L Kaplan and W Owings, 'Countering the Furor Around Critical Race Theory' (2021) 3(105) *National (US) Association of Secondary School Principles*.
[11] American Civil Liberties Union, 'Defending our Right to Learn' (online, 10 March 2022).

definitions are not legal constructions. Resultingly, they fall outside this typology's scope, because the typology exists to functionally diagnose the actions of Westphalian States.

The final form of racial discrimination outside the scope of this diagnostic typology is logically related to the prior exclusions. This typology, due to its nature, cannot address actions taken by a state that are racially/culturally non-inclusive and/or insensitive, notwithstanding their negative impacts.[12] An example thereof is found in a later chapter the thesis, but is worth mentioning here to illustrate its exclusion from this typology. Existing research has shown NSW courthouse architecture reminds Ingenious Australians of their colonisation at moments of heightened emotional vulnerability.[13] Another area of anti-discrimination law, namely disability law, expressly mandates inclusion for a disadvantaged group, which in the case of New South Wales courthouses, requires building accessibility features during new construction, restorations, renovations, and/or retrofits.[14] Nevertheless, the current global norms of racial anti-discrimination law do not specifically address cultural insensitivity, so such state actions are not accounted for in this typology. However, while this typology, itself, does not address non-inclusivity, it does address *correcting* existing non-inclusion by way of positive discrimination. As discussed later in this chapter, positive discrimination exists to remedy social injustice.

Classification

Having now addressed forms of discrimination that are generally inapplicable to this typology (despite being real, and at times, legally actionable), this section pivots towards the typology itself. This section classifies and categorises the various elements of a general set of 'racially discriminatory state actions' into subsets that assist in both: (a) applied research and (b) legal analysis. Later sections will then describe each form of racial discrimination contained within the typology, thereby aiding distinguishment between the various forms thereof.

There are two primary subsets of racial discrimination under current legal norms: (a) negative discrimination and (b) positive discrimination. For the purposes of this typology, negative

[12] P Łuków, 'A Difficult Legacy: Human Dignity as the Founding Value of Human Rights' (2018) 19 *Human Rights Review* 313.
[13] N Spaulding, 'The Enclosure of Justice: Courthouse Architecture, Due Process, and the Dead Metaphor of Trial,' (2012) 4 *Yale Journal of Law & the Humanities* 311; T Anthony and E Grant, 'Courthouse Design Principles to Dignify Spaces for Indigenous Users: Preliminary Observations' (2016) 8(1) *International Journal for Court Administration* 43.
[14] *Disability (Access to Premises – Buildings) Standards 2010* (Cth); *Building Code of Australia 1988* s D3.

discrimination is any state action serving to disadvantage a historically discriminated against people group. Negative discrimination, in all of its forms, is prohibited. Typological distinctions are only drawn for determining the point at which a particular state action becomes impermissible. Positive discrimination, on the other hand, is any state action serving to benefit a historically discriminated-against people group. Positive discrimination substantially differs from negative discrimination. Where negative discrimination is always prohibited, positive discrimination is sometimes permissible (or even mandatory). Therefore, typological distinctions are drawn to determine what a state may or must do in a particular circumstance. Each of these two subsets can be broken down further, and the various subtypes are addressed in turn.

Negative Discrimination

This section addresses the forms of discrimination, aptly called negative discrimination, in which governments and institutions disadvantage particular racial populations. Negative discrimination presents in two main subtypes: (1) facial discrimination, where the law, as written, discriminates, and (2) as applied discrimination, where the law is ostensibly race-neutral but, in practice, disadvantages a particular racial group. As applied discrimination, itself, parses into two sub-subsets: (a) direct discrimination, where the state or institution applies a neutral law to disadvantage a particular racial group, and (b) indirect discrimination, in which specific legislation disproportionately affects a racial group or groups in a detrimental, discriminatory way. Each of these sub-forms is addressed in its own subsection.

Facial Discrimination

The most obvious form of negative racial discrimination is termed 'facially discriminatory legislation.' It occurs when the explicit text of a statute (or, alternatively, a regulation, rule, or policy) overtly disadvantages a particular racial group. Notable forms of facial discrimination occur throughout human history, with one of the longer running (and historically, frequently occurring) acts of facial racial discrimination being the periodic Jewish expulsions from various countries around the world. For an example, consider the overt, express racial discrimination within the text of one such Jewish expulsion. The 1492 Alhambra Decree stated:

[King Ferdinand and Queen Isabella] …order the said Jews and Jewesses of our kingdoms to depart and never to return or come back to them or to any of them.[15]

In the Alhambra Decree, the face of the document bestows an intentional, overt legal disadvantage on the Sefardi[16] Jewish community. The disadvantaged group was legally required to *immediately* leave Spain and never return. Furthermore, any Jews who successfully fled Spain for its colonies still faced legally enshrined, institutional discrimination when the Spanish government implemented a precursor to modern racist legislation. Spanish law barred anyone without pure, 'Christian' (AKA white Spanish) blood from most opportunities in settler society and further required that its colonies deny ethnic Jews legal equality anywhere in the Spanish empire. This legal doctrine, *limpieza de sangre,*[17] even applied to persons descended from Jews who had converted to Catholicism during the inquisition and was still enforced in regional Spain until the later years of Francisco Franco's *caudillismé* dictatorship.[18]

Other, well-known, historical examples of facial racial discrimination include the *Nirnberg Gezetsn*,[19] the Northern Territory Intervention,[20] the Race Power of the Australian Constitution,[21] American Jim Crow,[22] and South African Apartheid.[23] Neither the effects nor size of the discrimination is relevant to the analysis. Likewise, neither effect nor size impacts its prohibited status under the ICERD. Typologically, the only question of relevance is whether the express wording of the written law, rule, regulation, or policy formally disadvantages a racial/ethnic group.

As Applied Discrimination

The previous subsection addressed laws or policies of state actors or institutions that overtly discriminate in their writing. This subsection now addresses discrimination in which the textual wording of a law or policy is facially neutral but creates negative racially discriminatory outcomes 'as

[15] *Decreto de la Alhambra, Edicto de Granada* [early modern Castilian] 'Decree of Alhambra, Edit of Granada' (Spain, 1492).
[16] Sefardi/Sefardic Jews are modern Jewish communities descending from medieval Jewish communities in Iberia and the Maghreb.
[17] [Spanish] 'purity of blood.'
[18] *See generally,* J Perez, *Los judíos en España* [Spanish] 'The Jews of Spain' (Marcial Pons Ediciones de Historia, 2005).
[19] [Yiddish transliteration] (Original script: נירנבערג געזעצן). *See, Nürnberger Gesetze 1935* [High German] 'Nuremburg Race Laws of 1935' (Nazi Germany) mandating formal apartheid for Jews and Romani.
[20] *See,* the *Northern Territory National Emergency Response Act 2007* (Cth) enabling the use of military police in Aboriginal Australian communities in the Northern Territory.
[21] *See,* Aust. Const. s 51(xxvi) empowering the Commonwealth Parliament to pass racially discriminatory legislation.
[22] *See, Plessy v Fergusson*, 163 U.S. 567 (1896) enabling American segregation (apartheid).
[23] *See, Reservation of Separate Amenities Act 1953* (South Africa) enabling South African apartheid.

applied' in practice. The following subsections address the two forms of as applied discrimination, direct discrimination and indirect discrimination, alongside their modern legal origins.

Direct Discrimination

Direct discrimination occurs when a law or policy is written in a textually race-neutral manner but is enforced discriminatorily. This form of discrimination also goes by the name disparate treatment or differential treatment in some jurisprudence outside of Australia. On the other hand, Australian jurisprudence primarily employs the more common term used in the international human rights discourse. The Oppression in Discretion, a later chapter in this thesis, investigates the concept at length.

Direct discrimination as a legal concept originates from (and is still typified by) the Supreme Court of the United States case, *Yick Wo v Hopkins*.[24] While *Yick Wo* itself turned on the American Post-Bellum[25] constitutional reforms, the legal constructions themselves remain a part of the international framework adopted by the ICERD and significantly influenced the Australian Constitution.[26] *Yick Wo*, therefore, merits discussion to facilitate a better conceptual understanding of direct discrimination. In *Yick Wo*, the city of San Francisco, California's local government placed a bar on any and all laundry services operating in wooden buildings, ostensibly as a fire safety measure.[27] However, San Francisco's municipal ban on wooden laundries was not absolute, since the city also created an arbitrary waiver system (that could not be appealed). The end result of the system's design granted its administrators an unchecked, non-reviewable power over which laundries could and could not operate if the owners lacked the funds to build a facility from flame-resistant materials like stone, concrete, adobe or brick. While the city ordinance remained in force, roughly 200 ethnic Chinese laundry owners applied for waivers, but the City of San Francisco California only granted two waivers to Chinese-owned laundries. In contrast, the outright majority of white applicants were granted similar waivers to the ones denied virtually all ethnic Chinese applicants. The situation plainly favoured white applicants at the expense

[24] 118 U.S. 356 (1886).

[25] This is the American academic term for the period in US history immediately following the United States' Civil War.

[26] *See,* J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson 1901). *See also,* G Williams, 'Race and the Australian Constitution: From Federation to Reconciliation' (2000) 38(4) *Osgoode Hall Law Journal* 643; J Williams and J Bradsen, 'The Perils of Inclusion: The Constitution and the Race Power' (1997) 19(1) *Adelaide Law Review* 95.

[27] San Francisco is somewhat famous for its status as a tinderbox among US cities. Even at the time of *Yick Wo*, a large number of fires that had repeatedly decimated the city prior to and after the 1849 Gold Rush. *See,* The Museum of the City of San Francisco, 'Early History of the San Francisco Fire Department' (online, retrieved 11 August 2021).

of ethnic Chinese persons, but during that era, such practices were widespread because they comported with internationally accepted, Anglophone legal norms.[28]

In deciding whether San Francisco violated the United States Constitution's 14th amendment prohibition against racial discrimination, the US Supreme Court opined:

> *No reason whatever except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood.*[29]

The court went on to describe the *real* reason for these denials:

> *[T]this consent of the supervisors is withheld from [the two plaintiffs] and from two hundred others who have also petitioned, all of whom happen to be Chinese subjects, eighty others, not Chinese subjects are permitted to carry on the same business under similar conditions.*[30]

For the first time in modern Western history,[31] a Court held that extreme disparities in an arbitrary administrative legal process demonstrate a deliberate intent to discriminate, notwithstanding facially neutral language in the enabling legislation. Furthermore, the American Supreme Court's opinion in *Yick Wo* remains the fundamental premise for modern direct discrimination law today. Typologically, the dispositive question is one of racially discriminatory practices. If the alleged discriminator demonstrably treats one group less favourably than the racial majority, the action becomes unlawful, even if said action is enabled by facially neutral legislation.

On the subject of intent, it bears mentioning that intent is a universally required element in all direct discrimination claims. The proof thereof, however, is necessarily an evidential question. It is sometimes possible to obtain a 'smoking gun' type document that conclusively establishes a Westphalian state's overt, direct intent to discriminate on the basis of race. However, doing so is exceedingly rare. Few modern states or entities are foolish enough to keep records of deliberately discriminatory actions, and obtaining such evidence in discovery is often impossible. In active litigation, intent is usually inferred by courts just as it was in *Yick Wo*. In the UK case of *Nagarajan v London Regional Transport*[32] the court considered evidential issues of how a plaintiff may prove an

[28] *See*, Quick and Garran (1901) 622.
[29] *Yick Wo* 374 *emphasis added*.
[30] Ibid.
[31] C Tobler, *Indirect Discrimination: A case study into the development of the legal concept of indirect discrimination under EC law* (Intersentia, 2005).
[32] *Nagarajan v London Regional Transport* (2000) 1 A.C. 501.

'unconscious racial attitude' and the 'real reason[s]' for an alleged discriminatory action. The *Naggarajan* court allowed statistical proof without mandating its use holding, 'it will be a question of fact in each case.' When doing so, the House of Lords expressly stated that a prior case, *Aziz v Trinity Street Taxis Ltd.*,[33] was wrongly decided insofar as the court in *Aziz* implied that a claimant must prove the alleged discriminator's conscious awareness of discriminatory intent. The following year, this new evidential rule entered Australian jurisprudence when the full Federal Court of Australia adopted the *Naggarajan* evidential doctrine in *Sharma v Legal Aid (QLD).*[34] *Sharma*, in turn, has been favourably cited by the full Federal Court on at least two occasions.[35]

Indirect Discrimination

The prior subsection dealt with the form of applied discrimination where intent to discriminatorily enforce a race neutral text can be established before a court or tribunal. This subsection (and the immediately following chapter) address a different situation in which a text disproportionately or disparately negatively impacts a minority or historically discriminated against class of persons. The international community usually refers to this specific form of discrimination as indirect discrimination. Although, as one might correctly assume, indirect racial discrimination is also often interchangeably referred to by its original American name, disparate/disproportionate impact. Regardless of the nomenclature, it is the most common form of negative racial discrimination in many nations because indirect discrimination is difficult to detect and even harder to prove.

The respected EU anti-discrimination scholar, Christa Tobler, notes prior examples of European law having addressed the concept of indirect discrimination predating the form it is used in today, but concedes the modern concept of indirect discrimination originates from American jurisprudence. [36] Therefore, just as understanding direct discrimination required addressing *Yick Wo*, understanding indirect discrimination requires discussing another American case, *Griggs v Duke Electric Power Company*.[37] In *Griggs*, an employer passed a policy elevating the minimum job requirements for all positions save for manual labourers. This policy was applied prospectively, not retroactively, to all new hires and internal company transfers. Under the policy, applicants were

[33] *Aziz v Trinity Street Taxis Ltd* (1988) 3 WLR 79.
[34] *Sharma v Legal Aid* (QLD) [2002] FCAFC 196.
[35] *Qantas Airways Limited v Gama* [2008] FCAFC 69; *King v Jetstar Airways Pty Ltd* [2012] FCAFC 115.
[36] Tobler (2005).
[37] 401 U.S. 424 (1971).

required to either: (a) prove year 12 completion, or (b) demonstrate a minimum IQ-test score. Any applicants who had not completed year 12 or could not demonstrate the required minimum IQ-test score were disallowed from consideration.[38] According to the United States Supreme Court, 'neither standard was successfully related to job performance,' and 'both requirements operated to disqualify [African Americans] at a substantially higher rate than white applicants.' The plaintiffs, a group of African Americans, were unable to establish intent. As the court viewed the matter, the fundamental question at issue was whether to allow covert discrimination absent a showing of extant discriminatory intent notwithstanding demonstrable proof that the alleged discriminator had previously engaged in 'overt racial discrimination.'[39]

The court's opinion directly stated that there was no way to establish an element of intent in this matter.

> *The Company's lack of intent is suggested by special efforts to help the undereducated employees through Company financing of two-thirds the cost of tuition for high school training.*[40]

However, the court held intent was not dispositive. According to the *Griggs* court,

> *…Congress directed the thrust of the [Civil Rights] Act to the consequences of . . . . practices, not simply the motivation.*[41]

Therefore, according to the Supreme Court of the US, a facially neutral text indirectly discriminates when the effect thereof disparately or disproportionately impacts one group detrimentally, while favouring another group. The *Griggs* court's opinion closed by stating a legal prohibition against indirect discrimination exists to ensure:

> *…that race, religion, nationality and sex become irrelevant. What congress has commanded is that any tests used must measure that person for the [purpose] and not the person in the abstract.*[42]

It remains the core of indirect discrimination law to the present time.

Like direct discrimination, indirect racial discrimination is universally prohibited by the ICERD, but it is worth briefly noting that the legal frameworks around indirect discrimination vary

[38] *Griggs* 424.
[39] Ibid.
[40] Ibid.
[41] Ibid.
[42] ICERD art. 2.2.

interjurisdictionally more so than direct discrimination. For example, the Canadian system of indirect discrimination is largely similar to the system used in the United States yet places a greater emphasis on substantive equality.[43] Similarly, common law jurisdictions usually rely on statistical evidence in proving indirect discrimination while other systems do not. European Community jurisdictions view statistical analysis to be overly onerous, and therefore do not require statistical evidence to establish the existence of a disparate impact on the alleged minority class.[44]

An alternative example is the Latin American jurisdiction[45] of Mexico, which has robust public discourse surrounding indirect discrimination, but does not legislatively distinguish indirect racial discrimination from direct racial discrimination. Thus, there is no overt discussion of indirect discrimination in current Mexican jurisprudence or legislation despite indirect discrimination claims being legally actionable under existing Mexican statutes and the Mexican Constitution.[46] Australia's Northern Territory adopts a similar approach, in that indirect discrimination remains legally actionable without being expressly referenced in legislation.[47] As this chapter repeatedly states, jurisdictional variations are commonplace in racial anti-discrimination law, particularly within the more controversial area of positive discrimination addressed by the following section.

Positive Discrimination

Whereas the prior section addressed legally prohibited, negative racial discrimination, this section addresses positive discrimination. Positive discrimination definitionally varies by jurisdiction, but for the purposes of this typology, positive discrimination is legislation or policies specifically targeted at correcting historical, ongoing harms suffered by a minority or otherwise disadvantaged segment of a Westphalian state's population. As such, positive discrimination differs significantly from the forms of discrimination discussed in the prior section since positive discrimination tends to be expressly authorised – or even mandated – under both international law and most Western legal traditions.

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[43] A Yu 'Direct Discrimination and Indirect Discrimination: A Distinction with a Difference' (2019) 9(2) *Western Journal of Legal Studies.*

[44] Tobler (2005).

[45] Much like the Anglo settler colonial nations, there is a distinctive legal-constitutional arrangement among the 'New World' Spanish settler colonial nations in Latin America. It is not necessary to further discuss the particularities of their unique legal systems in this chapter, but worth mentioning in a footnote.

[46] OECD 'The Price of Prejudice: Labour Market Discrimination on the Grounds of Gender and Ethnicity' in *OECD Employment Outlook 2008* (online, 2007).

[47] *Anti-Discrimination Act 1992* (NT).

Regarding the aforementioned international legal mandate to positively discriminate, ICERD Article 2.2 requires that:

> *2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a con sequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.*[48]

Thus, the express text of the ICERD requires state parties to take actions (termed 'special and concrete measures') guaranteeing the 'full and equal enjoyment of human rights and fundamental freedoms.'[49] However, it is worth noting that despite a general, internationally recognised presumption that positive discrimination is legal, that presumption is by no means universal. Additionally, the manner by, and extent to which, a ratifying state legally allows and/or tolerates positive discrimination varies jurisdictionally.

Some nations, such as France, focus on formal racial equality to the point the domestic legal system deems all racial discrimination (including positive discrimination) to be presumptively unlawful. Other nations, like the United States, prohibit minimum quota systems but still allow decision makers to account for extant institutional racism. Still others, like Australia, interpret positive discrimination as a formulaic framework, that when followed, even allows paternalistic legislation that harms minority populations.[50] This typology illuminates the differences between the legal approaches to positive discrimination, making each subtype clear as they are discussed in the following subsections.

Strict Formal Equality

Under a strict formal equality approach, positive discrimination is prohibited. To proponents of, and systems implementing, strict formal equality, all forms of racial discrimination are equally undesirable. Using the logic of strict formal equality, the ultimate objective of racial anti-discrimination law and policy is to completely eliminate any and all legal distinctions made between individuals,

[48] ICERD art. 2.2.
[49] Ibid.
[50] W Sadurski, 'Gerhardy v Brown v The Concept of Discrimination: Reflections on the Landmark Case that Wasn't' (1986) 11(1) *Sydney Law Review* 5.

groups, and classes on the basis of race. Strict formal equality does have its advantages. It is plainly a simpler legal analysis, and as a normative, moral proposition, it has some degree of merit. Still, it is a relatively uncommon stance,[51] that has been critiqued for over a century,[52] due to strict formal equality's proven inability to assist minority populations achieve wider social advancement and basic human dignity.

Evolving forms of strict formal equality formed part of the constitutional bedrock of every French Republic from 1789 until 1981 when French anti-discrimination legislation began modernising. However, in France, the modern inclusion of positive discrimination creates a constitutional quandary of sorts. Anne Levade elucidates the anathema of positive discrimination to French culture:

> *According to the French view, the ambiguity of such a formula comes from the fact that the decision for positive discrimination is based on a forbidden criterion. In effect, the French Republic recognizes no minorities or disadvantaged groups; it only recognizes citizens, equal in their direction relationship with the state. So, insofar as it does not want to know about either ethnic origins or religions, this concept appears to be, a priori, the least racist and least discriminatory. Contrary to the experience in Anglophone society, notions of community and minority go against republican sentiments.*[53]

The fundamental cause of this legal 'paradox'[54] is due to the French constitutional arrangement's extant preference for strict formal equity dating back to the *Déclaration des droits de l'homme et du citoyen de 1789.*[55] In France, accounting for race itself is forbidden because the very idea of differentiating between racial or ethnic groups is seen as promulgating the very racism French law prohibits.[56] As such, in France, where positive racial discrimination does exist, such measures are usually temporary and targeted at specific, achievable objectives conducive to measurement. Then, after achieving the temporary objective, the positively discriminatory policy or legislation ceases to have effect thereby returning all French citizens to a place of formal equality before the French state.[57]

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[51] Notably, Australian anti-discrimination law expressly rejects this position. *See Gerhardy v Brown* [1985] HCA 11 (Brennan J).

[52] *See,* A France, *Le Lys Rouge* [French] 'The Red Lily' (Ancienne Maison Michel Levy Freres, 1894). *See also,* E Zola, *J'Accuse...!* [French] 'I Accuse…!' (An open letter to the President of France written as a response to the overt antisemitism in the wrongful conviction of Alfred Dreyfus, 1898).

[53] A Levade, 'Positive Discrimination and the Principle of Equality in French Law' (2000) 111(4) *Pouviors* 55.

[54] Ibid

[55] [French] 'the declaration of the (legal) rights of the man and of the citizen of 1789.' It is often simply referred to as the Declaration of the Rights of Man in English language materials.

[56] Ibid.

[57] P Bloch, 'Diversity and Labor Law in France' (2012) 30 *Vermont Law Review* 717.

Furthermore, positive racial discrimination usually employs legal proxies for race, instead of directly addressing race itself, to sidestep the philosophical and constitutional quagmires inherent in French anti-discrimination law.[58]

Notably, while the concept of strict formal racial equality originates in French legal and political thought, it is by no means unique to France. Recently, conservative opinions and American Supreme Court jurisprudence suggest that American 'strict constructionists' similarly interpret the US constitutional prohibition on racial discrimination to similarly forbid all American governmental actors from drawing any legal distinctions between racial groups whatsoever.[59] In the United States, this move towards strict formal equality gives rise to a new, typologically significant, distinction. There are now two forms of positive discrimination, each of which is described in the following two subsections.

Indirect Positive Discrimination (Affirmative Action)

Of the two legal approaches to positive discrimination just mentioned, affirmative action is the narrower. The affirmative action approach largely limits legally permissible positive discrimination to mechanisms targeted at correcting current, extant harms suffered by an historically oppressed ethnic and/or racial group. Even then, such mechanisms are only permissible up to the extent they are necessary to achieve future equality. Likewise, in such a system, directly beneficial discrimination (such as creating a quota system) is unlawful.[60] To be lawful under the affirmative action approach, positive discrimination must be *indirectly* beneficial discrimination (i.e., policies more beneficial to an oppressed group than a non-oppressed group).

To explain the limits of affirmative action in more detail, take, for example, the current university admissions policy in the American constituent-state jurisdiction of Texas. In 2003, the United States Supreme Court struck down the state's university admissions policy as legally impermissible positive (direct) discrimination.[61] Under the system the court declared unlawful, government-owned universities were utilising a points-based admission system. That system granted points to applicants for academic achievement, and various other factors such as socioeconomic class, extracurricular activities, and whether the applicants' parents were alumni. These points, in turn, were the primary

[58] Levade (2000).
[59] *See, Fisher v University of Texas,* 570 U.S. 297 (Thomas J concurring) (2013).
[60] *See generally, Regents of the University of California v Bakke*, 438 U.S. 265 (1978).
[61] *See, Gratz v Bollinger*, 539 U.S. 244 (2003).

basis for granting a particular applicant's admission to a Texas university. On the whole, the system was rather straightforward and uncontroversial, but the court took issue with one particular aspect. The system automatically granted additional points to applicants from historically oppressed ethnic and racial groups (persons of Black American, Asian & Pacific Islander, Indigenous American, and Latiné descent), purely on the basis of their race and/or ethnicity.

In 2003, the American Supreme Court found such practices unconstitutional in *Gratz v Bollinger* because the Texas university admissions system drew prohibited distinctions between groups, not individuals, on purely racial lines. Unlike *Students for Fair Admissions v Harvard*,[62] the issue in *Gratz* was not whether government-owned universities were allowed to grant preferential admission to minority applicants, because doing so was upheld by the same court on the same day in *Grutter v Bollinger*.[63] On the contrary, the court in *Gratz* struck down Texas' points-based admission system for granting directly preferential treatment to minorities as opposed to individualised, *indirect* assistance to minority populations. In the American system, and those like it, the *Yick Wo* doctrine prohibits *all* direct discrimination, whereas the *Griggs* doctrine *only* prohibits negative indirect discrimination.[64] As such, Texas shifted its state-wide admissions policy in the aftermath of *Gratz*.

The new, *Gratz*-compliant, Texas university admissions policy is colloquially called the 'top 10% rule'[65] and was specifically drafted to indirectly benefit minority applicants. Under this new scheme, the top 10% of each graduating class in every government-run year 12 program is automatically awarded entry into any government-run university in Texas (save for the two constitutional universities'[66] main campuses). Due to the natural demographics of Texas and 'white flight,' the program provides a disproportionate number of 'automatic' admissions to majority-minority year 12 schools without expressly granting a racial preference. Notably, Texas policy would be impermissible negative discrimination (indirect discrimination) if the program disadvantaged minority applicants. Nevertheless, Texas' indirect positive discrimination scheme has already withstood judicial scrutiny,

[62] 600 U.S. 181 (2023).

[63] *Grutter v Bollinger,* 539 U.S. 306 (2003) *overturned by*, *Students for Fair Admissions v Harvard*, 600 U.S. 181 (2023).

[64] In the US specifically, this distinction flows from the hierarchy of legal norms. *Yick Wo*'s prohibition against direct discrimination is constitutional, whereas the *Griggs* prohibition against indirect discrimination is statutory. In *Gratz* and later in *Students for Fair Admission*, the court held the *Yick Wo* bar against direct discrimination was absolute, not unidirectional in nature. Direct discrimination is, therefore, constitutionally prohibited in all forms, both positive and negative.

[65] *Texas Education Code* ch. 51 sub. ch. s 51.801 et seq.

[66] The University of Texas's Austin Campus and Texas Agricultural and Mechanical University's College Station campus are entities mandated to exist under art. VII of The Texas Constitution.

unlike other university admissions systems that previously listed race as a relevant consideration.[67] As such, the typological distinction one draws is that the affirmative action approach allows indirect positive discrimination but prohibits all forms of direct and facial discrimination.

Directly Beneficial Legislation and Policies

This subsection discusses positive discrimination targeted towards achieving functional racial equality in a society. The reasoning behind taking a functional equality approach was eloquently stated by the High Court in *Gerhardy v Brown*:

> *[F]ormal equality before the law is an engine of oppression destructive of human dignity if the law entrenches inequalities in the political, economic, social, cultural or any other field of public life.*[68]

While more commonly called 'special measures' in Australia,[69] this typology uses the term 'directly beneficial' positive discrimination to differentiate this legal approach from affirmative action. In Australia, specifically, two of the more common forms of directly beneficial policies are mandatory quotas and 'identified' benefits (such as Indigenous only job postings and University positions). Typologically, the key distinction between affirmative action and directly beneficial legislation is that directly beneficial 'special measures'[70] represent a direct, government intervention targeted at correcting past (or present) social wrongs experienced by oppressed and/or socially disadvantaged racial/ethnic populations.[71] Such policies either mandate minority inclusion or grant some direct benefit to the members of a racial and/or ethnic group.

Most quota schemes mandate a minimum number of individuals from an historically oppressed people group are selected for inclusion in an area where that group has been traditionally unincluded (or is currently excluded). These quotas tend to include workplace and education requirements but can also be implemented in other areas. One notable and longstanding example of a legally enforceable quota system is the guaranteed minimum political representation of ethnic Danes in the German state of Schleswig-Holstein. This system of direct positive discrimination dates back to the historical circumstances relating to German confederation but still remains in use today. As a result

[67] *Students for Fair Admissions v Harvard.*
[68] *Gerhardy v Brown* [1985] HCA 11 (Brennan J).
[69] RDA s 8.
[70] ICERD art. 2.2.
[71] Sadurski (1986).

of these rights, the ethnic Danish community in Schleswig-Holstein continues to thrive in a place Denmark has not ruled in centuries.[72]

Beyond quotas, another common use of directly beneficial legislation is creating, by policy or legislation, employment positions restricted to members of a specific group. For the purposes of this typology, such distinctions must be overt and formalised. It is insufficient, for this typology, to hold up a longstanding yet informal custom as directly beneficial positive discrimination. For an example of an informal beneficial custom, look to the Bureau of Indian Affairs in the United States. Unlike Australia, where most Ministers for Indigenous Australians have been non-Indigenous, the American norm has been to appoint an Indigenous Tribal Citizen to head the Bureau of Indian Affairs ever since the Red Power Movement drew attention to the US government's appalling mistreatment of Indigenous Americans.[73] Nevertheless, this is not a directly beneficial policy, because nothing legally compels the American president to adhere to this custom. Regardless of the prevailing norm, every American president remains free to appoint any US citizen, of any race, colour or creed, to the post. That said, drawing a typological distinction does not diminish the power of such customs. Even without binding legislation or enforceable policy, there can be powerful, socio-political pressures for politicians to conform with the existing governmental norms, customs, and traditions. Keeping with the same example, after the departure of Omarosa Manigault Newman, US President Donald Trump's administration lacked any senior Black American advisors.[74] However, an Indigenous American, Tara Sweeney, served out the entirety of Trump's presidency as US Assistant Secretary of the Interior for the Bureau of Indian Affairs.[75] Nevertheless, in this typology, social and political obligations are distinct and different from legally enforceable mandates.

In contrast to prevailing traditions, norms, or customs, an identified employment position is backed by an enforceable mandate or compulsory legal requirement that the position may only be filled by a member of a particular racial or ethnic minority group(s). To illustrate such mandates with another example, consider the Australian Institute for Aboriginal and Torres Strait Islander Studies

[72] Denmark maintains similar rights for the few remaining ethnic Germans in Sønderjylland, although those rights become less important as the ethnic German population in the region has declined, intermarried, and largely assimilated into the Jutlandic-Danish culture they were previously distinct and separate from prior to WWII.
[73] Bureau of Indian Affairs (US) *History of BIA* (online, retrieved 17 March 2023).
[74] Interview with Omarosa Manigault Newman (C Dodd, NBC News, Meet the Press, 12 August 2018).
[75] US President Donald Trump appointed Tara Sweeney, a citizen of the Alaska Native Village of Barrow Iñupiat Traditional Government (also known as the Iñupiat Community of the Arctic Slope). *See*, BIA (2023).

(AIATSIS). The organisation is a creature of statute, and AIATSIS employees are members of the Australian Public Service. However, the *Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989* (Cth) is somewhat unusual for Australian legislation creating a government entity. Specifically, s 12(1A)(a-b) expressly requires:

> *(a) at least 5 of the Councillors are Aboriginal persons or Torres Strait Islanders; and*
>
> *(b) at least one of the Councillors is a Torres Strait Islander.*

On the face of the legislation, the Minister for Indigenous Australians is statutorily restricted as to whom they may appoint to the AIATSIS council. Furthermore, since *AIATSIS Act 1989* (Cth) s 12 only creates nine seats on said council, s 12(1A)(a-b) legislatively mandates an Indigenous Australian controlling majority whilst also mandating the larger Aboriginal Australian population includes the smaller Torres Strait Islander Australian population. Therefore, the legislation is overtly discriminatory in that it plainly draws distinctions on the basis of race. However, this form discriminatory legislation *directly benefits* Australia's First Nations. As such, *AIATSIS Act 1989* (Cth) provides a concrete example of directly beneficial, positive discrimination. Such legislation may be controversial in the United States or France, but it enjoys firm footing under international law.[76]

Unspecial Measures (Perverse Uses)

As with so many things in law, it possible to interpret the ICERD's Article 2.2 special measures provision in a manner perversely allowing otherwise untoward, unlawful negative discrimination. The most effective way to describe how such legislation operates, is once again, by way of a real-world example. The Australian constituent state of Queensland statutorily limited the amount of alcohol an individual could possess within a 'restricted area' subject to a waiver scheme dubbed a 'permit.'[77] Queensland then utilised *Liquor Act 1992* (QLD) to enact *Liquor Regulation 2002* (QLD), thereby criminalising the act of drinking in the tall grass on Palm Island. Both the place and the act are significant because the Palm Island population is 93.8% Indigenous Australian[78] and drinking in the tall grass is an invidious racial stereotype of Indigenous Australian behaviour. This enactment was, and remains, discriminatory according to the High Court of Australia.[79] Nevertheless, the High Court did not strike down the regulation or enabling legislation for openly targeting stereotypically Indigenous

[76] ICERD art. 2.2.
[77] *Liquor Act 1992* (QLD) s 168B.
[78] ABS, *Palm Island: 2016 Census Quickfacts All Persons* (2016).
[79] *Maloney v The Queen* [2013] HCA 28.

behaviour in a hyper-Indigenous place. Instead, the High Court of Australia upheld the Queensland regulation as a legitimate use of positive discrimination in *Maloney v The Queen.*[80]

In effect, the Australian judiciary interpreted positive discrimination to include paternalistically saving a racial group from its own self-destructive behaviours.[81] Such an interpretation of ICERD art. 2.2 may very well be awkward and structurally racist, but that interpretation is binding law in at least one jurisdiction. In Australia, therefore, positive discrimination is merely a framework of legislative interpretation governing the implementation of legally permissible racial discrimination. So long as the correct formalistic rules are adhered to and followed, the as applied impacts and real-world effects of discriminatory legislation are legally immaterial. Only format and process matter, not function or outcome – such is the nature of the perversion.

Diagramming Discrimination

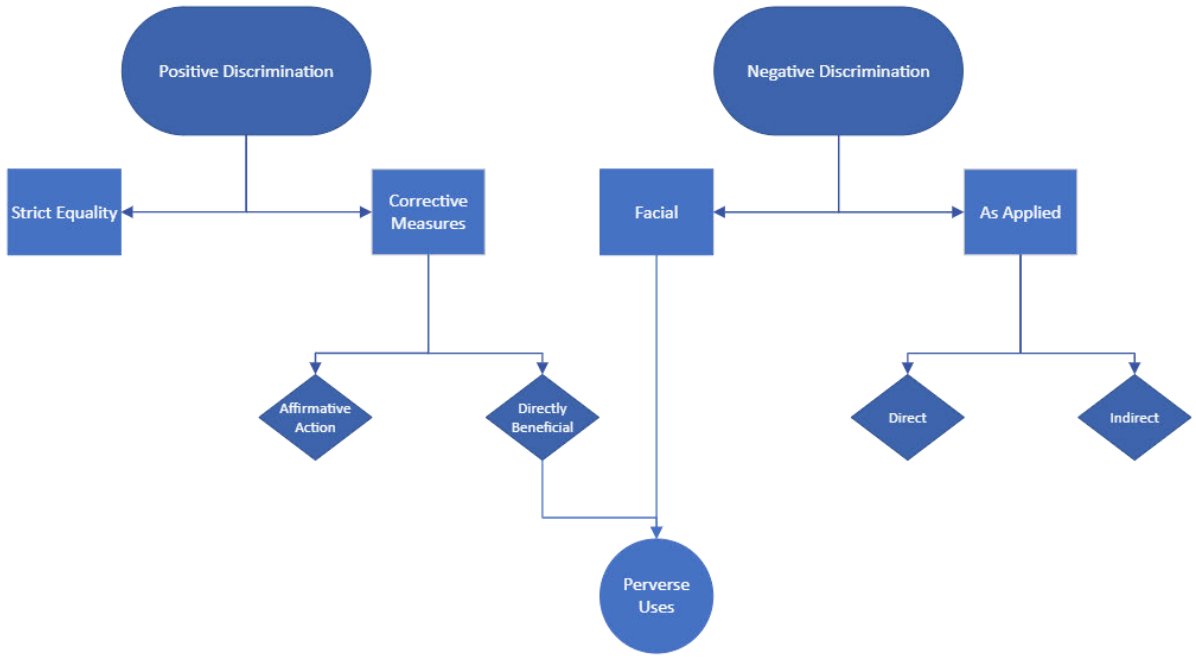
Prior sections of this chapter have: (a) defined racial discrimination, (b) laid out the limits of this typology, and (c) set out the various types of racial discrimination within the typology. This section now changes course. This section contains the functional analytical tool by which the various forms of racial discrimination found in the prior section can be categorised. Doing so allows both this and future research to build methodologies to diagnose racial discrimination by state actors.

Readers should note that this system of classification differs from many that precede it. To some extent, that difference is a function of this typology's overtly diagnostic orientation. However, as shown in *Figure 1*, this typology further differs by intentionally mirroring the indirect-direct model typically used to classify negative discrimination in how it classifies positive discrimination. By creating a more mirrored framework of analysis, this functional typology provides a new mechanism for assessing the lawfulness of particular state actions under particular circumstances. Likewise, this new classification system should prove more useful in comparing disparate jurisdictional approaches to anti-discrimination law.

[80] Ibid.
[81] Sadurski (1986).

As for the overall typology itself, *Figure 1* shows the conceptual set of racial discrimination is first divided into positive and negative discrimination. All forms of negative discrimination are usually prohibited, whereas (depending on the jurisdiction,) some forms of positive discrimination will be either permissible or compulsory. This typology's four types of positive discrimination are: (a) strict formal equality, (b) indirectly beneficial legislation, (c) directly beneficial legislation and (d) perverse uses thereof. Likewise, negative discrimination can first be broken down into facial discrimination and as applied discrimination. As applied discrimination can be broken down yet again into direct and indirect discrimination. Unlike what currently exists in the literature, this new, functional, diagnostic typology enables researchers to test for each form of racial discrimination contained therein using both legal and scientific methods. Creating such a tool enables both this thesis and future research to proceed from a common benchmark. As such, its creation represents a significant, sociolegal innovation.

Diagnostic flowchart of racial discrimination in the law (Figure 1)



Conclusion

In bringing this chapter to a close, it is appropriate to revisit the fundamental purpose for producing such a typology in the first place. Existing typologies and definitions found in Australian literature are all either descriptive or normative in nature. They are not functionally diagnostic. This typology, therefore, is a substantial step forward scientifically because it is specifically designed to aid in creating diagnostic methodologies, specifically geared towards determining whether state actions racially discriminate. By limiting its scope and then classifying both negative and positive racial

discrimination, this chapter enables research grounded in a common semantic definition and a common a set of typological distinctions. In so doing, this typology enables the replication of this thesis' results and facilitates future, cross-jurisdictional research outside of the Australian context.

As this thesis moves onward, it pays to recall where the work has already ventured and where it is going. The prior chapter established the foundations on which the thesis sits, and this chapter laid out the functional, diagnostic typology used throughout the remaining chapters. The immediately following chapter is similar: it sets out the overarching methodology used throughout the entirety of this project.

III.

Testing For Inequity

Designing a method to assess Westphalian state actions for racial discrimination

An Introductory Note

An earlier version of this chapter was a prior conference paper submitted to the 2021 University of Sydney Early Career Academics Symposium.

Purpose and Scope

The purpose of this chapter is to discuss designing a radical departure from more common legal research methodologies: a scientific, multi-method test for intrinsically legal phenomena. The legal phenomenon is racial discrimination against racial minorities in a criminal legal and justice regime – some forms of which cannot be proven without outside scientific methods. Additionally, the term multi-method is intentional because no single method can detect such complex social phenomena. As such, this chapter weaves two interconnected narratives. The first describes a novel, intensive, scientific-legal research methodology from which new scientific and legal research can build and grow. The second is a personal account of building this methodology so future researchers need not repeat this researcher's mistakes nor reinvent the wheel. Future researchers will be able to apply lessons learned herein to develop other research with both scientific and legal outcomes capable of assisting institutionally disadvantaged minority groups. Combining the methodology itself with the researcher's own thinking and the project's growing pains hopefully offers a window into designing processes for future projects as well as a baseline from which to verify this project's findings.

Insofar as this chapter's position in the thesis, it is important to bear in mind that future chapters will not only refer to this methodology but will also restate and elaborate on the particular methods found herein as they become relevant to individual issues. Specifically, in both The Racism of Remand and The Oppression in Discretion, there is a more in-depth discussion of the statistical analyses as they apply in practice, whereas this chapter deals with statistical testing in the abstract. Those *applied* chapters also discuss the details of disaggregating statistical data to avoid Simpson's Paradox, which is difficult to do using the examples found in this methodology. Likewise, both The Oppression in

Discretion and Racial Realities use the courtroom observational methods contained within this chapter but do so in markedly different ways necessitating separate methods sections detailing the particular manner of their use. Notably, the only method not to be revisited in later chapters is the Rombauer Method of Legal Research that was already deployed in the immediately preceding chapter. While the Rombauer Method is deployed throughout the thesis, it is sufficiently commonplace in legal research circles that it needs no further explanation beyond the methodology.

Research Questions

Before proceeding, it is necessary to restate this project's specific research questions, since they are fundamental to methodological design. The initial primary research question informing this project is:

> *Does race or Indigenous status of Aboriginal defendants as a class[1] negatively impact accused persons in New South Wales (NSW) at trial? If so, do those negative impacts racially discriminate as a general, sociolegal construct?*

The second follows on from the first:

> *If so, do those negative impacts potentially 'racially discriminate' in a general, sociolegal sense of the term?*

Likewise, it is also necessary to read this methodology alongside the typology it follows, as the two chapters are inextricably interrelated. Recalling the prior chapter, negative discrimination encompasses all forms of discrimination that disenfranchise or disadvantage a particular group and/or groups.[2] This methodological framework tests for three specific forms of negative discrimination: (1) facial discrimination, (2) direct discrimination, and (3) indirect discrimination. To avoid redundancies, this chapter does not restate those concepts, and instead focuses on testing therefor.

Doctrinal Legal-Textual Research

Text-based legal research, as a sociolegal method, is singularly useful in uncovering facial discrimination. Notable examples of facially discriminatory legislation in the post-World War II era include the race power (s 51(XXVI)) of the Australian Constitution, South African Apartheid,[3] and

[1] A legal class is a definable group of persons to whom legal rights and/or obligations may be applied.
[2] *Street v Queensland Bar Association* [1989] HCA 53.
[3] For *Example, Reservation of Separate Amenities Act 1953* (South Africa).

American Jim Crow Laws.[4] To determine whether the text of a document is legally discriminatory (as opposed to merely offensive), on its face, this study employed a widely used, existing research method utilised by Western-oriented lawyers and judges. Western legal research and textual interpretation is a highly structured form of Baconian inquiry,[5] that has been refined over centuries. The process has been designed for a specific purpose: elucidating 'the law' within a particular 'fact pattern.'[6]

To varying degrees, law schools around the world inculcate students with a relatively standardised set of research methods. In application, these methods constitute their own, unique form of intellectual inquiry, but one so essential to lawyering, legal research methods are easily taken for granted. Therefore, it is worth elaborating on the intellectual process of doctrinal legal research, to ensure the portability and repeatability of this methodology, as a whole. This methodology adopts the 'Rombauer method of legal research,' which is named for its creator, Marjorie Rombauer.[7] Rombauer's four-step method is widely taught across the United States and Canada; to a lesser extent, it is also taught in Mexico and the United Kingdom. Similar doctrinal methods are taught in Australia, New Zealand/Aotearoa, and the European Union.

According to Rombauer, legal-textual research follows a four-step process:

1. *Preliminary Analysis*
2. *Codified Law*
3. *Binding Precedent*
4. *Persuasive Precedent*

The Rombauer Method follows a set linear progression, in which the researcher completes each phase entirely before turning to the next. Preliminary analysis, for this purpose, entails finding legal terms that signal discriminatory intent in a particular jurisdiction. The linguistic nature of discriminatory legal terms vary. Sometimes, discriminatory terminology is overt, as was the case with South African

[4] For an example of 'Jim Crow Laws,' *see The Code of Alabama*, v.1. (Alabama, 1923).
[5] Baconian inquiry is a form of pre-Newtonian scientific inquiry. It is a precursor to the modern experimental scientific method but lives on as the primary intellectual model used in Western legal practice.
[6] A fact pattern in the legal sense is the particular facts relevant to determining how the law views a specific issue.
[7] M Rombauer, *Legal Problem Solving* (West, 1991).

Apartheid. Take, for example, this excerpt of Apartheid-era South Africa's *Reservation of Separate Amenities Act*:

> *2. (1) Any person who is in charge of or has control of any public premises or any public vehicle, whether as owner or lessee or whether by virtue of his office or otherwise, or any person acting under his control or direction may, whenever he deems it expedient and in such manner or by such means as he may consider most convenient for the purpose of informing all persons concerned, set apart or reserve such premises or such vehicle or any portion of such premises or such vehicle or any counter, bench, seat or other amenity or contrivance in or on such premises or vehicle,* ***for the exclusive use of persons belonging to a particular race or class.***
>
> *(2) Any person who wilfully enters or uses any public premises or public vehicle or any portion thereof or any counter, bench, seat or other amenity or contrivance which has in terms of sub-section (1) been set apart or reserved for the exclusive use of persons belonging to a particular race or class,* ***being a race or class to which he does not belong,*** *shall be guilty of an offence and liable on conviction to a fine not exceeding fifty pounds or to imprisonment for a period not exceeding three months, or to both such fine and such imprisonment.*[8]

(emphasis added).

In this text, the bolded terms display an overt parliamentary intent to discriminate against persons of one race, in favour of another – the very definition of facial discrimination. However, overt racist language is not required to show facial discrimination. Sometimes, more subtle terminology is used.

The second stage of the Rombauer Method (codified law) involves reading the laws in question, searching for the facially discriminatory legislation. For example, in this research, the applicable legislation was found using the *Annotated Criminal Legislation of NSW* indictable offences and indictable procedure sections.[9] The researcher scoured these sections for terms, euphemisms, and phrases, searching for signs of discriminatory intent.

The 'Binding Precedent' phase involved examining NSW Court of Criminal Appeals decisions and Australian High Court judgments, searching for facially discriminatory offences. There are still common law jurisdictions that allow courts to create crimes that do not exist in statutes, although courts are

[8] *Reservation of Separate Amenities Act 1953* (South Africa).

[9] Using a current, annotated copy of legislation assists this process, because the annotations include binding precedent.

more likely to alter existing statutes in ways that profoundly alter their legal meaning.[10] For example, a court can render a law still on the books entirely unenforceable like the American Supreme Court did to Alabama's constitutional ban on interracial marriages:

> *The legislature shall never pass any law to authorize or legalize any marriage between any white person and a negro, or descendant of a negro.*[11]

This provision of the Alabama Constitution was repealed in the year 2000, however, the text of Alabama Constitution art. IV § 102 was rendered legally unenforceable in 1967, by *Loving v Virginia*.[12] Nevertheless, between 1967 and 2000, the discriminatory text remained enshrined in the Alabama state constitution, despite being unenforceable. In such a situation, the text is clearly racist, but does not constitute facial discrimination.

Alternatively to the Alabama Constitution above, a court may reinterpret a text, endowing a provision with new scope and power. This situation occurred with the post-1967 ammended 'race power' in the Australian Constitution:

> *The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:*
>
> *. . . .*
>
> *(xxvi)*
>
> *the people of any race, for whom it is deemed necessary to make special laws;*[13]

Many Australians believed the 1967 amendment to s 51(xxvii) granted Indigenous Australians full legal equality,[14] but in *Kartinyeri v Commonwealth*[15] the High Court of Australia held otherwise. Notwithstanding how the text appears at first glance, the Australian Constitution enables negative discrimination against Indigenous Australians – so long as the discriminatory legislation is passed by the Commonwealth Parliament, not a state or territory's legislature. Therefore, binding precedent and judicial interpretation render the Australian Constitution facially discriminatory.

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[10] S Tarrant, 'Building Bridges in Australian Criminal Law: Codification and the Common Law.' (2013) 39(3) *Monash University Law Review* 838.; CB Hessick, 'The Myth of Common Law Crimes' (2019) 105(5) *Virginia Law Review* 965.

[11] Alabama State Const. Art IV s 102.

[12] *Loving v Virginia,* 388 US 1 (1967).

[13] Aust. Const. s 51(xxvii).

[14] A Wood, 'Constitutional Recognition: A Case for Less is More' in *It's Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform*. (Melbourne University Press, 2016) 104-113.

[15] *Kartinyeri v Commonwealth* [1998] HCA 22.

Moving on from binding precedent, persuasive precedent, in this context, is primarily used as a way of interpreting and analysing vague and/or ambiguous legal texts without 'black letter' meanings. For example, the United Kingdom's *Race Relations Act*[16] is a useful in understanding the specific meanings of terms found in the Australian *Racial Discrimination Act 1975* (Cth), because several of the concepts in the UK's *Race Relations Act 1968* were integrated into Australia's RDA[17] This legislative history of earlier laws informing later laws constitutes a legal genealogy of sorts. And, while legal genealogies cannot fully explain a legal text in its entirety, understanding the 'parent legislation' aids researchers in accurately interpreting the concepts and terminology found in subsequent 'progeny' legislation.

Persuasive precedent also extends to using 'secondary sources.' These sources include legal academic publications, legal histories, practitioner research, government reports, and other authoritative texts that contemplate the applied meanings of legal documents. Justice Kirby summarised the importance of persuasive precedent in *Gillard v The Queen*:

> *[W]hen during argument counsel were asked whether there had been academic or professional writing about the problem before the Court, we were told by counsel for the appellant that he had been unable to find anything that was in point. Subsequent inquiry has disclosed that there is extensive literature about unlawful joint enterprises where death results and about the decisions on the doctrine of common purpose in Australia, England, the United States, Canada and elsewhere. Law reform bodies have also recently addressed the problem of accessorial liability. They have done so at the national level in Australia, and in South Australia, England, Canada and elsewhere. Such materials have analysed the history, current state and defects of the law on this subject in ways useful to the functions of this Court as the final appellate court of the nation.*[18]

Despite not being used in a courtroom context, this project's methodology engages in persuasive precedent research because, as Justice Kirby makes clear, persuasive precedent matters *to courts* when they determine legal meanings. Frankly – seeking what matters to courts is the entire point of using doctrinal legal research methods in sociolegal anti-discrimination praxis. Without doing so, researchers have not fully assessed whether the legislation in question has a discriminatory meaning.

[16] *Race Relations Act 1968* (UK).
[17] *See, Australian Medical Council v Wilson* [1996] FCA 591.
[18] *Gillard v The Queen* [2003] HCA 64 (Kirby J concurring) *citations removed.*

Statistical Methods

One of the more difficult aspects of designing this project's methodology was determining how to diagnose indirect discrimination (and subconscious/unconscious direct discrimination) in a criminal justice system. When this research began, Australia lacked a scientifically based, judicially endorsed, statistical test for determining the point at which domestic criminal legislation becomes indirectly discriminatory. The High Court applied the *International Convention for the Elimination of All Forms of Racial Discrimination* (ICERD) to Australian criminal law in *Maloney v the Queen* and *Gerhardy v Brown,*[19] but neither case contains any reference to a specific, statistical test that would evidentially prove Australian criminal legislation racially discriminates. Australia is by no means unique in this regard. Another example is the United States, although for different reasons.[20] The same is true in Europe, where Denmark argued against applying indirect discrimination analysis to its domestic criminal legislation before the European Court of Human Rights.[21]

On the other hand, Australia has a thriving academic discourse that uses statistical evidence to scientifically assess racial disproportionalities in Australian criminal justice. Within that discourse, Chris Cunneen and Don Weatherburn engaged in a multiyear debate on how best to remedy Indigenous hyperincarceration. Weatherburn[22] and Cunneen[23] disagree *emphatically* about whether Australia's various criminal justice systems racially discriminate, although the two occasionally agree on specific issues.[24] Furthermore, Cunneen[25] explicitly discussed the concept of indirect racial discrimination in 2006, and in 1990, Gale et al.[26] published what likely remains the most systematic study of racial disparities in South Australian criminal justice. Notwithstanding this thriving body of academic

[19] *Maloney v The Queen* [2013] HCA 28; *Gerhardy v Brown* [1985] HCA 11.

[20] *See,* EW Shoben and RC Hunter, 'Disparate Impact Discrimination: American Oddity or Internationally Accepted Concept?' (1998) 19(1) *Berkeley Journal of Employment & Labor Law* 108; R Clegg, *Disparate Impact and Criminal Justice* (Report for the (US) Center for Equal Opportunity, 22 March 2016). *See also*, *O'Donnell v Harris County, TX,* 251 F. Supp. 3d 1052 (S.D. Tex. 2017).

[21] Tobler (2005).

[22] D Weatherburn and J Fitzgerald, 'Reducing aboriginal over-representation in prison: A rejoinder to Chris Cunneen' (2006) 18(2) *Current Issues in Criminal Justice* 366.

[23] Cunneen (2006).

[24] D Weatherburn and J Holmes, *Indigenous Imprisonment in NSW: A closer look at the trend* (Report for NSW Bureau of Crime Statistics and Research. Report no. 126, June 2017).

[25] Cunneen (2006).

[26] F Gale, R Bailey-Harris, and J Wunderstiz, *Aboriginal Youth and the Criminal Justice System: the injustice of justice?* (Cambridge University Press, 1990).

research, prior to Emory's work in 2017,[27] there had been no direct attempt to apply statistical tests drawn from anti-discrimination litigation practice to Australian criminal legislation.

In the absence of a judicially endorsed test, the researcher initially considered developing a regression model or an ANOVA along the lines of what is currently en vogue in experimental jurisprudence. Notable examples of regression analysis in experimental jurisprudence are Robertson et al.'s experiments on whether race and class influence prosecutorial discretion in the US,[28] as well as Gazal-Ayal and Sulitzeanu-Kenan's[29] observational experiment on ethnic in-group bias in Israeli bail proceedings. Another potential option was an econometric modelling approach similar to that taken by Abrams, Bertrand and Mullainathan[30] in their seminal study uncovering inter-judge variance in judicial decisions involving minority accused persons. Nevertheless, this research declined to develop a model from scratch for three main reasons. First, the project needed a test specifically tailored to uncover racial discrimination against minorities with an end goal in mind: namely, correcting any potential racial discrimination that may be uncovered by way of recommendations for legal or political reform. Second, in Western law there exists a legal doctrine based on the Latin maxim, '*Lex nil facit frustra, nil jubet frustra*,'[31] that preferences extending existing solutions over reinventing the wheel. In other words, if a similar test exists in another area of law, and such a test can be adapted to testing the criminal law, adapting an existing test is preferable. Third, anti-discrimination law is a body of law unto itself, just like criminal law, tort law, or property law. Taking an established test from one area of law and applying that test to a related fact-pattern is already a familiar concept for lawyers, courts, legislators, and sociolegal researchers.

This aspect of the research then proceeded by searching other areas of anti-discrimination law for adaptable tests. A part of that search involved initiating a series of systematic but informal discussions with anti-discrimination law practitioners in the researcher's global professional networks, each with decades of experience litigating anti-discrimination claims. These preliminary discussions

[27] R Emory, 'The 80% Rule and Indirect Discrimination as a method to assess NSW Criminal Law and Policy' (Conference paper, Alfred Deakin Institute Conference, 50 years of naming institutional racism: realising racial equity or intensifying injustices? 2 Nov 2017).

[28] C Robertson, S Baughman, and M Wright, 'Race and Class a Randomized experiment with prosecutors' (2019) 16(4) *Journal of Empirical Legal Studies 8*07.

[29] O Gazal-Ayal and R Sulitzeanu-Kenan, 'Let My People Go: Ethnic in-group bias in Judicial decisions' (2010) 7(3) *Journal of Empirical Legal Studies* 428.

[30] D Abrams, M Bertrand, and S Mullainathan, 'Do Judges Vary in Their Treatment of Race?' (2012) *The* 41(2) *Journal of Legal Studies* 347.

[31] [Latin] 'The law does nothing in vain, commands nothing in vain.'

with legal practitioners drew the researcher to the conclusion that an effective test needed to be easily understood by persons without advanced statistical training, because general comprehension by educated persons without a statistical background would have the highest chance of general, sociolegal uptake beyond specialist circles. With ease of understanding in mind, the researcher combed United States, Canadian,[32] Mexican,[33] and European Community law[34] for an applicable test. Seeing that large-scale corporate employment datasets numerically resemble government-maintained criminal statistical datasets, it appeared employment law tests would be the easiest to adapt for assessing criminal law and policy. Initially, this project selected the venerable '80% rule,'[35] that was originally used to test for racial discrimination in hiring.[36] It was selected for this research because (a) it is easy to apply, (b) easy to repeat, (c) easy for reasonably educated people without a background in statistics to understand, (d) does not require offender level data (though such data is preferable,) and (e) enjoys widespread current use.

The beautiful simplicity of the 80% rule is precisely why it remains one of the most widely used tests in anti-discrimination law decades after first being included in the US Equal Opportunity Employment Commission (EEOC) manual.[37] Nevertheless, it is by no means the only viable test. In some situations, such as when using datasets where the sample size contains less than 100 entries, other tests (such as the 'standard deviation test' or Fisher's exact test) reduce the risk of false positives (type 1 error).[38] This led to additional textual research seeking another, more scientific, test to use.

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[32] Canadian Supreme Court jurisprudence on issues of indirect discrimination is largely similar to the US approach, but with a more overt focus on substantive equality than many of its common-law counterparts. *See,* A Yu, 'A Direct Discrimination and Indirect Discrimination: A Distinction with a Difference' (2019) 9(2) *Western Journal of Legal Studies. However,* Canadian jurisprudence difference most from US jurisprudence in applying an asymmetrical standard of review for the legality of positive discrimination. *See also*, T Loenen, 'Indirect Discrimination as A Vehicle For Change' (2000) 6(2) *Australian Journal of Human Rights* 77.

[33] Mexican anti-discrimination law is governed by multiple areas of Mexican law. Notably Article 128 of the Mexican Constitution, and more relevant here, *Capitulo IV de la Ley Para Prevenir y Eliminar La Discriminacion 2018* [Spanish] Capital IV of the Law for Preventing and Eliminating Discrimination 2018' (Mexico). There is no discussion of statistics as in US legislation and regulation. Indirect discrimination is referenced in public discourse since the creation of *El Consejo Nacional para Prevenir La Discriminación* [Spanish] 'National (Mexican) Council for Preventing Discrimination' in 2003 but not in most Mexican legislation. *See,* OECD (2007).

[34] European Community law does not use statistical tests, as statistical tests are widely viewed in the European Community as overly onerous. *See,* Tobler (2005).

[35] *Uniform guidelines on employee selection procedures* (United States) 43 FR 38290 4D Federal Register, 44.43 (1979) 6570-06-M [US] s 1607.4(D).

[36] The base premise of the 80% rule in employment law is that a hiring criterion used by an employer presumptively discriminates when the criterion excludes a disproportionate number of racial minority applicants compared to white applicants.

[37] Ibid.

[38] US Federal Register, 44.43 [1979].

Problematically, most the alternative tests were proposed by defendants seeking to avoid liability, which increases the risk of a false negative (type 2 error).[39] Eventually, this researcher came across a more modern test produced in academic research that is now being used in active litigation instead of a test proffered by a litigant. This second test, termed the 'impact ratio test' by Morris and Lobenz, operates on more statistically accepted principles, but still fully incorporates the 80% rule. Additionally, it was decided not to entirely supplant the 80% rule with the impact ratio test, because the 80% rule is still legally valid, and there is real value to tests that are easily run by legal professionals without a background in statistics or computing.

Later chapters will cover the operation of the 80% rule and impact ratio test in greater depth, but the concepts are laid out for methodological purposes here. The 80% rule operates by dividing the likelihood a particular individual of the majority racial group will be convicted of a particular offence by the likelihood of the overrepresented minority group will be convicted of a particular offence. If the quotient of the two numbers is greater than 0.8, there is no potential of indirect discrimination. If the quotient is less than 0.8, indirect discrimination is likely present absent a reasonable explanation for the adverse impact. The following calculation illustrates the 80% rule:

$$If: \frac{non\ Indigenous\ incarceration\ rate\ per\ capita}{Indigenous\ incarceration\ rate\ per\ capita} \leq 0.8$$

$$Then: TRUE$$

Here is the equation applied using mid-2016 figures obtained from NSW Bureau of Crime Statistics and Research:[40]

$$\frac{163\ (per\ 100k)}{2039\ (per\ 100k)} = 0.07901114881$$

$$0.07901114881 < 0.8$$

$$so: TRUE$$

[39] S Morris, and R Lobsenz, 'Significance Tests and Confidence Intervals for the Adverse Impact Ratio' (2000) 53(1) *Personnel Psychology* 89.

[40] NSW Department of Communities and Justice, *Court Statistics 2016*; data extracted from NSW Bureau of Crime Statistics and Research dataset.

Since 7.9% is below 80% there is a high probability of indirect discrimination present in the system. Furthermore, with such extreme figures, there is a low probability any reasonable justification exists. In fact, one could reasonably argue the only rational explanation for such an extreme result is discrimination does exist somewhere in the New South Wales criminal law.

The impact ratio test was designed to integrate the 80% rule alongside additional data into a more complex algebra-based, two-tailed statistic.[41] That additional data will typically be drawn from either census data or a total possibility pool for both the minority and majority groups in a similar manner to population health research. For the purposes of this chapter, data is drawn from the population, but in actual research a combination of census data and total possibility pool data was applied depending on the aspect of criminal law and procedure being assessed. The following is an illustration of how to set up the impact ratio test equation[42] using ABS incarceration data and ABS census data from year end 2016:

$$If: |Z_{IR}| > 1.96$$

$When$:

$$Z_{IR} = \frac{\ln\left(\frac{SR\ non}{SR\ Indig}\right)}{\sqrt{\frac{1 - SR\ Total}{SR\ Total}\left(\frac{1}{N\ non} + \frac{1}{N\ Indig}\right)}} = \frac{\ln(SR\ non) - \ln\left(SR\ Indig\right)}{\sqrt{\frac{1 - SR\ Total}{SR\ Total}\left(\frac{1}{N\ non} + \frac{1}{N\ Indig}\right)}}$$

$$Then: AFFIRMATIVE$$

In some ways, the impact ratio test is more mathematically straightforward despite being the more complex equation. Where the 80% rule utilises a nonstandard analysis, the impact ratio test is a two tail, normal curve, α=0.05, two standard deviation from μ (the set mean) analysis. In any normal distribution (normal bell curve), roughly 95% of values fall between two standard deviations of the set mean, and a full 99.7% of values fall between three standard deviations of the set mean. In line with modern social statistical theory, the impact ratio test returns an affirmative result at 2α ÷ μ meaning

[41] Morris and Lobsenz (2000).
[42] For readability's sake, the key to the equation is located at *Appendix i.*

any value where $|Z_{IR}| > 1.96$.[43] When this occurs, the likelihood that an adverse racial impact results from naturally occurring chance falls below five percent, thereby meeting the generally acceptable margin of error for social scientific research. The following example equation uses ABS data to illustrate the impact ratio test in operation:

$$Z_{IR} = \frac{\ln\left(\frac{0.0013}{0.0140}\right)}{\sqrt{\frac{1-0.0016}{0.0016}\left(\frac{1}{7581615}+\frac{1}{216176}\right)}} = \frac{\ln(0.0013)-\ln(0.014)}{\sqrt{\frac{1-0.0016}{0.0016}\left(\frac{1}{7581615}+\frac{1}{216176}\right)}}$$

$$|Z_{IR}| = 43.6194$$

$$43.6194 > 1.96$$

$$so: AFFIRMATIVE$$

From a legal evidential perspective, Morris and Lobenz's impact ratio test finds probable discrimination whenever the absolute value of Z_{IR} is greater than two standard deviations from the set mean of a normal curve where α=0.05. In this case, Z_{IR} is roughly 44.5 standard deviations from the set mean, so the impact ratio test confirms the finding of probable discrimination from the 80% rule. Since the result from the impact ratio test is equally as extreme as the 80% rule, in hypothetical active litigation, a defendant (in this case, the state of NSW) would be hard pressed to justify such an egregious evidential finding.

Measurement and Datasets

Australian criminal justice statistics are not kept in a central national database, nor are raw datasets available to the public. Instead, each state maintains its own databases, publishes its own reports, and acts as gatekeeper for researchers seeking to use that data to assess criminal law and policy.[44] In NSW, the coordinating government body is the NSW Bureau of Crime Statistics and Research (BOCSAR). BOCSAR publishes periodic reviews of the NSW criminal justice system and sells datasets to researchers who have already received ethical clearance. The initial pilot research for this

[43] 1.96 is most common because anything beyond 1.96 (two standard deviations or 2SD on a normal curve) is unlikely to occur by chance. Roughly 95% of all values on the normal curve occur within 2SD and 99.7% occur within 3SD.

[44] This is not to say the national Australian government does not involve itself in criminal justice research. The Australian Bureau of Statistics both aggregates state data and collects certain forms of data independently.

thesis and Emory's first two academic conference presentations[45] on the 80% rule used BOCSAR-published research data, whereas later chapters in this thesis use both published reports and custom datasets purchased from NSW BOCSAR. Both the reports and purchased datasets were temporally limited to recent cases, thereby avoiding a problematic issue in the criminological literature where researchers routinely use outdated datasets to discuss present realities.[46]

To control for as many variables as possible, datasets were limited to Indigenous males and non-Indigenous males whose cases were finalised in the NSW District Court. Females were intentionally removed for two interconnected reasons. The first is a scientific fact that Indigenous women face unique challenges, which could potentially skew results. Thalia Anthony,[47] PWC consulting,[48] Human Rights Watch,[49] Australian Human Rights Social Justice Commissioner June Oscar,[50] the Australian Law Reform Commission (ALRC),[51] and others have empirically proven Indigenous Australian women are the fastest growing demographic in government custody across every Australian jurisdiction. The causes thereof are a complex, interrelated set of compounded gender and racial biases. Unlike non-Indigenous women, who are the least incarcerated Australian demographic,[52] Indigenous women are more likely than non-Indigenous men to be incarcerated.[53] The second reason is out of respect for the Indigenous Australian distinction between 'men's business' and 'women's business.'[54] Aboriginal and Torres Strait Islander societies maintain divisions on gendered issues,[55] so this researcher did not consider themselves the appropriate individual to interrogate the Indigenous female space. Therefore, the research utilised an all-male dataset to: (a) avoid conflating the additional gender discrimination

[45] Emory (2017). *See also*, R Emory, 'It Didn't End with the Hougoumont – the ongoing penal colonisation of Indigenous Australia' (Presentation, Balmain Institute 14 November 2019).

[46] MS Nelson, A Wooditch, and SL Gabbidon, 'Is Criminology out of Date?' (2014) 25(1) *Journal of Criminal Justice Education* 16.

[47] T Anthony, 'The Limits of Reconciliation in Criminal Sentencing' in *The Limits of Settler Colonial Reconciliation* (Springer Nature Singapore, 2016) 49-269.

[48] PWC Consulting 'Indigenous incarceration: Unlock the facts.' (online, 17 May 2018).

[49] Human Rights Watch '2018 Country Chapters: Australia.' (Online, 2018).

[50] J Oscar, 'Grace Vaughn Memorial Lecture.' (Speech, Grace Vaughn Memorial, University of Western Australia, 2 May 2018).

[51] ALRC *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report no. 133, 1 December 2017).

[52] L Phelan, M Sotiri and M Scott, 'Profile of women in prison in NSW Part A: A Snapshot 2-5' (online, 2018).

[53] ALRC (2017).

[54] The traditional gender distinctions in mainland Aboriginal Australian cultures are not without their own controversies. For a discussion of the impact the gendered nature of Aboriginal Australian culture has on non-binary Indigenous Australians, *see,* C Kerry, 'Sistergirls/Brotherboys: The Status of Indigenous Transgender Australians' (2014) 15(3-4) *The International Journal of Transgenderism* 173.

[55] *See generally*, Deadly Story, 'Men's and Women's Business' (online, retrieved 2023). *Please note,* this website is run by an organisation that provides cultural education for Indigenous Australian children residing in out of home care. It contains video interviews with Indigenous Australian Elders who may be deceased.

faced by Indigenous women with the racial discrimination faced by Indigenous Australians of every gender[56] and (b) violating Indigenous Australian social morays.

Ideally, the dataset would have been limited to white males as compared to Indigenous males. However, at the time of field research and dataset purchases (2019), NSW BOCSAR did not collect, generate, or maintain any 'racial' data on the number of non-Indigenous people of colour[57] present at any stage of the NSW criminal justice process. Ethnic data is available, but BOCSAR's ethnic data does not distinguish between different racial groups from the same 'nation of origin.' Lastly, data was limited to offences triable in NSW District Court for three reasons. Firstly, District Court charges are more severe than in the Local (magistrate's) Court. This comparative severity of charges leads to the second reason: District Court procedure is more formal than that of the Local Court. Thirdly, there are substantially more trials conducted in the NSW District Court than in the Supreme Court of NSW, since the NSW Supreme Court only tries charges of murder, piracy, and terrorism.

Initial 80% Rule Testing

To pilot the statistical methods, this researcher undertook an investigative study in mid-2017 exploring the feasibility of applying the 80% rule to Australian incarceration rates. The eventual results of that study were presented at a conference at the Alfred Deakin Institute later that year.[58] In the pilot study, research used freely available BOCSAR-produced government reports on NSW incarceration rates that had already been grouped by Indigeneity and gender. That investigation then applied the 80% rule analysis on an offence-by-offence basis, excluding offences with less than 100 persons incarcerated, then less than 100 non-Indigenous persons incarcerated, and finally excluding offences with less than 100 Indigenous persons incarcerated. At each interval, the 80% rule was triggered at a somewhat alarming rate; a rate that correlated with a jurisdiction that is 16 times more likely to incarcerate an Indigenous person than a non-Indigenous person.

[56] Kerry (2014).

[57] Non-Indigenous people of colour are persons who are neither white nor Aboriginal or Torres Strait Islander. This entire demographic is not tracked in NSW criminal justice data, and the Australian census does not track race beyond an Indigenous identifier. Ethnic data is collected, but ethnicity is a proxy variable.

[58] Emory (2017).

Changes and Adaptations

After completing the pilot study used to produce this project's initial conference paper, the researcher purchased a more in-depth dataset from BOCSAR. This thesis' dataset contains, inter alia, Indigenous status, socioeconomic status, location of arrest, location of offence, severity of offence, offender recidivism, and bail status. With these datapoints, research was able to compare Indigenous and non-Indigenous persons accused of similarly severe crimes, with similar socioeconomic status, arrested in coastal metropolitan NSW (where observational field research took place). The project also acquired data to assess racial disparities in pre-trial release (bail) to determine whether the established disparate remand rates result in disparate trial outcomes. Lastly, the researcher acquired additional guilty plea rate data to reconcile conflicting claims from practitioners regarding whether Indigenous Australians were more or less likely to plead guilty before trial than non-Indigenous Australians.

Applying existing statistical-legal tests for racial discrimination in the criminal law is a significant step forward in criminological research as well as criminal legal research. Until now, the trend in criminal legal and criminological research has been to either discuss racial discrimination in the criminal law in abstract terms, or claim non-legal criminological statistics speak for themselves. Furthermore, the 80% rule fits within the ICERD framework by applying tests already embedded in law to an area lacking an internationally accepted test.[59] Therefore, by using well-known legal concepts courts are already familiar with, these statistical methods may persuade courts in future active litigation.

Observational Methods

To elicit a broader range of research evidence beyond that obtained through statistical methods, the researcher sought to integrate observational data collection into the methodology. This was done to determine if discrimination uncovered by either the Rombauer Method or anti-discrimination statistics was visible in courtroom trials. Doing so provides both a qualitative and quantitative evidence base from which to proceed into interpretation and analysis.

This last group of methods tests for two forms of discrimination. The first is indirect discrimination, though in a different context than the statistical methods used in the preceding

[59] *See, Maloney v The Queen* [2013] HCA 28.

sections. The second is the most difficult form of racial discrimination to diagnose: direct discrimination. The critical orientation of this method is that a researcher is physically present in the court, and there are several research benefits to the researcher's physical presence therein. Firstly, by having 'boots on the ground,' it becomes possible to see beyond the record and government statistics allowing the researcher to rule out potential confounding factors from statistical analysis. One chapter in this work, The Oppression in Discretion, does exactly that.

Furthermore, (whilst noting this project was unable to generate a sample large enough to enable such a sample) a researcher keeping accurate data on seemingly trivial behaviour and procedure, it is possible to generate additional numeric data for indirect discrimination tests free from previously documented problems introduced by secondary data.[60] For example, an observational researcher can keep counts of every witness question, every objection, how judges rule on evidential matters, and how seemingly small procedural factors combine to influence trial outcomes. Social scientists have been observing court proceedings for generations but using observational methods to prove discrimination in this way is entirely novel. Later research using a larger research team would substantially benefit from applying these methods to a larger dataset.

In addition, these methods also generate qualitative ethnographic research data similar to any other ethnographic endeavour. The methods contained in the following subsections are, therefore, a framework developed during the initial phase of the project but requiring and benefitting from ongoing evaluation and refinement during court observations. Indeed, iterative design was a vital part of this methodology. Notably, these observational methods are reproducible, repeatable, portable, and built upon on global concepts adaptable to local applications.

Theoretical Framing and Prototyping

Systematic observational studies of Western criminal court trials are rare, and those that exist usually focused on less formal trials that occur in greater numbers, such as local courts[61] or children's courts.[62] Therefore, conducting a scientific observational study of criminal court trials capable of

[60] Nelson et al. (2014).
[61] M Mileski, 'Courtroom Encounters: An Observation Study of a Lower Criminal Court' (1971) 5(4) *Law & Society Review* 473.
[62] J Walter, and S Ostrander, 'An Observational Study of a Juvenile Court,' (1982) 3(3) *Juvenile and Family Court Journal* 53-69.

producing an "oranges to 97-percent-oranges comparison,"[63] required designing a new method for the specific task at hand.

In the earliest stages of project design, this observational study was intended to be conducted in a way that would examine the courts from both a legal and scientific perspective. Studies often do one or the other, but rarely does a single study attempt to marry concepts of social science to concepts of law; or to combine quantitative and qualitative methods. Maureen Mileski, an early colleague of Donald Black (the creator of 'Pure Sociology,') was among the first to apply modern ethnographic observational research methods to a Western trial court.[64] However, Mileski's methods did not target any specific issues of law. Gazal-Aya land Sulitzeanu-Kenan[65] observed a substantial number of bail hearings, but did not apply any legal tests. Walter and Ostrander[66] on the other hand, used layperson, volunteer research assistants to observe a substantial 627 juvenile proceedings over a relatively brief period. More importantly, Walter and Ostrander's project design successfully proved systematic judicial noncompliance with a legal doctrine. Their work largely guided this project down a similar path: using scientific observational methods to make an intrinsically legal argument.

The study observed 16 randomly sampled full proceedings, as well as an average of 15-20 of short matters a day (such as minor appeals and pre-trial hearings) on non-trial observation days. Observations took place across over a dozen courtrooms in several cities in coastal, urban NSW from August 2018 to November 2019. If resources were a non-issue research would have used law students or paralegal students with a basic understanding of the law as research assistants to increase the scale of the project to the dozens of full proceedings observed in Walter and Ostrander's work. However, this project could not afford trained or even training volunteer research assistants. This method can therefore be implemented by a single researcher — so long as the researcher is sufficiently trained and dedicated to accomplishing the rigorous task of solo data collection in trials containing upwards of 40 actors. On the other hand, courtroom observation could be valuably enhanced with a team of researchers.

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[63] The term "oranges to 97-percent-oranges comparison" comes from an unnamed source in a Washington Post article on hyperincarceration. M Lee, 'Yes, U.S. locks people up at a higher rate than any other country' *Washington Post* (7 July 2015).

[64] Mileski (1971).

[65] Gazal-Ayal and Sulitzeanu-Kenan (2010).

[66] Walter and Ostrander (1982).

Borrowing a term from experimental jurisprudence, this methodology constitutes a 'natural experiment.'[67] As with other forms of experimental research design, this method limits conflating variables, implements random assignment, and utilizes a control group with which to compare the independent variable group in a manner more akin to natural scientific research. Those variable controls, in turn, enable the research to extrapolate scientifically valid findings from a relatively small sample. With regards to variable controls, all court matters observed were deliberately limited to males accused of an indictable offence represented by government-funded defence lawyers. The two groups for comparison were Indigenous males represented by the Aboriginal Legal Service NSW/ACT[68] and non-Indigenous males represented by Legal Aid NSW.[69] While it would have been preferable to compare majority group (self-identified Anglo-Celtic or 'white Australian' males) or even white males, this was impracticable for reasons that will be made clear in following subsections. Likewise, only certain types of cases could be observed due to privacy restrictions on the open court doctrine in NSW. For example, this research was unable to observe any cases with a minor victim, domestic violence, or sexual violence because such matters are subject to non-publication orders.

Observational Dataset

A key innovation in dataset selection for observational methods was obtaining Indigenous and non-Indigenous identifier data from the accused's legal counsel's internal records. Previous studies identified ethnicity and race either by the observer's visual estimation[70] or by using proxy variables such as the ethnic origins of surnames.[71] This research needed no such proxy variables or any visual estimation of the accused's race. Likewise, this study's use of legal counsel's records to provide trials for observation created a more reliable layer of separation that is entirely non-existent in prior studies. Some studies, such as Mileski's observational study of lower courts in the US, or Gazal-Ayal and Sulitzeanu-Kenan's natural experiment on Jewish and Arab ingroup bias in bail hearings, relied on the natural randomness inherent in the assignment of matters to judges. Other studies, such as Walter and Ostrander's observational study of American juvenile courts, attempted to come as close to complete sampling on any given day as was possible, using a substantial number of volunteer research

[67] Gazal-Ayal and Sulitzeanu-Kenan, (2010).
[68] The Aboriginal Legal Service or ALS provides courtroom advocacy for Indigenous Australians in NSW and the ACT on a variety of issues, one of which is criminal defence.
[69] Legal Aid NSW provides indigent criminal defence counsel in NSW.
[70] *See e.g.,* Mileski (1971); Walter and Ostrander (1982).
[71] Gazal-Ayal and Sulitzeanu-Kenan (2010).

assistants.[72] This project's observational dataset on the other hand began with a set of matters already filtered by legal counsel for gender, open court status, and Indigeneity for the coastal region of NSW. As such, this research project was able to implement *intentional* randoms and a single-blind system to select proceedings for observations.

To select the actual dataset cases, ALS and Legal Aid[73] lists were used to build an agenda of several dozen cases to potentially observe. Most weeks, multiple Legal Aid cases were committed to trial, and a single researcher could not hope to be in two places at once. Furthermore, the overt majority of NSW District Court criminal matters end in settlement prior to trial. The wider Common Law's overwhelming preference for plea bargaining[74] [75] is by no means universal,[76] but in New South Wales where that preference was statutorily enshrined in 2017,[77] it was functionally impossible for the researcher to determine which cases would proceed until the day a matter was scheduled to commence. To keep the agenda current, this researcher checked the online NSW criminal district 'court lists' on a near daily basis to update their own case lists. The morning a trial was scheduled to proceed, if multiple trials were still listed, each case a number was assigned priority using a random number generator[78] and the researcher attended the case with the highest random number. As a result of its unique multilayer randomisation, this methodology achieves a greater degree of randomness than used in previous research that relied on natural randoms, and greatly reduces the potential for selection bias. This more precise random sample and strict variable controls thereby reduced confounding variables, reduced selection bias, reduced the need for racial estimations, and completely eliminated proxy variables. Therefore, these 16 matters listed for trial may appear small numerically, but the ethnographic data displays greater scientific weight than a larger number of trials observed without this advanced sampling technique.

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[72] Walter and Ostrander (1982).

[73] In NSW there are two main government-funded criminal defence agencies. The Aboriginal Legal Service provides all Indigenous persons in NSW access to free criminal defence counsel. NSW Legal Aid provides indigent persons regardless of race or Indigenous status free or reduced cost criminal defence counsel.

[74] Plea-bargaining is the overwhelming norm in common law jurisdictions, as has been mentioned in US Supreme Court jurisprudence. *See*, G Chin, 'Federalism and a Fantasy of Full Enforcement: Justice Scalia on Plea Bargaining' (2012) 25(2) *Federal Sentencing Reporter* 135. *See also, Lafler v Cooper*, 566 U.S. 156 (2012).

[75] It is worth briefly mentioning that within the common law, there is substantial variation on how plea-bargaining operates. The Americans, for example, are allowed to negotiate the penalty, whereas several Australian jurisdictions prohibit negotiating sentences.

[76] Plea bargaining remained entirely prohibited in the Nordic legal systems until recently, and Sweden still maintains that prohibition. *See,* L Ervo, 'Plea Bargaining Changing Nordic Criminal Procedure: Sweden and Finland as Examples' in *Rethinking Nordic Courts* (Springer, 2012).

[77] *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* (NSW).

[78] The preferred method of random number generation was a single six-sided die, but on a few occasions, the researcher used a software random number generator.

Measuring Legal Process

The most difficult aspect of observational research was discovering which metrics and measurements would prove useful and beneficial. At each legal procedural stage there is a winner, a loser, a timestamp, and usually a known outcome. However, not all observable phenomena will produce data useful for assessing the research objectives, making choosing what to observe a critical step in research design. In the earliest planning phases, this researcher initiated an email dialog with Donald Black and Maureen Mileski (now Tabor) seeking advice on how best to document courtroom processes. Donald Black and Maureen Mileski's approach has its advantages but is targeted more at understanding the nature of law itself (the reason de jure for Pure Sociology's existence). This methodology needed something different. In a stroke of luck, the researcher made an advising appointment with Professor Sally Engle Merry who was visiting the ANU College of Law. In that meeting, Professor Merry pointed research in the direction of focusing beyond the record and discouraged overly leaning on quantitative design (in line with her most recent book).[79]

After familiarising themselves with NSW criminal procedure and spending a week observing trials at the ACT Supreme Court,[80] the researcher brainstormed a list of variables they might observe in court from their existing understandings of criminal trials across Australia and other jurisdictions. The project initially leaned towards recording only information beyond the record, before learning NSW District Courts do not always produce a transcript. Furthermore, purchasing criminal transcripts would overrun the entire project budget. Upon learning ethnographic data collection required documenting much of what enters the record, the researcher scrapped these initial, longer variable lists. Taking advice from Professor Mark Nolan at the ANU College of Law, data collection began focusing on ways to document event timing and to link happenings in the courtroom to trial procedure. The advantage of tying observations to procedure immediately became obvious: procedure is a set series of measurable moments in a trial. If certain observations proved irrelevant, procedural observations would still be usable. Additionally, procedure provides the common map of a trial, grounding all observations to events any legal practitioner/academic will understand and providing

[79] SE Merry, 'The seductions of quantification: measuring human rights, gender violence, and sex trafficking' (2020) 44(4) *Journal of Law and Society* 726.

[80] A different, but related, jurisdiction since ACT criminal law and procedure is based heavily on a recent codification of NSW criminal common law and procedure.

more robust comparative bases for analysis across cases. This project is a hybrid of both social science and law which necessitates tying the science to legal milestone from which to measure.

Site Selection

One of the most important determinations in applying this methodology was research site selection. Some sites have sufficient minority population density to generate a viable sample of trials, whereas others will not. In Australia, nearly half the Indigenous population lives in two cities (Sydney NSW, and Brisbane QLD). Sydney and coastal NSW were eventually selected for two reasons. Firstly, Sydney provided a larger potential dataset. It is the single largest Indigenous Australian community, and NSW incarcerates a larger number of Indigenous Australians than QLD. Second, there exists a public perception in Australian politics that northern states are more racist and less civilized than their southern counterparts. Researching in QLD could be written off as racism in the 'deep north' whereas researching in NSW shines a stronger light on the country as a whole.

Piloting and Data Collection

Unlike the indirect discrimination and disparate impact pilot which was completed in a few weeks and presented to the academic public not long after,[81] piloting and refining observational data collection methods was a three-phase process that took over a year to complete. This subsection deals with each of the three pilot phases in chronological order, addressing how each informed the final observational methodology.

Before going into a District Court criminal trial in NSW, the researcher undertook preliminary methods development testing using exploratory open coding in the ACT Supreme Court over the course of approximately two months, primarily on Mondays and Tuesdays. These initial developmental forays mostly concerned learning and testing what to observe and what to code. This process was attuned to emergent characteristics and variables, in order to be alert to the actual court room performance. Observations gradually shifted from more generalized, timecoded event documentation to procedural elements, as is the norm in Legal Anthropology.[82] However, several other factors stayed in the coding system throughout the entirety of field research. These variables were more human-

[81] Emory (2017).

[82] A focus on procedure in observational-legal research is called the 'processual approach' or 'processual paradigm' in legal anthropology. *See,* SF Moore, 'Law as Process: An Anthropological Approach' (1978) 6(1) *British Journal of Law and Society* 135.

centric observations such as the estimated race, age, and gender of everyone in court alongside observed attentiveness of jurors and accused persons on a ten-point scale. While there will always be inter-researcher variations in subjective determinations such as attentiveness, such subjective observations can go beyond the court's record and thereby generate data not otherwise obtainable. I initially began coding in a paper notebook by hand, but quickly requested special dispensation from the courts to bring a laptop computer into the courtroom to accelerate coding and increase the amount and complexity of collected data.

After continuously refining the coding system for the next nine or so months, the researcher undertook a second methods test at the Parramatta District Criminal courthouse list court and the Sydney Downing Centre criminal District Court short matters (list) court. These pilots assisted in developing a shorthand system for listing all those present in court not too dissimilar to a sporting event scorekeepers' shorthand.[83] Additional methods testing took place on single days of criminal trials at Sydney Downing Centre, before then proceeding to a final methods development test over the course of a complete trial.

Piloting in a full criminal trial from start to finish exposed problems with the proposed observational system. Firstly, it was not possible to maintain a real time excel spreadsheet of quantitative data and take notes of qualitative data at the same time. Trials simply move too fast and last too long to keep up with two divorced sets of fieldnotes. By the middle of trial, fieldnotes were converted into a simpler format. This included keeping countable data such as witness question count, objection count, and jury pool size in tally form on paper, while still typing other observational data into a word processor. At the end of each day, count data was then integrated into that day's word processing document, which included a series of tables I could export into statistical software. To avoid losing journals, during periodic trips back to Canberra, notebooks were electronically scanned into a digital format and the digitisations were then placed into encrypted file storage along with the other digital field research data.

Codes

[83] Found in *Appendix ii.*

A list of commonly used observation variables is contained in *Appendix ii.* On top of this list, when an abbreviation exists in *The Bluebook* (20th edition),[84] the researcher employed that shorthand rather than develop their own. Additionally, this project measured dozens more issues which were not conducive to shorthand. Longhand data included the subjective strength of the evidence, obviously racist behaviour by someone in the courtroom, and a running account of the goings on in court. Longhand data trended more towards observations and descriptions, perhaps more in accord with anthropological or sociological ethnographic methods, but such data provides contextual richness to the shorthand coded observational data. Likewise, codes and abbreviations evolved over time, sometimes from longhand observations, which is the best-practice norm in observational research.

Iterative Research method - Changes and Adaptations

Research was initially designed to take place at a single courthouse, but after a series of conversations with senior personnel at the Aboriginal Legal Service NSW/ACT (ALS) and Legal Aid NSW, it became apparent that no single courthouse in Australia had enough open court trials of Indigenous accused males to produce a workable dataset. Research therefore expanded to trials in Sydney, Parramatta, Wollongong, Campbelltown, and Newcastle. Expansion proved fortuitous as it provided a markedly richer dataset.

About seven months into field research, it became apparent that many criminal matters ended with a guilty plea in the days before trial. This required additional time in Sydney, eventually extended field research from nine months to slightly over a year. Even with the extension, the dataset was not going to be as large as initially planned and necessitated including last-minute guilty pleas made in the list court or to the district trial court judge because they unexpectedly provided valuable data. Finally, the researcher began working on ways to use interview data to buttress observational courtroom research and overcome temporal limits inherent in all field-based research.

Practitioner Interviews

As 20 matters listed for trial would not provide anything similar to the kind of long-term picture NSW criminal law practitioners have, interviews became an essential tool to incorporate professional expertise from lawyers and judges into later data analysis. Interviews, when combined with

[84] Harvard Law Review Association, *The Bluebook: a uniform system of citation* (20th ed., 2015).

observational data, produce a more robust picture of whether courts racially discriminate in practice. The responses interviewees gave were largely anecdotal, but legal practitioners are professionally trained to recognise both inconsistencies and patterns. For example, every criminal defence lawyer and every prosecutor had seen cases they believed were a perversion of justice, and those interviewees had spent significant time and energy contemplating the complex social and legal factors leading to a perverse verdict in court. Where several interviewees agreed on the social and legal factors in play, interviews provided strong evidence an issue required further attention.

Furthermore, practitioner interviews enable this methodology to push beyond the temporal boundaries of observational field research, and in some ways extend the dataset into both the future and past. Additionally, interviews also provide local knowledge for an outside researcher like me. This researcher has years of academic legal experience both inside and outside of Australia, but Australian practitioners have a deep insider view that this researcher's more distant, comparative perspective lacks. Thankfully, every interviewee was more than willing to educate the researcher on the peculiars and particulars of the NSW criminal legal system they may not have otherwise properly understood.

While it was unknown at the time, the most important benefit from interviews was their usefulness guiding both quantitative and qualitative data analysis. This research project generated significant sums of mixed methods data that would have taken years to assess without some idea of which criminal laws, procedures, policies, and practices were most likely discriminatory. Interview responses provided a basis for intelligently searching through data by drawing on interviewees' combined professional experience and local courtroom knowledge. For example, it was interviews that pointed out the connection between bail for the accused and final disposition. Likewise, it was interviews that first enlightened the impact of prosecutorial discretion in withdrawing charges.[85]Furthermore, interview data illuminated the importance of so called 'convenience pleas'[86] and their connection to recent changes in NSW criminal procedure and evidence law. While it may be possible to uncover such connections without practitioner interviews, the added time and cost involved in data analysis makes doing so unwise.

[85] Later chapters will show in detail how both issues serve to discriminate against Indigenous males.

[86] A convenience plea is when an accused person pleads guilty to a crime despite a realistic possibility they may prevail in court due to some outside pressure on the accused.

Interviewee Selection

To secure a balance of viewpoints, the project sought to interview equal numbers of lawyers from the NSW Director of Public Prosecutions, NSW Legal Aid, the Aboriginal Legal Service of NSW/ACT (ALS), and NSW District Court Judges. Seeking a round figure and parity between all four employers, the researcher aimed to interview 3 lawyers/judges from each group. At the encouragement and advice of Legal Aid NSW, NSW Justice, and the ALS NSW/ACT, interviewee criteria included a minimum number of 5 District Court trials, and the researcher only interviewed judges actively practising in court between June 2018 and June 2019.

Judges were selected on advice of former ALRC Commissioner Judge Myers,[87] and other research colleagues, but the ALS, DPP, and Legal Aid selected and provided lawyers for interview based on the aforementioned criteria. It might have been possible to seek out more interviews but considering the yearlong process in scheduling and piloting coupled with the months of negotiations that were necessarily involved in being able to obtain access both to the courts and to people, the desired 12 interviews dwindled to 10; some people simply became too busy to participate. That final interview dataset included 2 DPP senior prosecutors, 2 NSW District Court Judges, 3 ALS solicitor advocates, and 3 Legal Aid solicitor advocates. 3 respondents were female, 7 were male. None were Indigenous.

In an ideal world there would have been gender parity and a broad racial sample among those interviewed, but there is still a significant diversity problem in the Australian legal profession that worsens at the higher levels of the profession. The majority of practising solicitors in NSW are female, but the majority of judges are male, and the vast majority of members of the bar and senior Crown prosecutors are male.[88] There was no data available at the time for gender disparity among solicitor advocates, but visual estimation in courtrooms showed the problem existed at the solicitor advocate level as well.

Likewise, it was not possible to interview a single Indigenous Australian barrister or solicitor advocate in the field locations in which observational research was conducted. NSW has 76% of the nation's known Indigenous Australian solicitors (Victoria does not currently have data on Indigenous

[87] Judge Myers led the ALRC inquiry into Australian Indigenous incarceration from 2017 to 2018. It was the largest such inquiry in Australia since the Royal Commission into Aboriginal Deaths in Custody.

[88] Law Society of NSW, *2018 National Profile of Solicitors Final* (Report for the Law Society of NSW. Report no. ESA12418, 17 July 2019); NSW Bar Association, 'About Us, Statistics' (online, 2023).

solicitors,)[89] meaning NSW has more Indigenous solicitors than all other states with reported data combined. However, despite this, NSW is still nowhere near population parity for Indigenous persons in the practice of law. Indigenous Australians make up about 2.8% of the NSW population,[90] but only comprise 1.4% of the law society,[91] far less than 1% of the NSW bar,[92] and during field research there was not a single Indigenous Australian NSW District Court judge. Over the course of fieldwork, the researcher did not encounter an Indigenous solicitor advocate, barrister, or Crown prosecutor with more than 5 trials, who was currently trying cases in NSW District Court. The researcher did meet several Indigenous administrators as well as several junior lawyers training to become solicitor advocates, yet none of these individuals met the interview criteria agreed to by partner organizations during access and ethics negotiations with the researcher.

Changes, and Adaptations

The initial interview draft had over 40 questions in length and focused primarily on detecting bias and opinions about bias among practitioners. After realizing the observational dataset would be smaller than initially planned, and take place in several courthouses across NSW, the interview structure was entirely overhauled. Again, a quick process of testing that questionnaire with academics at the ANU and in Sydney, and amongst this researcher's wider international network, identified a core of topics and questions. The new interview structure focused primarily on criminal trial process, evidence, procedure, and court craft to integrate the years of experience from senior defence solicitor advocates, senior Crown prosecutors, and experienced judges into the research.

After this informal review of questions, the researcher conducted a pilot interview with a criminal law practitioner (a prosecutor with the Commonwealth Office of the Director of Public Prosecutions) in Sydney in March 2019. During the piloting process, three questions were removed from the substantive question set. One question was removed because the concept was somewhat foreign to the Australian law so it was awkward and perhaps confusing, and two other questions because they would not produce valuable interview data. The remainder of the questions worked, though several needed rewording to flow smoothly.

[89] Ibid.
[90] ABS, 'New South Wales remains Australia's most populous state' (online, 2017).
[91] NSW Law Society (2019).
[92] Australian Bar Association, *Indigenous Members* (n.d.).

Piloting the questions in such ways was an essential part of the recursive method design process, as was delaying the conduct of interviews until the tail end of field research. By waiting to use observational research in designing questions this researcher was able to tailor questions to more relevant inquiries. By piloting interviews, the researcher was able to ensure questions worked, and were conducive to elucidating more information than courtroom observations could have alone. Had questions been written too early on, or had they not been piloted, the project evidence base would be lesser for it. The final set of interview questions is found in *Appendix iii*.

An Additional Photographic Method

The specific details of this method are found in *Appendix vii* after the bibliography, but its later addition to the initial methodology is substantial enough as to warrant including it here since it showcases the flexibility and adaptability of this methodology for future research. As the researcher discovered travelling outside of Sydney for additional data collection, it became apparent that courthouse exterior architecture influences how New South Wales trials play out – which surprised the researcher. This methodology was initially designed with the expectation that *courtroom* design would play a role in process and courtcraft since the interrelationship between internal courtroom design and courtcraft is, to some degree, inevitable. In Australia, the accused sits in the dock, which is sometimes glassed in, and the legal practitioners for both the Crown and the accused usually share a bar table. The very courtroom configuration necessitates a different manner of courtcraft than other common law jurisdictions such as the United States where the dock has been abolished and the standard practice in criminal trials is for the accused to sit next to their legal representative throughout trial.[93]

However, during fieldwork, something unexpected occurred. The architecture was not overtly discriminatory in the sense that it was not *required* for NSW District Court buildings to be constructed in an exclusionary way. Nevertheless, the buildings were still overwhelmingly exclusionary in a manner creating visible discomfort for every Indigenous person who found themselves therein. That unexpected revelation gave rise to another iterative methodological design decision: the researcher travelled to all 30 NSW courthouses with District Court criminal trial sitting dates to photographically

[93] M Rossner et al., 'The dock on trial: courtroom design and the presumption of innocence' (2017) 44 (3) *Journal of Law and Society* 317.

capture them all. This, in turn, led to a GIPA[94] request for NSW Department of Communities and Justice data on judicial infrastructural capabilities across the state.[95] The end products of these later-stage methodological additions are: (a) the gallery show in The King's Courts (*Appendix vii*), and (b) the related sociolegal chapter (An Infrastructural Institution) that draws on said gallery show for data.

The significance of these changes is in highlighting the importance of reflexive assessment and iterative research design throughout the entirety of the research process. Furthermore, these unexpected additional methods demonstrate the flexibility of methodological design and its applicability for future researchers. This methodology was intentionally designed to allow such researchers to take from it what they will – but also add to it. In other terms, one of the primary benefits of this methodology is that while there are few modifications necessary to apply this research to other jurisdictions outside of Australia, this methodology is also conducive to adaptation when the facts on the ground unfold differently than expected. Even in this specific research project, the adaptability of this design has proven itself on many occasions, and in so doing, creates a wider range of possible applications than it was originally designed for. This methodology is targeted at finding discrimination within a legal framework, but certain forms of discrimination will always exist beyond the remit thereof. To assess such problems, this methodology can and should be used in conjunction with other methods, in order to better serve the specific needs of a particular jurisdiction.

Conclusion

The fundamental purpose of this chapter is to document the design of an innovative methodology and multi-disciplinary set of methods to address a complex research and real-life problem. Legal research has gradually begun to leave the walled garden of its historical confinement, and this paper hopefully pushes those boundaries even further. The motivation here (apart from documenting the design and resulting robustness and validity of the methods) is to enable other researchers to borrow from, expand on, and hopefully add to this new arena of applied social scientific legal research. While there are a small number of studies using experimental methods testing issues of law, the more common socio-legal schools of thought such as experimental jurisprudence and pure sociology largely exist as theoretical scientific approaches to studying law.

[94] *Governmental Information (Public Access) Act 2009* (NSW).

[95] The NSW Department of Communities and Justice created new records to respond to this request, since prior to answering this GIPA request, the Department did not keep central counts of their own infrastructural capacity.

This methodology, therefore, represents something exciting and new. It is an innovative approach to researching complex legal phenomena that cannot be accomplished using traditional legal research methods in isolation. Interdisciplinary research, on the other hand, offers another way forward: using social scientific methods to make and prove intrinsically legal arguments. For example, this project's interview questions were redesigned to account for data generated during courtroom observations, and the observational methods were designed using a deliberately iterative process. This iterative interrelationship is the key to successful interdisciplinary research because no single method could hope to assess a legal system for something as complex as racial discrimination. However, when multiple methods are used in conjunction, the resultant methodology becomes capable of uncovering new understandings of legal phenomena that provide real-world, practical benefits for historically oppressed peoples.

Keeping in mind that the entirety of the thesis utilises the methodology contained herein, readers will observe only the Rombauer Method is found in every chapter. Where necessary, later chapters expand on particular methods inside their own discrete methods sections, thereby expounding on the specific methodological concepts each raises in turn. The two immediately following chapters utilise the statistical methods from this methodology, with The Racism of Remand doing so to the largest degree of any chapter in the work. Likewise, both The Oppression in Discretion and Racial Realities use ethnographic courtroom observational methods, and Racial Realities relies almost entirely on ethnographic data. A Troublesome Tendency similarly contains a limited use of the prior observational and statistical data collected using this methodology, coupled to a Rombauer Method legal analysis guided by themes arising from practitioner interviews. The photographic appendix, The Kings Courts, is somewhat unusual in that it utilises unique photographic methods not directly utilised elsewhere in the thesis, but the chapter that grew out of it, An Infrastructural Institution, employs other methods described in this chapter. Such a flowing design of interwoven methods is intentional and should assist readers in transitioning between the various methods collectively forming this thesis' overarching methodology.

IV.

The Racism of Remand

Applying existing anti-discrimination tests to pre-trial detention in NSW

Purpose and Scope

Having now set out the methodology for the overarching project, this particular chapter is an analysis into racial discrimination in NSW's pre-trial detention scheme. Under that scheme, 57.88% of non-Indigenous male accused are released into the community before final resolution of their criminal matter, but only 34.92% of Indigenous males facing a pending indictment are released back into the community. While this chapter is primarily a statistical sociolegal endeavour, it is important to note from the outset that its original basis is a direct interview response to question 27.[1] According to that judicial interviewee, the single most beneficial change for Indigenous males accused of indictable offences in NSW would be reinstating the common law presumption of bail.

This chapter, therefore, begins with a legal justification for the statistical tests it applies, illustrating that the *Racial Discrimination Act 1975* (Cth) (RDA) and *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) binds all Australian constituent states and forbids indirect discrimination of all forms in criminal law. After setting out the legal concept and laying out the applicable Commonwealth law, this chapter discusses existing research creating a reasonable inference that indirect discrimination exists in the NSW pre-trial detention system. Then, this chapter further illuminates the ways by which this study tested for indirect discrimination in NSW pre-trial detention and practically applies those methods to *Bail Act 2013* (NSW). Following the data analysis, this chapter demonstrates how pre-trial detention serves as one of the single largest factors (if not the largest factor) in why fewer Indigenous people prevail against NSW criminal indictment compared to their non-Indigenous counterparts. Finally, this chapter closes by claiming the NSW pre-trial detention system indirectly discriminates in a manner that negatively impacts trial outcomes and discussing the significance of doing so in the academic body of literature.

[1] *See, Appendix iii*.

Disparate Impact, Disproportionate Impact, and Over-representation

Any discussion of Indigenous incarceration in Australia will inevitably contain the word 'over-representation.' The term has its value, especially in politics and the social sciences. However, in a legal setting, the term is inappropriate. Juridically, the applicable terms are disparate impact, disproportionate impact, or indirect discrimination. Recalling the second chapter of this thesis, as a sociolegal concept, racial discrimination by Westphalian state actors is not based on over-representation in and of itself. Rather, racial discrimination, in this context, involves whether legislation, regulations, rules, and/or policies disparately affect a racial group in a negative way. Therefore, discussions of over-representation, to some extent sidestep the issue by discussing statistics and probabilities as if they speak for themselves. To avoid doing the same, this thesis focuses on the Australia as a Westphalian state actor using the typology set out in The Laws of the Lands. As such, this section addresses the legal concept of indirect discrimination as it applies to this research.

Scholars largely agree that indirect discrimination, in its current form, originates in American case law.[2] As previously mentioned in The Laws of the Lands, the first modern application thereof is the US Supreme Court's decision in *Griggs v Duke Electric Power Co,*[3] and since creating the doctrine, American courts have interchangeably used the terms 'disparate impact' and 'adverse impact.' Outside the United States, the legal doctrine is now more commonly referred to as indirect discrimination. Nomenclature aside, *Griggs* stands for the proposition that beyond a certain point, actions disproportionately disadvantaging racial minority populations become racially discriminatory regardless of the alleged discriminator's purported intentions.

This same concept applies, in a similar manner, to Indigenous pre-trial incarceration in NSW. As is made plain by following sections, the question at issue is not whether the NSW Legislative Assembly deliberately disadvantaged Indigenous accused persons when drafting *Bail Act 2013* (NSW). Nor is it germane whether the causes of Indigenous over-representation in pre-trial detention originate historically. The relevant sociolegal questions are simply: (a) whether a discriminatory, disparate impact exists, (b) whether that discriminatory, disparate impact infringes upon a protected

[2] C Tobler, *Indirect Discrimination: A case study into the development of the legal concept of indirect discrimination under EC law* (Intersentia, 2005).
[3] 401 U.S. 424 (1971).

human right, and (c) whether that discriminatory, disparate impact can be directly attributed to New South Wales legislation, regardless of the NSW Legislative Assembly's parliamentary intent.[4] In this chapter, as with every other chapter, the relevant right is found in ICERD art. 5(a), the right of all racial groups to functionally equal treatment before the organs of justice.

Applying Disparate Impact to Australian Criminal Legislation

This section addresses the sociolegal validity of applying existing adverse impact testing to criminal legislation in NSW. It is a settled issue of Australian domestic federal law that the *Racial Discrimination Act 1975* (Cth) forbids discrimination by Australia's constituent states. Justice Mason's ruling in *Gerhardy v Brown*[5] illustrates that s 10(1) of the RDA is a substantive equality provision triggered 'where persons of a particular race, colour, or origin do not enjoy a right that is enjoyed by persons of another race, *or do not enjoy that right to the same extent.*' (emphasis added).. The High Court's plurality decision[6] restated Justice Mason's position in *Western Australia v Ward,*

> *In determining whether a law is in breach of s 10(1), it is necessary to bear in mind that the subsection is directed at the enjoyment of a right; . . . . it [does not] require that the law, in terms, makes a distinction based on race. Section 10(1) is directed at "the practical operation and effect" of the impugned legislation and is "concerned not merely with matters of form but with matters of substance".*[7]

The Court's plurality in *Ward* never explicitly references indirect discrimination by name, but Justice Callinan makes it clear he believed the court had interpreted s 10(1) of the RDA as forbidding racial discrimination notwithstanding parliamentary intent.[8] According to Justice Callinan, the Court's plurality in *Ward* effectively construed s 10(1) of the RDA to ban facially neutral laws with disparate impact on minority groups.[9] The High Court's history, therefore, shows the core legislative purpose of s 10(1) is to ensure substantive equality before the law *in practice*, not just theory.

The current *legal* test (as opposed to a statistical or evidential test) applied by Australian courts sets out several sub-elements that RDA s 10 claimants must establish. Firstly, RDA s 10 protects racial

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[4] *Western Australia v Ward* [2002] HCA 28, 54.
[5] *Gerhardy v Brown* [1985] HCA 11.
[6] A plurality opinion is not technically legally binding because the court could not form a majority of judges sharing a single position. However, plurality opinions are still predictive of how a court will rule in the future.
[7] *Ward* 54.
[8] Note the similarity between Justice Callinan's judgement and the analysis of the majority in *Griggs*. *See,* Ibid (Callinan J dissenting at 388); *Griggs* 424.
[9] *Ward* 388.

groups as classes, not individual members thereof, because s 10's purpose is to ensure all racial groups collectively receive equal treatment under Australian law.[10] The next mandatory element is a legitimate, good faith claim that the impugned legislation actively infringes upon an ICERD art. 5-protected human right. Under present case law, such claims exist regardless of race neutral parliamentary draughtsmanship and notwithstanding benign legislative intentions. Instead, claimants proving the impugned legislation creates a racially disparate impact will sufficiently establish an ICERD art. 5 right's infringement.[11] Furthermore, Australian courts do not allow a reasonability defence against RDA s 10[12] claims, so when constituent state legislation racially impedes an ICERD art.5 right, only RDA s 8 'special measures' will withstand judicial scrutiny. Should the offending legislation not be a RDA s 8 special measure, it will be deemed inconsistent with federal legislation as per Australian Constitution s 109.[13]

Importantly, the RDA case law overtly states s 10 offers a broader set of protections than those contained in s 9. In *Maloney*, Justice Hayne stated, 'the reference to discrimination is apt to bring conceptual baggage which has been developed in other contexts but which finds no reflection in s 10.'[14] His Honour further discusses, in detail, that RDA s 10 applies in a different manner (namely by omitting multiple elements required under s 9) and that RDA s 10 provides greater protections than the more traditional protections against indirect discrimination found in RDA s 9.[15] On this issue, Justice Hayne and Chief Justice French are in agreement.[16] Thus, *Maloney* demonstrates that due to RDA s 10's increased breadth over s 9, the party alleging constituent state legislation violates s 10 is not *required* to prove the additional elements necessary in s 9 direct and indirect discrimination claims. Nevertheless, nothing in the current body of High Court jurisprudence *precludes* a claimant from using similar evidential methods to those used in RDA s 9 litigation when alleging s 10 violations.

It is also a settled matter of black letter, Australian law that RDA s 10 prohibits racially discriminatory criminal legislation. In fact, the High Court directly considered the RDA's and ICERD's applicability thereto in both *Gerhardy v Brown* and *Maloney v The Queen. Gerhardy* and *Maloney* arise

[10] N Rees, S Rice and D Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 2014) 219.
[11] *Maloney v The Queen* [2013] HCA 28 (French CJ at 11 & 38).
[12] *Maloney* (French CJ at 39).
[13] Ibid.
[14] *Maloney* (Hayne J at 68).
[15] Ibid.
[16] *Maloney* (French CJ at 39).

from s 10 challenges to potentially directly and indirectly discriminatory criminal legislation, respectively. In both instances, the High Court unequivocally held that RDA s 10 applies to Australian constituent state criminal legislation whilst then upholding the challenged criminal laws as valid RDA s 8(1) special measures. Specifically, Justice Gageler stated in *Maloney*, 'It was uncontroversial in each of those cases, as it is uncontroversial in this case, that s 10 of the RDA gives effect to Australia's obligations under Arts 2(1)(c) and 5 of the [ICERD.]' [17] As such, RDA s 10 plainly binds the criminal law, and Australia's various legislatures may not pass racially discriminatory criminal legislation absent RDA s 8 special measures.

Notwithstanding the High Court's in-depth discussions of RDA sections 8 and 10 in *Maloney*, *Gerhardy*, and *Ward*, there remains a substantial gap in Australian racial discrimination jurisprudence as it applies to the criminal law. While the High Court has repeatedly applied both the RDA and ICERD to Australian constituent state criminal legislation, the Court has not yet been presented with a matter requiring that it sets out the specific evidential manners by which claimants must: (a) establish criminal legislation indirectly discriminates, (b) establish a disparate impact flowing from criminal legislation when such impacts are not obvious, or (c) establish a systemic bias in the application of criminal legislation. Instead, the *Maloney* court treated the claimant's alleged racial disparity as an inherent aspect of the challenged legislation before applying an RDA s 8 analysis. Similarly, in *Ward*, the court also remained silent on the issues of evidential proof and statistical testing because the High Court deemed the challenged legislation inherently discriminatory.

Since no statistical or otherwise dispositive evidential tests exist in the current High Court jurisprudence applying RDA s 10 to the criminal law, one must seek answers from other RDA provisions banning indirect discrimination with in-depth judicial discussions of evidential proof. While as of yet untried in Australian criminal matters, statistics are routinely used in Australian racial anti-discrimination litigation brought under s 9. In *Sharma v Legal Aid Queensland,* (an employment direct discrimination case) the trial judge, Kiefel J, ruled that evidential questions of fact in RDA s 9 claims may be established statistically.

> *[Statistical] evidence may be able to convey something about the likelihood of people not being advanced because of factors such as race or gender. . . . [evidence] may indicate that the real reason for refusal is a conscious or*

[17] *Maloney* (Gaegler J).

> *unconscious racial attitude which involves stereotypical assumptions about members of the group. It will be a question of fact in each case.*[18]

Sitting en banc, the full Federal Court of Australia affirmed Justice Kiefel's reasoning,[19] this time favourably citing the United Kingdom case of *Nagarajan v London Regional Transport*.[20] The full Federal Court of Australia's adoption of the *Nagarajan* doctrine is markedly significant to this research, because *Nagarajan* stands for the premise that statistically proven, systemic racial biases provide evidence of direct racial discrimination. Additionally, the *Nagarajan* court expressly overturned *Aziz v Trinity Street Taxis Ltd.*[21] to the extent that *Aziz* implied a successful direct racial discrimination claimant must establish the alleged discriminator's conscious motivation or deliberate intent.[22]

Similarly, statistics are commonly used to establish disparate impacts, and the existing body of High Court case law expressly refers to RDA s 10 by citing *Griggs*,[23] the American case from which all disparate impact analysis flows. Consider the following section of Justice Callanan's dissent in *Ward*:

> *It is necessary to say something about the concept of "indirect discrimination". As I understand it, indirect discrimination is said to occur when the criterion used is facially neutral, but the adverse impact on a particular race is such that the law can be called discriminatory. To find "indirect discrimination", there is no need for a discriminatory intention: Bowen CJ and Gummow J noted in Secretary, Department of Foreign Affairs & Trade v Styles that indirect discrimination consists of "practices which are fair in form and intention but discriminatory in impact and outcome."*

Whilst his honour was in the minority in *Ward*, Justice Callinan's dissenting opinion still serves an important purpose for this research project. After *Ward*, RDA s 10 now permit impugning legislation by assessing the adverse impacts, disparate impacts, or disproportionate impacts thereof. The most effective form of evidence to establish the disparate impacts of a Westphalian state's action when the discrimination is not apparent is statistics, thereby demonstrating the validity of their use here.

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[18] *Sharma v Legal Aid Queensland* [2001] FCA 1699.
[19] *Sharma v Legal Aid (Qld*) [2002] FCAFC 196.
[20] *Nagarajan v London Regional Transport* (2000) 1 AC 501, 510.
[21] *Aziz v Trinity Street Taxis Ltd* (1988) 3 WLR 79.
[22] *Sharma*, *Nagarajan*, and *Aziz* are all direct discrimination decisions, but the evidential distinctions between direct and indirect discrimination claims will not become relevant until the following chapter. For the purposes of this chapter, it is sufficient to state that the statistics used in proving both indirect and direct discrimination employ the same mathematical equations.
[23] *Western Australia v Ward* [2002] HCA 28 (Callinan J dissenting at para. 658).

Further establishing statistical analytics' applicability in the Australian criminal legal context, statistical evidence is frequently used as a defence to indirect discrimination claims brought under several other Commonwealth anti-discrimination acts of Parliament. In the express text of both *Disability Discrimination Act 1992* (Cth) s 107 and *Sexual Discrimination Act 1984* (Cth) s 87, 'the [alleged] discriminator' may illustrate an action is reasonable (and thereby not indirectly discriminatory) using statistics.[24] Defensive statistics are so commonplace in Australian indirect discrimination disputes that both the Human Rights Commission President and Sex Discrimination Commissioner are legislatively entitled to demand an alleged discriminator's statistics in writing. Furthermore, failing to provide said statistics along with their supporting documentation is a criminal offence against the Australian Commonwealth.[25]

That said, any challenges to the legality of racially disparate impacts flowing from an Australian constituent state's criminal legislation would ultimately be decided by the Commonwealth courts. In that vein, the High Court's prior history shows the High Court rarely, if ever, grants claimants' requested relief in challenges to criminal legislation brought under RDA s 10. Judicially applying indirect discrimination law to criminal legislation remains internationally controversial, and even socially inclined Westphalian states like Denmark[26] have previously refused to do so in European Court of Human Rights litigation. Ostensibly, current understandings of RDA s 10 require applying the provision to disparately impactful criminal laws, but on the whole, Australian courts lean towards 'deciding appeals unfavourably to claimants for relief under anti-discrimination and equal opportunity legislation.'[27] As such, this chapter, like every other chapter in this thesis, stops short of applying a complete RDA s 10 analysis or questioning the legality of the criminal legislation at issue. Instead, this chapter more narrowly focuses on diagnosing the presence of potential indirect racial discrimination as described by The Laws of the Lands in the NSW pre-trial detention scheme.

[24] Australian Human Rights Commission, *Federal Discrimination Law* (AHRC, 2016).
[25] *Sexual Discrimination Act 1984* (Cth) s 87; *Disability Discrimination Act 1992* (Cth) s 107.
[26] Tobler (2005).
[27] *New South Wales v Amery* [2006] HCA 14 (Kirby J).

Background and Existing Research

To restate and expand on an issue first raised in the introduction to this thesis, the 2016 Aboriginal[28] Australian incarceration rate was 2,346 per 100,000 individuals.[29] Despite this egregious figure, discussions surrounding Indigenous incarceration in Australia (even within scientific and legal circles) are highly politicised. Chris Cunneen,[30] Harry Blagg,[31] and Thalia Anthony[32] spearhead the critical criminology wing of the academic debate while Don Weatherburn and the NSW Bureau of Criminology Statistics and Research (BOCSAR) stand firmly in the traditionalist camp. Cunneen and Weatherburn specifically engaged in an unusually personal, multiyear debate across books and journals regarding whether racial discrimination meaningfully impacts Australian criminal justice.[33] For years, critical criminologists and traditional criminologists appeared deadlocked, with each camp staking mutually exclusive claims as to the causes of Indigenous over-representation in pre-trial detention. However, Fitzgerald developed a more nuanced position on Indigenous remand rates in 2009.[34] Similarly, eight years later, Don Weatherburn conceded that Indigenous offending patterns are unlikely the driving force in skyrocketing Indigenous pre-trial incarceration rates. '[Despite] there being considerable fluctuation in the number refused bail, overall, there is a significant upward trend.'[35] Weatherburn goes on to note, 'it seems likely that the increase in court appearances for these offences also reflects a change to enforcement policy rather than a real increase in offending behaviour.'[36] Weatherburn's statement here is significant, because if there is in fact a marked rise of persons being refused bail due to changes in government policing policy, then such changes give rise to a reasonable inference of racial discrimination against Indigenous Australians.

Additionally, research from other jurisdictions outside Australia has shown judges treat 'the other' less favourably than their own ethnic or racial group in bail hearings. Gazal-Aval and Sulitzeanu-

[28] This figure does not include Torres Strait Islanders.
[29] ABS, *Prisoners in Australia 2016* (Catalogue Number 4517.0 2016).
[30] C Cunneen, 'Racism, Discrimination and the Over-Representation of Indigenous People in the Criminal Justice System: Some Conceptual and Explanatory Issues' (2006) 17(3) *Current Issues in Criminal Justice* 329.
[31] H Blagg, *Crime Aboriginality, and the Decolonization of Justice* (Federation Press, 2nd ed, 2016) 2-16.
[32] T Anthony and C Cunneen, 'Introduction' in *The Critical Criminology Companion* C Cunneen and T Anthony (ed.s) (Hawkins Press, 2008).
[33] Cunneen, C (2006); D Weatherburn and J Fitzgerald, 'Reducing aboriginal over-representation in prison: A rejoinder to Chris Cunneen' (2006) 18(2) *Current Issues in Criminal Justice* 366.
[34] Fitzgerald, *Why are Indigenous Imprisonment Rates Rising?* (Report for NSW Bureau of Crime Statistics and Research. Report no. 41, August 2009).
[35] D Weatherburn and J Holmes (2017) *Indigenous imprisonment in NSW: A closer look at the trend* (Report for NSW Bureau of Crime Statistics and Research. Bureau Brief No. 126, November 2017).
[36] Ibid.

Kenan conducted a natural experiment on bail decisions in Israeli criminal courts the results of which show both Arabs and Jews favour their own ethnic group over the 'other.'[37] In the United States, Abrams, Bertrand, and Mullainathan statistically analysed judicial patterns in sentencing discovering individual judges can and do treat members of one race differently from another.[38] This falls squarely in line with Australian research showing both police[39] and judicial[40] bail decisions increasingly disfavour Indigenous Australians, which once again leads to a rational inference of racial discriminatory pre-trial detention in NSW.

Even with such a substantial body of literature on the impact of increasingly stringent bail legislation on Indigenous Australians[41] there is little discussion of applying anti-discrimination statistics drawn from litigation practice to criminal legislation in Australia. Emory (in 2017) applied the 80% rule to criminal incarceration rates on an offence level basis, but so far nobody in Australia has directly applied similar anti-discrimination analysis to pre-trial detention. This stands in stark contrast to the United States, where public officials and local judges have been sued for indirect discrimination in bail policy, and discriminatory policies have been invalidated by courts.[42] Likewise, the academic body of work in Australia is entirely devoid of any analysis using statistical anti-discrimination law tests to determine when bail law, policy, and practice indirectly discriminate. This chapter, therefore, marks a significant departure from previous research by building on Emory's 2017 research and again assessing a legal concept using legal tests. This chapter goes further still, by applying more advanced statistical testing methods pulled from anti-discrimination praxis to determine when a disproportionate impact crosses the threshold into indirect racial discrimination.

[37] O Gazal-Ayal and R Sulitzeanu-Kenan, 'Let My People Go: Ethnic in-group bias in Judicial decisions' (2010) 7(3) *Journal of Empirical Legal Studies* 428.

[38] D Abrams, M Bertrand, and S Mullainathan, 'Do Judges Vary in Their Treatment of Race?' (2012) 41(2) *The Journal of Legal Studies* 347.

[39] S Yeong and S Poynton, *Crime and Justice Bulletin: Did the 2013 Bail Act increase the risk of bail refusal? Evidence from a Quasi-Experiment in New South Wales* (Report for the NSW Bureau of Crime Statistics and Research. Report no. 212, 2018).

[40] M Travers, E Colvin, I Bartkowiak-Theron, R Sarre, A Day, and C Bond, *Rethinking Bail: Court Reform or Business as Usual?* (Palgrave Macmillan, 2020).

[41] ALRC *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report no. 133, 1 December 2017).

[42] *Pugh v Rainwater,* 572 F.2d 1053 (5th Cir. 1978).

Methods

This section deals specifically with methods as they apply to this chapter. How these methods fit into the wider methodology for the project was addressed in Testing for Inequity. As the previous section concluded, this methodology is a marked departure from existing research, because the tests applied here derive *from the law* and are employed to make a sociolegal argument. Using two statistical tests derives from the High Court of Australia gradually allowing a disparate impact-type analysis for RDA s 10 claims and they are deployed in this chapter in a manner such tests could hypothetically be deployed in active litigation. Likewise, the dataset used is numerically similar to datasets a lawyer would purchase for an expert witness in active litigation – because this method is not only an academic exercise in criminology. This method is fundamentally a sociolegal framework to test criminal law and policy for indirect racial discrimination.

Dataset

The methodology previously stated that the researcher purchased a dataset from the NSW Bureau of Criminology Statistics and Research (BOCSAR) in July 2019. That dataset includes all cases with a male accused of one or more indictable offence, where the accused was legally represented, and the matter was finalised in NSW District Court between 12 January 2016 and 31 May 2019 (dates inclusive). This researcher filtered the data for Indigenous self-identification[43] in any contact with the NSW criminal justice system and then excluded 861 cases out of 28838 where the accused never self-identified as either. The number of unknown cases represented 2.99% of the overall dataset. Testing the extremes with all non-responses included as indigenous or non-Indigenous did not impact conclusions.

The dataset includes several potential outcomes for the final disposition of a matter. Notably, the chapter does not refer to any single resolution but instead refers to the accused 'prevailing.' The immediately following chapter, The Oppression in Discretion, will discuss, in detail, how prosecutors in NSW withdraw charges against Indigenous accused at a disproportionately lower rate, but for the purposes of this chapter the accused 'prevailing' includes both a full acquittal at trial and having all charges withdrawn. Also note this chapter's focus on a different metric than the one is more routinely used in BOCSAR reports, which focus on an accused being bail denied (remanded). Instead, this chapter

[43] This is a standard BOCSAR variable name in purchased datasets.

focuses on the disproportionately low numbers of Indigenous male accused *released* (at liberty or on bail) pending trial.

In addition to disposition of outcome and Indigenous status other measured variables include: (a) the Australia New Zealand Standard Offence Classification (ANZSOC) number for the primary charge, (b) the Median Sentence Rating (MSR)[44] for the charges brought against the accused, (c) the number of charges for which an accused was eventually convicted, (d) local postcode socioeconomic data, and (e) sentencing information for those accused who were convicted of any charges brought against them. These variables are not, themselves, directly part of the statistical indirect discrimination testing but are employed as part of further sociolegal analysis.

The Statistical Tests

The primary tests used in this chapter for determining as applied, indirect discrimination are the 80% rule (adapted from the US Equal Employment Opportunity Commission handbook)[45] and the impact ratio test (adapted from Morris and Lobenz).[46] These are both established tests enjoying widespread use in international disparate impact litigation circles. However, the tests used here are by no means the only tests used in anti-discrimination litigation. Depending on the size and characteristics of a dataset, sometimes other tests, such as Fisher's exact test, the standard deviation test, or another test, might be more appropriate.[47] As a threshold issue, the 80% rule is a simple, quick, and effective rule of thumb from which to begin analysis.

Notably, the 80% rule has never been designed to be the only test used in determining adverse impact or indirect discrimination in employment or any other area of law; the rule exists as a starting point to analysis from which to build on. Morris and Lobenz designed a complementary test to do exactly that. When one finds potential discrimination by way of the 80% rule, the next step is to use what Morris and Lobenz termed the impact ratio test as a means of assessing whether the potential

[44] The scientific framework applied in the MSR is found in, I MacKinnell, P Poletti, and J Holmes, 'Measuring Offence Seriousness' (2010) 142 *Crime and Justice Bulletin* 1030.

[45] *Uniform guidelines on employee selection procedures* (United States) 43 FR 38290 4D Federal Register, 44.43 (1979) 6570-06-M [US] s 1607.4(D).

[46] S Morris and R Lobsenz, 'Significance Tests and Confidence Intervals for the Adverse Impact Ratio' (2020) 53(1) *Personnel Psychology* 89.

[47] R Emory, 'The 80% Rule and Indirect Discrimination as a method to assess NSW Criminal Law and Policy.' (Conference paper, Alfred Deakin Institute Conference, 50 years of naming institutional racism: realising racial equity or intensifying injustices? 2 Nov 2017).

discrimination is likely by chance. For the purposes of this chapter, the impact ratio test is used as both a confirming second test and as a test of significance in determining whether discrimination likely exists.

Statistical Analysis

This section addresses the statistical evidence itself, illustrating the pre-trial detention system so disproportionately impacts Indigenous males the overall system indirectly discriminates as a general, sociolegal construct.

Initial Analysis

The base assumption of all anti-discrimination testing is that a minority group should be selected at an identical rate to the majority group; however, all tests allow a certain degree of difference before asserting discrimination based on a disproportionate outcome. In 80% rule analysis, so long as the difference between the two groups is below a 20% discrepancy then discrimination cannot be proven statistically. For example, in the dataset used for this study, 57.88% of non-Indigenous males were released into the community pending the final resolution of their matter. If, in theory, the Indigenous community release rate was 46.31%, then the 80% rule would be satisfied despite a substantial divide between the two groups. However, the real racial gap in NSW is substantially larger than the previous example. The actual numbers for both Indigenous and non-Indigenous males on community release pending final disposition follow in *Table 1*:

Pre-trial detention rates by Indigenous status (Table 1)

	Indigenous	**Non-Indigenous**
Released	1990	13395
In Custody	3708	9745
Percentage Released	34.92%	57.88%

The raw data mathematically becomes: $0.3492/0.5788 = x$ and returns a result of 0.6033. Since $0.6033 \leq 0.8$, the 80% rule returns a probable finding of indirect discrimination in the NSW pre-trial detention system. However, the 80% rule lacks a test of significance so the next step becomes setting up Morris and Lobenz' impact ratio test to determine if the results from the 80% rule may have arisen by chance. The impact ratio test for the aggregate data follows below:

Figure 1

$$Z_{IR} = \frac{\ln\left(\frac{0.3492}{0.5788}\right)}{\sqrt{\frac{\left(\frac{1}{5698}+\frac{1}{23140}\right)(1\ -\ 0.5335)}{0.5335}}} = \frac{\ln(0.3492) - \ln(0.5788)}{\sqrt{\frac{0.4665\ \left(\frac{1}{5698}+\frac{1}{23140}\right)}{0.5335}}}$$

$$|Z_{IR}| = 36.5394$$

The impact ratio test triggers when $|Z_{IR}| = 1.96$ (two standard deviations). In this case, $|Z_{IR}| = 36.5394$, thereby creating a reasonable legal inference the discrepancy in community release rates is due to indirect discrimination as opposed to chance. For the sake of precision, the confidence level of a 37.285102 standard deviation result on a normal curve is $1 - 2.862 \times 10^{-304}$. In less mathematical wordings, the likelihood that the disproportionately low Indigenous male pre-trial release rate violates existing anti-discrimination statistical tests due to naturally occurring chance is less than one third of one centillionth of a percentage point. As a point of colloquial comparison, one 'google-th' is mathematically represented as 10^{-100} and one centillionth is 10^{-303}.

Disaggregation

On account of this extreme discrepancy, the aggregate data may look dispositive. However, one must undertake additional analysis beyond the aggregate data, because in anti-discrimination statistical analytics, aggregate data is prone to a known computational error called Simpson's paradox.[48] In the most famous example, the University of California Berkeley's aggregate data showed indirect discrimination against female applicants across UC Berkeley as a whole. On the other hand, when the data was broken down department by department, female applicants were statistically more likely to be admitted to individual departments. To prevent similar issues from arising in active litigation, indirect discrimination testing now usually requires disaggregating the data.[49]

In this instance, Simpson's paradox is not present. After disaggregating the data by ANZSOC offence category, the picture those data paint becomes *more* discriminatory, not less. Of the ninety-four ANZSOC offence categories for which Indigenous and non-Indigenous males appeared before the courts, only in sixteen offence categories was an Indigenous person more likely to be released prior to disposition than a non-Indigenous person was. Conversely, in thirty-six offence categories, the 80%

[48] P Bickle, E Hammel, and J O'Connell, 'Sex Bias in Graduate Admissions: Data from Berkeley' (1975) 187(4175) *Science* 398.
[49] Ibid.

rule was violated and in twenty-six offence categories, the impact ratio test showed the discrepancies found by the 80% rule were unlikely due to chance. To rule out further computational errors from small data populations, two ANZSOC offence categories were excluded because *n*<100. As a result, the final statistical data shows that in 25.53% of ANZSOC offence categories, an Indigenous male is less likely to be released before the NSW District Court ultimately resolves their matter(s). The disaggregated data, therefore, follows directly on the heels of the aggregate data, thereby pointing towards systematic, indirect racial discrimination across NSW pre-trial detention.[50]

Severity

In addition to Simpson's paradox, it is also theoretically possible that Indigenous Australians commit more serious offences for which there is less chance an accused might obtain bail. For non-Indigenous males, there is a distinct correlation between severity of the crime(s) alleged and the possibility of receiving community release pending resolution of the matter. If one looks at the severity index (median sentence rating or MSR) for which males are accused, non-Indigenous males in pre-trial detention are accused of more serious offences with harsher prison sentences than their counterparts released pending final disposition. That data is presented in *Table 2*:

Median Sentence Rating (10% groupings) for non-Indigenous males by custody status (Table 2)

	0%	**10%**	**20%**	**30%**	**40%**	**50%**	**60%**	**70%**	**80%**	**90%**	**100%**
In custody	2	10	10	10	21	32	38	51	60	96	128
Released	2	10	10	10	10	25	32	44	53	87	128

One might assume the same trend would also visibly apply for Indigenous males, but that does not appear to be the case. The distribution of non-Indigenous males released pending disposition trends towards less serious criminal accusations overall. For Indigenous males, on the other hand, only the lower percentiles of persons released into the community are facing significantly less serious accusations. The Indigenous MSR data follows in *Table 3*:

Median Sentence Rating (10% groupings) for Indigenous males by custody status (Table 3)

	0%	**10%**	**20%**	**30%**	**40%**	**50%**	**60%**	**70%**	**80%**	**90%**	**100%**
In custody	2	10	14.8	26	38	38	51	51	60	93	135

[50] *Appendix iv* contains a full data table for replication, including the ANZSOC categories of offences. This appendix is subject to delayed access restrictions.

Released	2	10	10	10	26.4	38	47	51	56	94	128

These differing trends show that while the seriousness of an accusation is one of the primary considerations that determine whether non-Indigenous males are kept in pre-trial detention, the same may not hold true for Indigenous males. Such a discrepancy gives rise to yet another reasonable inference of racial discrimination.

It is worth noting, that while there is some evidence supporting a hypothesis that Indigenous people are accused of slightly more severe crimes, this dataset (and others like it) cannot account for police overcharging. Previous research repeatedly illustrates NSW Police routinely overcharge Indigenous Australians compared to their non-Indigenous counterparts, so there may not actually be an increased severity of offending whatsoever.[51] Additionally, the MSR rating metric does not account for the fact Indigenous males are convicted of fewer offences at final disposition than their non-Indigenous counterparts:

Offences proven by Indigenous status (quartiles) (Table 4)

	25%	**50%**	**75%**
Indigenous	1	2	5
Non-Indigenous	1	3	8

Table 4 further calls into question an already limited correlation between elevated severity of allegations and elevated rates of pre-trial detention for Indigenous males. As such, an overall pattern of more serious offending does not appear to be the substantial proximate cause of Indigenous pre-trial detention rates. The only remaining reasonable inference one can draw is that the NSW pre-trial detention scheme crosses the threshold from over-representation into a racially discriminatory impact.

Flow on Effects

Having now established that pre-trial detention is disproportionate to the point it becomes presumptively discriminatory; this section shows such racial discrimination does not and cannot occur in a vacuum. Discrimination in pre-trial detention impacts the entire NSW indictable criminal legal

[51] ALRC (2017) 14.42.

system in ways that affect its fundamental legitimacy. Everything from the ability of Indigenous people to prevail in their matter, to guilty pleas, to sentencing, flows from the poison tree of racially discriminatory pre-trial detention.

Picking winners and losers

Claiming discrimination taints the entire system's integrity is a strong claim, but not an overstatement. Take for example the overall rates at which Indigenous and non-Indigenous males represented by counsel prevailed when charged with an indictable offence in NSW between January 2016 and May 2019:

Overall success rates by Indigenous status (Table 5)

	Indigenous	**Non-Indigenous**
Prevail	804	4389
Defeated	4894	18751
Percentage prevailing	14.11%	18.97%

When one assesses this data using the 80% rule, the rule produces a finding of probable discrimination with a value of 74.38. This is a problematic finding, denoting systemic failures in pre-trial detention that aligns with Travers et al.'s contemporaneous ethnographic research on the ramifications of Australian bail legislation[52] and Fitzgerald's prior research on rising Indigenous remand rates.[53] As such, there is an unfair, potentially discriminatory lack of justice for Indigenous males *even with a lawyer* directly flowing from differential rates of pre-trial detention. The overall rate of accused persons prevailing is a downstream impact stemming from indirect discrimination in pre-trial detention. *Tables* (*6 & 7*) illustrate just how significantly such disproportionalities in pre-trial detention correlate with a disparate impact in final positive dispositions favouring non-Indigenous males:

Pre-trial detention success rates by Indigenous status (Table 6)

	Indigenous	**Non-Indigenous**
Prevail	315	791
Defeated	3393	8954
Percentage prevailing	8.50%	8.17%

[52] Travers et al. (2020).
[53] Fitzgerald (2009).

Community release rates for an accused prevailing by Indigenous status (Table 7)

	Indigenous	**Non-Indigenous**
Prevail	489	3598
Defeated	1501	9797
Percentage prevailing	24.57%	26.86%

While not a conclusively causal relationship, scientifically, the strength of the correlation, in context, satisfies the burden of proof used in anti-discrimination litigation.[54] When weighing the totality of the evidence, it is more likely than not that pre-trial detention in New South Wales discriminatorily impacts Indigenous males' ability to prevail against a criminal indictment.[55]

As already shown, disproportionality and discrimination in pre-trial detention negatively impacts the entire criminal judicial system, and thereby deprives Indigenous males from fully enjoying their 'right to equal treatment before the tribunals and all other organs administering Justice.'[56] The following subsection builds on that proof, illustrating how disproportionate pre-trial detention rates interact with recent criminal law and evidence reforms in NSW. Later chapters also deal with both Early Appropriate Guilty Plea reforms (EAGP) and tendency evidence, so, this chapter's discussion thereof is limited to how EAGP and tendency evidence interact with pre-trial detention.

Guilty Plea Ramifications

In most common law countries, criminal trials are relatively infrequent, and most criminal litigation ends in settlement. However, unlike civil litigation where the parties are often evenly matched, when one party to criminal litigation is the state, the individual will always be at an institutional disadvantage in plea bargaining. That states wield those institutional advantages as weapons in guilty plea negotiations is well documented in both Australia, and abroad.[57] However, while many prosecutors across the common law use the threat of harsher sanctions if the accused gets convicted at trial as a negotiating tactic, New South Wales has gone a step further via statute. In 2017,

[54] Anti-discrimination litigation is civil in nature and utilises a civil burden of proof (the on-balance test).
[55] Noting that criminal litigation uses a different burden of proof (beyond a reasonable doubt).
[56] ICERD art. 5(1).
[57] W Dobie, J Goldin, and C Yang, 'The Effects of Pre-trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges' (2018) 108(2) *The American Economic Review* 201.

NSW passed the *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* (NSW); thereby creating a statutory scheme, under which, accused persons get punished more harshly if convicted at trial than when pleading guilty.[58]

When an accused is kept in pre-trial detention on weak evidence, but the prosecutor and their own lawyer inform the accused that if they plead guilty to an offence, they can immediately return to their family – the accused must weigh whether the prosecution case is strong enough to convict against the possibility of immediate release. While the EAGP scheme applies to everyone, and EAGP is too young to know if it will prove discriminatory in practice, the additional pressure to plead guilty will disproportionately impact Indigenous people due to their elevated rates of pre-trial detention. Therefore, discrimination in pre-trial detention combined with institutionally elevated sentences for conviction at trial (euphemistically called a discount scheme by the legislature and judiciary) gives the state significant additional leverage against Aboriginal and Torres Strait Islander accused persons, *as a class*. There is a viable possibility this additional pressure to plead will lead to persons, whom the state cannot prove guilty beyond a reasonable doubt at trial, accepting a guilty plea simply to escape pre-trial detention.

Furthermore, increased pressure to plead guilty created by mass pre-trial detention, in turn, creates its own problems. Recent legislative amendments to *The Uniform Evidence Act* expanded the use of tendency, propensity, and coincidence evidence in criminal litigation. The purpose was theoretically narrow, (paedophilia) but in practice, tendency evidence gets used for offences as trivial as deemed supply of drugs. When an accused pleads guilty to weak evidence, that aspect of their criminal record can be used as proof of guilt in subsequent criminal litigation, even years down the road. In observational research, this study observed a pre-trial hearing in which a nine-year-old marijuana conviction and a twelve-year-old marijuana conviction were admitted as coincidence evidence in a methylamphetamine charge. Therefore, for an accused in pre-trial detention, additional pressures to plead guilty come with serious risks, down the road, if they are ever accused again.

[58] It is worth noting that in NSW, the parties can only bargain as to charges, because the court retains exclusive powers over sentencing, unlike the American plea-bargaining system in which judges usually accept an agreed-upon sentencing recommendation from the parties.

Legislated pressures to plead combine with legislatively (and judicially)[59] broadened tendency, propensity, and coincidence evidence to create a feedback loop that reinforces discriminatory outcomes. When in pre-trial detention, an accused is more likely to plead guilty, and that plea strengthens future cases. Pleading guilty, in turn, makes obtaining bail more difficult for the accused in later litigation. This feedback loop creates a conundrum for the Aboriginal Legal Service (ALS,) especially in smaller offices outside of Sydney. When an Indigenous person in pre-trial detention receives a plea offer from the prosecution, the ALS defence lawyer is ethically required to relay said plea offer to the accused. On the one hand, the offer may allow the accused to walk free that very day, so rejecting the plea deal may increase the amount of time the accused spends in prison, even if they are eventually found not guilty at trial. On the other hand, a guilty plea may very well be used against the accused if that same individual gets accused of another crime in the future. Additionally, a decision to plead guilty may negatively influence the ability of the accused to obtain bail in any potential, future criminal litigation.

Impact on Sentencing

In the dataset used for this thesis, when an Indigenous male accused was kept in pre-trial detention, they were over twice as likely to receive a custodial sentence (62.2% of convictions) as when an Indigenous male accused was in the community at the time of conviction (29.3%). If there were a direct correlation between severity of allegations and pre-trial detention across the entire curve (as is the case for non-Indigenous male accused persons) one could reasonably conclude the severity of criminal acts was the driving factor for this elevated rate of imprisonment. However, as demonstrated earlier, above the 50th percentile, the severity curve between the two groups is effectively the same. For Indigenous people, it appears being in custody pre-trial correlates, at least partially, to receiving a prison sentence at time of conviction.

To some extent, when an accused is convicted whilst held in pre-trial detention, a custodial sentence makes intuitive sense. Persons held in NSW pre-trial detention are legally entitled to have that time credited towards their overall penalty upon conviction and judges routinely sentence such people to time served. However, as Weatherburn points out[60] many Indigenous people receive custodial sentences for low level offences when they could have received an Intensive Correction

[59] The High Court broadly construed the *Uniform Evidence Act* 'tendency rule' in *Hughes v The Queen* [2017] HCA 20.
[60] Weatherburn (2017) 8.

Order (ICO). While additional research is needed to explore, in detail, the causes for Indigenous people receiving custodial sentences for offences where an ICO is likely more appropriate, there is a direct correlation between custodial sentences and pre-trial detention.

Finally, it is worth mentioning that a person who has previously received a custodial sentence is far more likely to receive another custodial sentence should they be convicted again. NSW sentencing law requires that judges consider prior criminal behaviour in sentencing, and the sentencing report prepared by the DPP always includes a full criminal history of the convicted person. When that criminal history contains a prior prison term (even when the sentence was time served) it weighs against the convict in assessing whether to imprison them or to order a community sentence. Once again, prior custodial sentences create a feedback loop that reinforces the racially disparate rate as which Indigenous persons are sentenced to custody for offences a non-Indigenous person often receives an ICO.

Findings and Conclusion

The previous sections have shown that NSW's pre-trial detention disparately impacts Indigenous males charged with indictable offences, and that the sheer scale of disproportionality in pre-trial detention rates begs questions about the NSW criminal legal system's institutional integrity. Using the evidence put forth by this chapter up to this point, Weatherburn, a former NSW Justice researcher, concedes disproportionate Indigenous pre-trial detention rates keep worsening, and notes a lack of evidence tying those increases to Indigenous behavioural changes. Likewise, the previous sections demonstrate that mass pre-trial detention fundamentally deprives Indigenous males of an equal footing in NSW District Court criminal proceedings.

In NSW, 57.88% of non-Indigenous male accused person are released into the community pending trial, whereas only 34.92% of Indigenous male accused persons receive some form of pre-trial release. On account of these disparate impacts in the pre-trial detention system in NSW, Indigenous persons are 25.62% less likely to prevail against a criminal charge. Furthermore, the flow on effects mentioned in this chapter show that pre-trial incarceration not only negatively impacts Indigenous males in their present matter, but it can serve to seriously detriment them in the future should they ever be charged again. When taking all of the data in this chapter on the balance of the evidence, the resulting conclusion one draws is that NSW pre-trial detention crosses a threshold past which disparate impacts become a form of racial discrimination.

On account of these findings, this chapter marks a departure from previous scholarship on issues relating to the mass incarceration and over-representation of Indigenous people in Australian criminal detention. By proposing both a statistical test and illustrating the discriminatory impacts of NSW pre-trial detention, this chapter should provoke new discussions rarely explored in either academic literature or anti-discrimination jurisprudence. Instead of merely claiming disproportionality, this chapter proposes methods to diagnose racial discrimination as a general, sociolegal construct.

In addition, this chapter shows that racial discrimination in pre-trial detention poses a fundamental threat to the institutional legitimacy of the entire NSW criminal legal regime. How can a system which discriminates against First Nations people in such an egregious way be seen as fundamentally fair? And, more importantly, how can a system ostensibly designed to enforce the law *Without Fear or Favour*[61] allow the state to behave in such a discriminatory manner? These issues must be addressed, otherwise the entire criminal justice system fails to uphold its obligation to treat all people groups equally.

Having now closed this chapter, it will shortly become apparent the methods and analysis are, in some ways, shared with the following chapter. That chapter uses these same statistical methods, combined with ethnographic methods, to prove a different aspect of the NSW criminal legal process also racially discriminates. As is plainly visible therein, the following chapter addresses disparate treatment of Indigenous males in the exercise of prosecutorial discretion. Accordingly, that chapter describes the statistical methods in less depth while still demonstrating their applicability in a mixed methods setting.

[61] [61] ALRC, *Without Fear or Favour: Judicial Impartiality* (Report number 138, 2 August 2022).

V.

The Oppression in Discretion

A mixed methods analysis of prosecutorial behaviour in NSW District Court

Purpose and Scope

Where the prior chapter was primarily a statistical, scientific jurisprudential endeavour, this chapter is a mixed methods sociolegal analysis of prosecutorial discretion by the NSW DPP. It is broken down into four parts with the first being an overview of relevant legal concepts and their local application to Australian law. The second section is a statistical analysis showing the DPP withdraws disproportionately more charges against non-Indigenous males than against Indigenous males. The following component of this chapter is an ethnographic sociolegal analysis of a single-blind random sample of NSW District Court matters listed for trial that is used to test for confounding factors that may arise in a purely statistical study. The observational section shows many charges laid against Indigenous Australian males' progress to trial on such weak evidence that charges should have been withdrawn, thereby making confounding factors unlikely. The fourth part applies legal principles using the evidence from the previous two sections serve to demonstrate that the system of prosecutorial discretion in NSW is applied in a discriminatory manner, which then leads into the conclusion.

Prosecutorial Discretion in NSW

The system of indictable prosecution in NSW is similar to that of other Australian jurisdictions. The primary functions of the prosecutor no longer sit with the Attorney-General (A-G) but are now vested in an independent body named for its head, the Director of Public Prosecutions (DPP). However, in NSW there still exist remnants of an older system in which minor crimes tried before a magistrate (as opposed to a jury) can be (and still are) prosecuted directly by NSW Police. Likewise, it is still possible for individuals to pursue criminal charges by way of a private prosecution. Those alternative systems are not addressed by this study, and this chapter restricts itself to NSW District Court indictments prosecuted by the NSW DPP.

All NSW District Court criminal trials contained within this research project proceeded by way of an indictment under an older committal hearing system that is no longer in use. Under these older

procedures, the NSW Police or the NSW DPP would lay an indictment and the accused's legal representative would often initiate committal proceedings in the NSW Magistrates' Court. However, in 2018, Early Appropriate Guilty Plea (EAGP) reforms entered into force. The newer system largely abolished committal hearings, so more recent indictments usually proceed via charge certificates over which the NSW Local Court has few to no oversight powers. Since there have not been grand juries anywhere in Australia since 2009,[1] pre-trial procedure is almost entirely controlled by the DPP. After laying an indictment, filing charges with the court, and committing the matter to trial, only the DPP, the A-G, or a court can terminate prosecution before the ultimate trial date. Later sections establish how this lack of external judicial oversight in the charging process leads to a systematic, discriminatory application of prosecutorial discretion by the NSW DPP.

Direct Discrimination Within the Australian Criminal Legal Context

While this chapter focuses on the legal construct of direct discrimination, it is worth taking into account that the scientific literature on Indigenous hyperincarceration in Australia also refers to additional concepts beyond the law. In particular, the critical criminologist, Cunneen, has written at length on the interplay between racial inequity and Indigenous over-representation in custody. Cunneen's typology includes (a) 'systemic bias,' (b) '[direct] racial discrimination,' (c) 'indirect discrimination,' (d) and 'institutional racism.'[2] Don Weatherburn and the traditionalist camp, on the other hand, focus on Indigenous offence rates, Aboriginal disadvantage and Aboriginal behaviour largely at the expense of colonisation or racial discrimination.[3] Both positions (and specifically Cunneen's typology) prove useful when analysing Indigenous hyperincarceration at a societal and structural level. However, a criminological discussion of discrimination cannot be directly applied in a juridical context. One reason behind this incompatibility is an interdisciplinary distinction between social scientific proof and admissible evidence in anti-discrimination litigation. More important still, are meaningful semantic differences in professional jargon. To avoid interdisciplinary crosstalk, this section narrowly defines the particulars of direct discrimination in Australia, discusses the origins thereof, and explains the relevant sociolegal analytical framework for this chapter.

[1] The provision enabling grand juries in Victoria (that was rarely used between 1974 and 2009) was *Crimes Act 1958* (VIC) s 354. It was abolished by s 253 of the *Criminal Procedure Act 2009* (VIC).

[2] C Cunneen, 'Racism, Discrimination and the Over-Representation of Indigenous People in the Criminal Justice System: Some Conceptual and Explanatory Issues' (2006) 17(3) *Current Issues in Criminal Justice* 329

[3] D Weatherburn, *Arresting Incarceration: Pathways out of Indigenous Imprisonment* (Aboriginal Studies Press, 2014).

Conceptual origins

In Australia, a discussion of direct racial anti-discrimination law as it applies to the exercise of legislatively granted powers requires discussing the conceptual origins of direct discrimination and explaining the omission thereof from Australia's Constitution. The cause of that glaring omission is not age, since the concept of differential or disparate treatment in the application of otherwise facially neutral legislation in not particularly new. On the contrary, direct discrimination as a legal construction predates Australian Federation. The current legal concept of direct discrimination originates from the American case, *Yick Wo v Hopkins*,[4] and notably, the case receives significant attention from Quick and Garran in their 1901 commentary on the Australian Commonwealth's Constitution.

At the time it was handed down, *Yick Wo* introduced a truly radical concept to Western law. Tobler points to the protections for minority ethnic Danes in Holstein and minority Schleswig-dwelling ethnic Germans[5] (as part of the historical Schleswig-Holstein question) as an earlier model of European racial discrimination law, but still concedes the American case law to be the origin of most modern anti-discrimination law concepts. The reason for Quick and Garran's explicit discussion of *Yick Wo*, however, is entirely unrelated to the historical origins of direct discrimination as a legal concept in Australian anti-discrimination law. Instead, Quick and Garran state:

> *The decision in Yick Wo's case turned, of course, on the special inhibitions of the, [United States'] fourteenth amendment. There is no section in the Constitution of the Commonwealth containing similar inhibitions. On the contrary it would seem that by [subsection] xxvi the Federal Parliament will have power to pass special and discriminating laws relating to "the people of any race," and that such laws could not be challenged on the ground of unconstitutionality, as was done in Yick Wo v Hopkins.*[6]

According to Quick and Garran, since the Australian Constitution lacks any requirement that 'the law itself be fair on its face, and impartial in appearance'[7] to be presumptively constitutional, the race power (subsection xxvi) allows facially neutral laws to be 'applied and administered by public authority with an evil eye and an unequal hand, so as to practically to make unjust . . . . discriminations.'[8] That

[4] 118 U.S. 356 (1886).
[5] C Tobler, *Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination Under EC Law* (Intersentia, 2005).
[6] J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901).
[7] *Yick Wo* 373.
[8] Ibid.

said, today the Australian Constitution rarely forms the basis of racial anti-discrimination legal analysis. So, while at a constitutional level, it is unavoidable that unequal enforcement is still completely permissible, the Commonwealth Parliament has statutorily forbidden Australia's constituent states from directly discriminating. The following subsection will now address the statutory prohibition against Crown discrimination as it applies to criminal law and process.

The Racial Discrimination Act of 1975

After the Australian Commonwealth Parliament passed the *Racial Discrimination Act 1975* (Cth) to comply with Australia's treaty obligations under the ICERD (which Australia also ratified in 1975),[9] the RDA became the primary basis for Australian racial anti-discrimination law. That said, the RDA does more than simply localise the ICERD, since the RDA's specific legislative wording is also progeny legislation descending from both the *Race Relations Act 1968* (United Kingdom)[10] and the *Civil Rights Act of 1964* (United States).[11] Therefore, the statutory bar against racial discrimination in the express wording of the RDA shows the Commonwealth Parliament legislatively intended to incorporate internationally recognised prohibitions against racial discrimination that are otherwise allowable under the race power.

Regarding the RDA itself, the provision binding Australian constituent state criminal legislation is s 10. As stated earlier in the thesis, s 10 claimants must prove two elements. The first is 'If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory' and the second reads 'persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin.' The rights protected by s 10(1) are then defined by s 10(2) as the rights enumerated in ICERD art. 5. As with the rest of the thesis, this chapter focuses on the right to *functionally*[12] equal treatment before courts and tribunals in art. 5(a).

[9] It is also worth noting the RDA is an exercise of the foreign affairs power as opposed to the race power, as the RDA prohibits discrimination against all races, as opposed to targeting a particular race. See, *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

[10] B Bebber, 'Standard Transatlantic Practice: Race Relations and Anti-discrimination Law across the Atlantic' (2018) 4(1) *Journal of Civil and Human Rights* 5.

[11] S Forshaw and M Pilgerstorfer, 'Direct and Indirect Discrimination: Is There Something in between?' (2008) 37(4) *Industrial Law Journal* 347.

[12] *See, Gerhardy v Brown* (1985) 57 ALR 472 (Brennan J at 516).

The New South Wales legislation at issue in this chapter is a relatively small but incredibly powerful section of the *Director of Public Prosecutions Act 1986* (NSW). Section 7(2)(b) empowers the DPP to direct 'no further proceedings be taken against a person who has been committed for trial or sentence.' Clearly, *and without question*, the provision is written using facially neutral language. There is not a single word, phrase, or euphemism that one can possibly attack as facially discriminatory.[13] Nevertheless, the High Court of Australia made clear the appropriate interpretation of s 10 does not require express discriminatory language in *Mabo (no. 1)*:

> *[S]ection [10] is not to be given a legalistic or narrow interpretation. As its opening words ("If, by reason of ...") make clear, it is concerned with the operation and effect of laws. In the context of the nature of the rights which it protects and of the provisions of the [ICERD] which it exists to implement, the section is to be construed as concerned not merely with matters of form but with matters of substance, that is to say, with the practical operation and effect of an impugned law.*[14]

The *Mabo (no. 1)* interpretation of RDA s 10 has also been applied beyond the specific facts of that case. Both *Gerhardy v Brown*[15] and *Maloney v The Queen*[16] show the *Mabo (no. 1)* reading of RDA s 10 is a general rule of statutory interpretation applicable to *all* Australian constituent state legislation. Thus, under RDA s 10, the 'practical operation and effect'[17] of constituent state legislation must be race-neutral, regardless of legislative drafting. Furthermore, successfully challenging legislation under RDA s 10 does not require proving parliamentary intent to discriminate. A successful claimant need only prove that: (a) one racial group enjoys an ICERD art. 5 enumerated right to a lesser extent than another racial group, and (b) the differential enjoyment of said right flows from the challenged legislation.[18]

Insofar as proving disparate treatment of a racial minority by a state actor, there are many ways to establish racial bias. One of the ways this may be accomplished, in multiple jurisdictions, is through statistical inferences.[19] Using statistical proof to establish racial bias in Australia flows from the full

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[13] For an in-depth discussion of testing for facial discrimination, *please see*, the previous chapter, The Laws of the Lands: a functional, diagnostic typology of racial discrimination in the law.
[14] *Mabo v Queensland* (1988) 166 CLR 186. (*Mabo (no. 1)*).
[15] *Gerhardy v Brown* (1985) 159 CLR 70, 85
[16] *Maloney v The Queen* [2013] HCA 28.
[17] *Mabo (no. 1).*
[18] *Sahak v Minister for Immigration & Multicultural Affairs* (2002) 123 FCR 514 (Goldberg and Hely JJ at 523 fn. 35).
[19] See, *Sharma v Legal Aid (Qld)* [2002] FCAFC 196.

bench of the Federal Court's logic in *Sharma v Legal Aid (Qld)*[20] where the court embraced a United Kingdom evidential principle from *Nagarajan v London Regional Transport*.[21] The House of Lords' express wording follows:

> *[Statistical] evidence may be able to convey something about the likelihood. . . . the real reason for refusal is a conscious or unconscious racial attitude which involves stereotypical assumptions about members of the group. It will be a question of fact in each case.*[22]

By adopting the *Nagarajan* evidential doctrine, Australian jurisprudence can be argued to similarly reject any potential implication found in *Aziz v Trinity Street Taxis Ltd*[23] that direct discrimination requires proving the alleged discriminator's conscious, wilful intent. Therefore, the significance of both *Sharma* and *Nagarajan* is in their allowance of statistical evidence to establish the if 'real reason[s]'[24] behind actions are 'a conscious or unconscious racial attitude.'[25]

However, evidentially demonstrating an institutional racial bias in the enforcement of an Australian constituent state's domestic criminal legislation may not necessarily establish an actionable violation of RDA s 10. In *Yick Wo*, the American Supreme Court overtly equivalated direct racial discrimination in the enforcement of constituent state legislation with the 'practical impact and effects' thereof notwithstanding the US 14th amendment's silence on the issue. RDA s 10 similarly lacks any direct mention of racially biased enforcement:

> *(1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.*
>
> *(2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Chapter 5 of the Convention.*

[20] Ibid.
[21] *Nagarajan v London Regional Transport* (2000) 1 A.C. 501.
[22] Ibid.
[23] *Aziz v Trinity Street Taxis Ltd* (1988) 3 WLR 79.
[24] Ibid.
[25] Ibid.

While the High Court's judgment in *Maloney* dealt with arguably (albeit implicitly) race-biased regulations, the High Court has yet to hear a section 10 claim alleging racially biased enforcement of a constituent Australian state's domestic criminal legislation. On account of that distinction, it remains unclear whether the High Court of Australia would adopt the *Yick Wo* approach to statutory annulment. Given the High Court's history of denying appeals attacking criminal legislation for noncompliance with RDA s 10 that was discussed at length in the preceding chapter,[26] this chapter does not claim that racially disparate enforcement of constituent state legislation necessarily renders said legislation unlawful. Instead, this chapter limits itself to diagnosing the presence of direct racial discrimination as a general, sociolegal construct.

Statistical testing

This section lays out the methods, dataset, and results of an objective anti-discrimination statistical analysis of comparative charge withdrawal rates by the NSW DPP. This comparison is between Indigenous and non-Indigenous males, accused of indictable offences, represented by a lawyer, between the dates of 12 January 2016 and 31 May 2019 (inclusive). This is the second such analysis of NSW criminal law, procedure, and practice. The first was Emory investigating the use of the 80% rule on an offence level basis,[27] and the second is this thesis, including the immediately preceding chapter. This chapter uses the same tests as The Racism of Remand, but for a different purpose. In accordance with the full Federal Court of Australia's decision in *Sharma,* this chapter uses statistical testing to determine conscious or unconscious racial bias in applying legislative powers. So, while the statistical tests deployed are the same, the related sociolegal purposes differ.

Statistical Methods

This analysis adapts two tests drawn from other areas of anti-discrimination law: the 80% rule [28] and Morris and Lobsenz' impact ratio test.[29] Testing for Inequity and The Racism of Remand both contain more in-depth discussions of these methods, so this chapter focuses on their specific application.

[26] *See, New South Wales v Amery* (2006) HCA 14 (Kirby J).

[27] R Emory, 'The 80% Rule and Indirect Discrimination as a method to assess NSW Criminal Law and Policy' (Conference paper, Alfred Deakin Institute Conference, 50 years of naming institutional racism: realising racial equity or intensifying injustices? 2 Nov 2017).

[28] *Uniform guidelines on employee selection procedures* (United States) 43 FR 38290 4D Federal Register, 44.43 (1979) 6570-06-M [US] s 1607.4(D).

[29] S Morris, S and R Lobsenz, 'Significance Tests and Confidence Intervals for the Adverse Impact Ratio' (2000) 53(1) *Personnel Psychology* 89.

Assuming (that absent bias) all persons will be selected at equal rates, if a minority group is less than 80% as likely to have their charges withdrawn compared to the majority group, the 80% rule finds probable discrimination. As stated in the methodology to this thesis, if (and only if) the 80% rule is violated, the analysis progresses to Morris and Lobenz' impact ratio test. Morris and Lobsenz' test serves both as a confirming second test of the prior 80% rule analysis and as a test of significance determining the likelihood the prior 80% rule violation was due to statistical chance. The impact ratio test finds statical discrimination when the absolute value of the Z_{IR} statistic is greater than two standard deviations (1.96) because in a normal distribution, 97.7% of set elements fall between μ and μ ± 2σ.[30] Insofar as anti-discrimination statistics are concerned, anything beyond 2σ is 'clear and convincing' evidence of bias.

If both the 80% rule and the Z_{IR} test are violated, the next step is to assess for confounding factors such as Simpson's paradox.[31] In contrast with Emory's work proving indirect discrimination solely using statistical evidence,[32] removing confounding factors in direct discrimination situations (like prosecutorial discretion) may require additional nonstatistical methods. Therefore, this chapter utilises additional proofs to strengthen its statistical argument. As shown in a later section, this chapter utilises randomly sampled, highly targeted, courtroom observations. However, there are other potential forms of additional proof available to claimants, depending on the situation at hand. What additional proofs are required will inherently be situation-specific, and may, at times, necessitate novelty.

Statistical Dataset

The statistical dataset used here was compiled by, and purchased from, BOCSAR in July 2019. As mentioned previously, it contains all males listed for trial in the NSW District Court accused of indictable offences and committed to trial from 12 January 2016 to 31 May 2019 (inclusive). After purchase, the researcher split the dataset for comparison using the variable 'Indigenous self-identification at any contact with the police.' One group is self-identified Indigenous, and the other group is self-identified non-Indigenous. 861 cases out of 28838 cases (2.99%) had an accused for which there was no response to Indigenous status. Those cases were tested using the extremes of all

[30] A less mathematical way of stating this would be, all other things being equal, 97.7% of the time variations due to chance fall within two standard deviations of a dataset assuming a normal curve. Anything beyond two standard deviations would be presumed to be due to something other than chance.

[31] P Bickle, E Hammel, and J O'Connell, 'Sex Bias in Graduate Admissions: Data from Berkeley' (1975) 187(4175) *Science* 398.

[32] Emory (2017).

nonresponses being Indigenous or non-Indigenous, which did not impact conclusions. Accordingly, nonresponse cases were discarded.

Statistical Results

At an aggregate level, both the 80% rule and the Z_{IR} test were violated. The following figures show the 80% rule aggregate data:

$$\frac{0.04032}{0.065514} = 0.615436$$

$$0.615436 \leq 0.8$$

$$Therefore: TRUE$$

And the Z_{IR} test:

$$8.42687 = \frac{\ln\left(\frac{0.065514}{0.04032}\right)}{\sqrt{\frac{1-0.060411l}{0.060411}\left(\frac{1}{23140}+\frac{1}{5878}\right)}} = \frac{\ln(0.065514) - \ln(0.065514)}{\sqrt{\frac{1-0.060411}{0.060411}\left(\frac{1}{23140}+\frac{1}{5878}\right)}}$$

$$|8.42687| > 1.96$$

$$Therefore: AFFIRMATIVE$$

The next step is disaggregation, which involves filtering out charge cases where *n<100* in order to rule out both Simpson's paradox and false positives.[33,34] In this sample, there were 58 Australia and New Zealand Standard Offence Classification System[35] (ANZSOC) categories in which at least one male had their charges withdrawn, (52 for non-Indigenous males and 30 for Indigenous males). As shown in *Appendix v*,[36] in 28 ANZSOC offence categories, at least one Indigenous person *and* one non-Indigenous

[33] Ibid.

[34] For a more in-depth analysis of typical data errors in anti-discrimination testing, *See* Testing for Inequity; Morris and Lobsenz (2000).

[35] *See, Australian and New Zealand Standard Offence Classification* (3rd ed., 2011).

[36] This appendix is subject to delayed access restrictions.

person had their charges withdrawn by the prosecution. Of these 28, a subset of 22 had a total of more than 100 individuals.[37] Of those 22 ANZSOC charge categories, only in 2 was an Indigenous male more likely to have their charges withdrawn. Conversely, in 11 charge categories, both the 80% rule and Z_{IR} test returned results of presumptive discrimination against Indigenous males. These statistical results lead to a reasonable inference that the NSW DPP's office systematically discriminates against Indigenous males accused of indictable offences. Such discrepancies provide strong evidence of an organisation's unconscious racial biases.

This statistical finding is incredibly powerful, but there is a potential confounding factor that numbers alone are unable to conclusively rule out. In theory, the NSW DPP could possess stronger evidence against Indigenous males, and thereby have less reason to withdraw charges. Such assessments are inherently professional determinations made by individual prosecutors in each particular matter, which leads into the following section on observational testing.

Observational testing

As previously stated, there are times where statistical evidence, standing alone, may not produce sufficient proof to establish systematic direct discrimination by an institution. This is one such scenario where other forms of evidence provide a beneficial buttress to an existing strong, statistical argument. In this instance, external evidence aids the overall argument by pre-empting likely claims of a non-discriminatory basis for the established numerical discrepancies. This section, therefore, implements a second form of analysis (courtroom observation) to prove the DPP's systemic discrimination against Indigenous males lacks a non-discriminatory, sociolegal justification. Despite using a relatively small sample of 16 final matters (all of which are also contained within the statistical dataset), this research employed a variable-controlled, single-blind, random sampling technique more akin to those employed in the natural sciences. This advanced sampling methodology, in turn, greatly increases the scientific validity of results generated using a relatively small sample.

That said, while this study is significantly different from those that predate it, this thesis chapter is not the first observational study designed to determine prosecutorial or judicial compliance with legal doctrines. In 1982, Walter and Ostrander[38] undertook a large-scale study to assess American

[37] Any number over 100 individuals satisfies the requirement of n<100.
[38] J Walter and S Ostrander, 'An Observational Study of a Juvenile Court' (1982) 3 *Juvenile and Family Court Journal* 53-69.

juvenile court compliance with the US Supreme Court case, *In re Gault*.[39] That study attempted a near complete sample of matters and relied on large numbers of volunteers to gather data. Likewise, this is not the first study to use observational data to test for bias and discrimination in courts. In Israel, Gazal-Ayal and Sulitzeanu-Kenan utilised large-scale courtroom observation to produce a statistical dataset. Their resulting statistical analysis illustrated that both Arab and Jewish magistrates favour their own ethnic in-group when granting or denying bail.[40] However, the Gazal-Ayal and Sulitzeanu-Kenan study differs from this chapter since it relied on a natural random (the Israeli system's assignment of judges) and used surnames (Arabic and Hebrew) as a proxy for ethnicity.[41]

This study, on the other hand, required neither proxy variables nor natural randoms. Instead, this research utilises a substantially more scientific sampling method (detailed below) thereby enabling its reliance on a smaller observational sample. Due to that sampling technique, when the prior section's statistical data is coupled to the following section's observational and interview data, the resulting ethno-legal analysis becomes more than the sum of its parts. In other words, a joint reliance on statistical evidence, observational data, and interview data provides *stronger* evidence that the DPP systematically treats Indigenous males accused of an indictable offence less favourably than their non-Indigenous counterparts. Furthermore, statistical evidence is already allowed to establish direct racial discrimination under *Sharma*, so the observational and interview data in this chapter exists to confirm differential treatment *in practice*, not establish its existence.

Observational methods and dataset

Similar to The Racism of Remand's discussion of the statistical methods, this section explores the applied use of the observational methods first mentioned in Testing for Inequity. The scientific core of these specific methods are highly targeted, ethno-legal observations of courtroom proceedings made from the galleries of the NSW District Court. Stemming from aforementioned issues in Testing for Inequity, as well as other circumstances outside of the researcher's control, the final observational dataset contained: (a) four full trials of Indigenous males, (b) three full trials of non-Indigenous males,

[39] *In re Gault*, 387 U.S. 1 (1967) is a US Supreme Court case holding that juvenile accused are constitutionally entitled to the same procedural fairness rights as adults.

[40] O Gazal-Ayal and R Sulitzeanu-Kenan, 'Let My People Go: Ethnic in-group bias in Judicial decisions' (2010) 7(3) *Journal of Empirical Legal Studies* 403.

[41] It is worth noting that using surnames as a proxy for race and/or ethnicity is a significant assumption somewhere as ethnically, racially, and religiously diverse as Israel.

(c) one 'special hearing[42]' of a non-Indigenous male, (d) four late guilty pleas of Indigenous males and (e) four late guilty pleas of non-Indigenous males. Notably, all these matters are also contained in the statistical dataset used throughout the project.

This observational dataset numerically appears small, but still proved sufficient for the objectives of this research for several reasons. Firstly, the dataset was, in fact, a statistically significant number of the overall set of trials scheduled for ALS clients. Next, the dataset was obtained using intentional randoms, instead of natural randoms, which, as previously noted, which further strengthens the empirical robustness of the resulting dataset. Likewise, because this is largely an ethno-legal, observational form of evidence, the sociolegal weight from this second form of evidence is in the events that occur in a scientific sample of trials, not by demonstrating statistically significant correlations that require a significantly larger sample. In this chapter, observational methods are purely intended to *supplement* an existing statistical argument, not supplant it.

The fundamental sociolegal question of the observational data in this chapter is whether a scientifically obtained (albeit small) observational sample uncovers a statistical confounding factor or aligns with the wider statistical data. In research such as this, if the observational results do, in fact, align with the statistical results, it stands to reason that the statistical data contains no major confounding factors. As is the case here, absent a visibly confounding factor, the statistical finding of racial discrimination is substantially strengthened. However, this method may not always be appropriate. If the objective of research is proving direct discrimination through purely observational means, the better approach would be to utilise methods more akin to Gazal-Ayal and Sulitzeanu-Kenan[43] or Walter and Ostrander[44] since those methods generate larger datasets. Nevertheless, for the purposes of this chapter, using a small, scientifically obtained sample is sufficient to rule out confounding factors to the degree required in most racial anti-discrimination litigation: a preponderance of the evidence.[45]

In line with the purpose and scope of this second form of data, legal-observational data collection focused on three main areas: (a) law, (b) process, and (c) courtcraft in both the pre-trial list

[42] These are similar to trials, but they involve an accused being unfit to plead or unfit to stand trial.
[43] Gazal-Ayal and Sulitzeanu-Kenan (2010).
[44] Walter and Ostrander (1982).
[45] Anti-discrimination litigation is civil, not criminal, in nature. Criminal litigation requires proof beyond a reasonable doubt.

court and trial court. Other chapters in this thesis, namely Testing for Inequity and Racial Realities, address the process of piloting and developing these observational datapoints, so those processes are unnecessary to mention here. The observational question at issue for this chapter is whether or not there are Indigenous cases progressing to trial that arguably should not have proceeded, thereby ruling out confounding factors from the statistical argument. The remainder of this section addresses these observational findings relevant to the issue of unconscious institutional bias in pre-trial discretion.

Observational Results

Of the eight matters that progressed to a trial date, there is a strong legal argument four matters lacked any reasonable possibility of conviction 'beyond a reasonable doubt.'[46] Three of the four Indigenous trials were so lacking in evidence there was no reasonable possibility of conviction, and therefore represent an institutional NSW DPP failure to withdraw charges. Importantly, these three unwinnable Indigenous matters differ significantly from the single non-Indigenous matter that arguably should not have been tried, because the non-Indigenous matter was unwinnable due to police misbehaviour, not unreasonably weak evidence. Throughout observational research, the DPP possessed both: (a) greater amounts and (b) higher quality evidence when prosecuting non-Indigenous males than when prosecuting Indigenous males. While recognising that in any individual criminal prosecution, the quality of evidence necessary to proceed to trial is a subjective professional judgement call, within the context of the overall observational dataset, a pattern emerges. The table in *Appendix vi* contains the relevant trial summaries and documents the researcher's assessment of the comparative strength of the Crown's evidence. As it relates to the statistical argument found earlier in this chapter, the DPP's observable pattern of progressing Indigenous prosecutions to trial with lesser amounts of lower quality evidence renders the likelihood of a confounding factor in the statistical data scientifically improbable.

Keeping in mind this dataset is too small to be statistically representative if it were standing alone, the scientific nature of the observational dataset still grants significant weight to the supplemental proof it provides in ruling out confounding factors in the statistical data. Such uses are further strengthened when the observational data aligns with the wider statistical analysis, as occurred here. Coupling both forms of data together creates a reasonable inference that the NSW DPP is institutionally biased in deciding whether to progress matters involving an Indigenous male accused to

[46] *NSW Office of the Director of Public Prosecutions – Prosecution Guidelines 2007* ss 1.2.1 & 1.3

trial. In light of the statistically lower number of charges the DPP withdraws against Indigenous males, the observational data shows that an unreasonable number of Indigenous males stand trial for crimes when the DPP cannot meet the minimum evidential standard to do so.[47] To explain this research finding using ethnographic examples, the next subsection briefly summarises the Crown's evidence in three trials in order to illustrate its poor quality and low quantity.

Observational Trial data

The following ethnographic summaries exist to examine matters where the DPP arguably erred by failing to withdraw charges the Crown could not reasonably expect to prove beyond a reasonable doubt. The matters not found below are discussed briefly in *Appendix vi*. For the purposes of this chapter, readers should consider those matters having been properly brought to trial, and they will be discussed at length in a later chapter with a different focus.

Trial 1

The accused was charged with both breaking and entering and the armed burglary of a domicile. The allegation against him claimed he had climbed into a third-floor balcony to assault and rob the inhabitants of the apartment. The strongest evidence against the accused was that he was found in possession of stolen property and prior guilty plea-based convictions used as tendency evidence. The victim had been entirely unable to identify the accused despite an unusually poor photo array excluded on the basis of its unrepresentativeness (the photo array was primarily made up of persons that subjectively appeared to the researcher as Black Arabs, Pacific Islanders, and Sub-Saharan Africans as opposed to visibly Aboriginal individuals).

At trial, the defence solicitor asked the accused to walk around the courtroom in a scene eerily similar to Gregory Peck's portrayal of Atticus Finch tossing a ball at Brock Peter's Tom Robinson in the 1962 film adaptation of *To Kill a Mockingbird*.[48] The accused Indigenous man hobbled and limped around the courtroom, as he was born with a deformed foot that surgery never truly repaired. The accused visibly suffered from well-documented, serious mobility issues, that gaol medical authorities already knew about, rendering this accused physically incapable of having committed the crime with which he was charged.

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[47] Ibid.
[48] *To Kill a Mockingbird* (Universal Pictures, 1962).

Trial 2

The accused faced a charge of the aggravated robbery in company of a taxicab driver. The police were unable to locate the other passenger who formed the 'in company' aspect of the charge. This uncharged individual was filmed on the taxi's CCTV system both assaulting and robbing the driver without the accused's physical assistance. The same CCTV footage showed the accused fleeing the scene *before* the attack took place.

Paradoxically, Crown's own evidence *exonerated* the accused. Nevertheless, the Crown attempted to bootstrap together a weak common purpose argument the court swiftly rejected. The irony continues because had the accused been charged correctly, instead of overcharging with insufficient evidence, the accused would have been found guilty of the crime which he committed on camera (theft of services). The offence committed on camera was a summary offence, and by the time the accused faced trial, the timeframe to lay summary charges had passed. Therefore, this matter represents two separate failures of prosecutorial discretion.

Trial 3

The accused was charged with a home invasion and robbery of his former flatmate. Two other individuals were alleged to have participated but were not charged. The victim in this case had severe alcoholic brain damage and had relapsed at the time of the home invasion. The alcoholic brain damage rendered the victim entirely incapable of remembering names or faces (even for a few minutes).

The strongest evidence against the accused was a prior uncontested apprehended violence order against the accused dating to the termination of his shared living arrangement with the victim. The accused had never contested the order, and in court, it was unclear if the accused had received proper service of process when the final order was entered against him. Furthermore, the only eyewitness to the home invasion was a neighbour living in an apartment across the hallway who told police he saw three 'African American' men commit the crime through his front door peephole. The accused was visibly Aboriginal, and the court commented on the fact Aboriginal Australian people look nothing at all like African Americans. It is worth noting here, that Indigenous Australians and Black Americans most recently shared any genetic ancestry (beyond European admixture) over 72,000 years

ago[49] and are entirely different ethnic groups. The *only* potential visible similarity between these two unrelated ethnic groups, from two different continents, is skin pigmentation.

Corresponding Interview Data

As was previously mentioned in the methodology, the observational data in this thesis can often be further extended using practitioner interviews. This chapter contains one such instance.

With regards to the interview data itself, there were a number of questions in the practitioner interviews directly relating to prosecutorial practice. Those direct questions are 20 and 25:

> *20. What differences exist regarding evidence introduced by the Crown against Indigenous male accused compared to non-Indigenous male accused?*
>
> *25. What impact does prosecutorial practice have on the massive over-representation of Indigenous males in District Court trials?*

The responses to these questions buttress this project's observational data. All three ALS interviewees responded that the Crown does, indeed, bring weaker evidence against certain categories of Indigenous males, and informal discussions, at other points, with one of those interviewees showed that interviewee believed the DPP relied on weaker tendency evidence when trying Indigenous males. Another ALS interviewee stated their belief that Indigenous males with a criminal record were often charged on weak evidence. The third ALS respondent noted that often times there is a disconnect between the DPP senior Crown prosecutors and the junior DPP lawyers attending pre-trial appearances, which leads to problems implementing the case conferencing system (where charges could be withdrawn).

Outside of the ALS, two of the Legal Aid NSW interviewees held similar beliefs to their ALS counterparts, but one did not have enough trial experience representing Indigenous males to provide an opinion. Likewise, one of the DPP interview respondents stated the DPP's culture failed to account for factors beyond the evidence when charging Indigenous males that create negative impacts for Indigenous accused persons. The other DPP interviewee believed no such distinctions existed. One of the judicial interviewees believed there were lower quality police investigations when any accused was a person of colour. The second judicial interviewee specifically mentioned the increased visibility of

[49] AS Malaspinas, M Westaway, and C Muller, et al., 'A genomic history of Aboriginal Australia' (2016) 538 *Nature* 207–214. <https://doi.org/10.1038/nature18299>

Indigenous males led to DPP overcharging, while also noting the DPP usually withdrew the weakest prosecutions.

Regardless of their opinions of the DPP, as an institution, no interviewee claimed that large numbers of individual prosecutors were acting discriminatorily. However, defence solicitor advocates almost all raised particular, institutional practices within the DPP that disproportionately impact Indigenous males. So, while there was not universal agreement regarding whether the DPP treats Indigenous males differentially, a majority of interviewees had observed differential prosecutorial treatment of Indigenous over the course of their professional careers. The interview results are plainly more subtle and nuanced than can be contained within this chapter, but the importance of their inclusion is for the theme those interviews contain. Overall, the interview data shows that, at some level, there is a differential treatment of Indigenous males accused of indictable offences that occurs for numerous and varied reasons.

Related to these formal interview responses are informal conversations with legal practitioners during observational research.[50] During these informal field research discussions,[51] prosecutors routinely admitted systemic problems in DPP governance, and less than a handful reported significant training in Indigenous issues or Indigenous culture. Of the prosecutors who did report more than a passing familiarity with Indigenous Australia, most gained that knowledge outside the DPP, and many had previously worked with/for the ALS. Many prosecutors (and even Legal Aid defence lawyers) mentioned in interviews or passing comments, that their personal lack of training primarily resulted from a lack of availability. At the time, the DPP offered Indigenous training on an inconvenient schedule at highly infrequent intervals. Likewise, at the time, Indigenous issues training was not a compulsory subject in the criminal practitioner continuing legal education curriculum, so prosecutors reported such training took a back seat to compulsory subjects. Once again, these are institutional issues that support the findings of the wider observational data.

[50] A visible estimation of the racial makeup of both senior and instructing trial counsel is contained in Racial Realities.
[51] These conversations were conducted with the participants' informed consent, the researcher identified themselves as such, and informal responses were documented anonymously.

Further Ethnographic Data and Analysis

On a positive note, no trial discussed in this chapter produced a perverse verdict. All three Indigenous accused tried on unreasonably weak evidence were acquitted on all charges. However, that in no way eviscerates the harm suffered by these three Indigenous men who were forced to stand trial on poor evidence. Furthermore, in Trial 1 and Trial 3 the accused were being held in pre-trial detention, so there is a potential argument those two men were wrongfully imprisoned.[52] Additionally, whereas a private-paying defendant can seek a costs order for being prosecuted on unreasonably weak evidence, courts rarely grant costs orders made by government-funded legal services like the ALS. Notwithstanding the accused's free legal counsel, the statistics suggest these observed cases are part of a larger pattern of racial discrimination by the DPP *as an institution.* The institutional nature thereof is observable in court.

Claiming the observational and interview data provides strong evidence of institutional direct racial discrimination by the DPP is distinct and different from claiming any individual directly discriminated or acted in overtly racist manner. During research, every individual prosecutor discharged their duties with due diligence and legal professionalism, which logically shifts responsibility to the DPP as an organisation. While it is probable a number of DPP prosecutors do harbour bigoted (or even overtly racist) views like the rest of non-Indigenous Australian society,[53] calling individual prosecutors sloppy, lazy, or racist misses the mark and avoids addressing the institutional failures of an organisation discriminating in its organisational capacity. Furthermore, the structure and internal governance within the DPP also weigh against placing responsibility at the feet of individual prosecutors. In NSW, the prosecutor acting on behalf of the Crown at trial is not necessarily the senior prosecutor empowered with the decision to prosecute or withdraw charges. As with all large bureaucracies, there is a chain of command inside the NSW DPP, and like all lawyers, DPP prosecutors have a client (the NSW Director of Public Prosecutions). Resultantly, when an individual trial prosecutor is not the senior prosecutor authorised to withdraw charges and terminate prosecution, the trial prosecutor is required to carry out the Director's instructions by progressing the matter until is concludes by plea agreement or trial verdict.

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[52] The European Court of Human Rights has repeatedly interpreted the *European Convention on Human Rights* art. 5 s 5 as creating a right to monetary compensation for wrongful incarceration when an accused is acquitted after being held in pre-trial detention. *See Włoch v Poland (no. 2)* [2011] Eur Court HR 10; *Sahakyan v Armenia* [2015] Eur Court HR 11.

[53] S Shirodkar, 'Bias against Indigenous Australians: Implicit association test results for Australia' (2019) 22(3-4) *Journal of Australian Indigenous Issues* 3.

The organisational hierarchy of the DPP is observable in prosecutorial courtcraft. In particular, one can occasionally observe ethical quandaries arising from the DPP hierarchy having institutionally compelled an individual prosecutor to try a matter and/or make specific legal arguments. In this observational dataset, it was not uncommon to see prosecutors literally raise their hands (in a manner not dissimilar to the way a Yeshiva-trained rabbi raises their hands as a sign of noncommitment regarding esoteric issues of halacha[54] and morality) before informing the court, 'those are my instructions.' During field research, it became apparent prosecutors do so as a form of euphemistic ethical signalling. This prosecutorial signalling resembles the required euphemistic signalling a solicitor must undertake to remove themselves as counsel without informing directly informing a court of their client's criminal perjury and without using the words 'my client just committed criminal perjury.' For prosecutors, however, the euphemism informs the court that a legal position is unreasonably weak or even indefensible while also informing the court a specific decision was made by the DPP hierarchy, not the individual prosecutor.

The purpose of such euphemisms appears to be satisfying an individual prosecutor's ethical requirements as a legal practitioner not to present baseless arguments before the court[55] while simultaneously satisfying their ethical duties as a public prosecutor.[56] Notably, several prosecutors informally labelled such practices problematic or otherwise voiced their disapproval of euphemistic signalling. Considering the institutional nature of most prosecutorial decision making, these offhand statements provide yet another reason for placing responsibility with the DPP, as an organisation, instead of individual employees thereof. As such, the weight of the evidence shows institutional practices require holding the Crown itself, not individual prosecutors, responsible for its systematic application of prosecutorial discretion.

Findings

The previous sections have discussed the relevant legal concepts, set out the methods relevant to this chapter, and laid out the evidence. This section now makes out a case the DPP, as an organisation, applies the *Director of Public Prosecutions Act 1986* (NSW) s 7(2)(b) and its own

[54] [Hebrew transliteration] (Original script: הלכה) 'Jewish religious law.'
[55] *See, NSW Office of the Director of Public Prosecutions – Prosecution Guidelines 2007* s 2.2 (9-11).
[56] Ibid.

prosecutorial guidelines[57] in a racially discriminatory manner. Since the removal of committal hearings (which effectively removed most judicial oversight in the charging process,) the DPP has primary discretion over what charges proceed and what charges are withdrawn, without the checks and balances the previous system provided. Therefore, it becomes entirely possible for the DPP to apply the law with '…an unequal hand, so as to practically to make unjust . . . . discriminations.'[58] While quoting the analysis in *Yick Wo* may seem out of place in Australia, doing so is consistent with the Commonwealth Parliament's intent for the RDA to bar discrimination otherwise allowable under the race power as interpreted by Quick and Garran's 1901 commentary to the Commonwealth Constitution. Furthermore, *Mabo (no. 1)* shows RDA s 10 concerns the 'operation and effect of laws' [59] not 'merely matters of form.' [60] Likewise, the immediately previous chapter established that *Maloney v The Queen* extends the *Mabo (no. 1)* analysis to the criminal law.

Now turning to the evidence in this chapter, the DPP withdraws significantly more charges against non-Indigenous males than against Indigenous males. At over 8.59 standard deviations using Morris and Lobenz's anti-discrimination statistic, any possibility that the DPP withdraws so many fewer charges against Indigenous males by chance, is roughly 0.00000000000000008785% on a normal curve. When applying the evidential doctrine from the Federal Court of Australia's en banc opinion in *Sharma*, the logical inference one draws is the 'real cause'[61] of the DPP's systematic actions being some form of bias (which may even be unconscious). Furthermore, the observational data demonstrates that in at least some instances, Indigenous accused persons face trial on evidence so weak, there is no reasonable possibility of a conviction, meaning the public interest would be better served by withdrawing charges.[62] While noting the observational dataset is too small to conclusively demonstrate institutional bias inside the DPP standing alone, the sampling methodology scientifically allows extrapolation. As such, the observational data provides strong evidence for ruling out confounding factors tainting, clouding, or otherwise obscuring the statistical data. Further strengthening the evidence of systematic differential treatment is that both the statistical data and observational data align with the practitioner interview data, since most interviewees reported having

[57] Ibid s 1.4.
[58] *Yick Wo.*
[59] *Mabo v Queensland* (1988) 166 CLR 186. (*Mabo (no. 1)*).
[60] Ibid.
[61] Ibid.
[62] *See, NSW Office of the Director of Public Prosecutions – Prosecution Guidelines 2007* s 1.4.

personally observed differences in the way the DPP treats Indigenous male accused persons at some point during their professional careers.

In contrast to criminal litigation where the burden of proof is beyond a reasonable doubt, the burden of proof in Australian anti-discrimination disputes is the on-balance test. Using the evidence in this chapter, on balance, one would be hard pressed to argue the DPP is not racially discriminating in a general, sociolegal sense of the term. The statistical picture is truly grim. The observational picture and interview data align with the statistics. The data in this chapter thereby paints an overall picture of a *Yick Wo*-type situation in which the state's enforcer of facially race-neutral legislation discriminatorily applies their nonreviewable powers.

However, it remains unclear whether racially biased applications of nonreviewable powers, granted through criminal legislation, actionably violate RDA s 10. Furthermore, even if the High Court of Australia were to apply the *Yick Wo* doctrine to RDA s 10, the question of standing may still prove insurmountable. The High Court has previously prohibited judicial review of prosecutorial discretion, and given the Court's history in anti-discrimination litigation,[63] it may deny standing to a claimant challenging *DPP Act 1986* (NSW) s 7(2)(b) using the rule in *Maxwell v The Queen*:

> *It ought now be accepted, in our view, that certain decisions involved in the prosecution process are, of their nature, insusceptible of judicial review. They include decisions whether or not to prosecute, to enter a nolle prosequi, to proceed ex officio, whether or not to present evidence and, which is usually an aspect of one or other of those decisions, decisions as to the particular charge to be laid or prosecuted. The integrity of the judicial process - particularly, its independence and impartiality and the public perception thereof - would be compromised if the courts were to decide or were to be in any way concerned with decisions as to who is to be prosecuted and for what.*[64]

In light of both *Maxwell* and the unanswered questions in present RDA s 10 jurisprudence, this chapter cannot claim that racial discrepancies in prosecutorial discretion are unlawful. Nevertheless, this chapter has still been able to scientifically demonstrate the NSW DPP exercises its prosecutorial discretion in a racially disparate manner. Furthermore, this mixed methods investigation establishes the DPP's disparate treatment of Indigenous male accused persons racially discriminates in a general, sociolegal sense of the term. A later chapter in the thesis (An Infrastructural Institution) also deals with

[63] *New South Wales v Amery* (Kirby J).
[64] *Maxwell v The Queen* (1996) 184 CLR 501, 534.

a number of issues disparately impacting Indigenous male accused persons currently beyond the ambit of Australian anti-discrimination litigation. Many, if not most, racially disparate state actions cannot be corrected by courts – even when the only bar against judicial solutions is stare decisis.

Conclusion

This chapter takes a substantial step forward in the wider sociolegal literature assessing biased applications of legislatively granted powers within a criminal litigation context. Prior research has also analysed both judicial decision-making and prosecutorial actions using either statistics or observational methods. This chapter, however, uses *both* statistics and ethnography in a more closely conjoined manner. Furthermore, this chapter overtly applied a mixed methods approach to diagnosing Weberian state racial discrimination as a general, sociolegal construct. Such innovations are necessary, particularly in Australia, where Indigenous Australians remain the single most incarcerated people group anywhere in the developed world.[65]

In closing this chapter, it seems fitting to address the wider issues that show why this research is so necessary. Recently, the Aboriginal Elder and Senator from Yawuru lands (Western Australia) Pat Dodson, called for:

> *"each state and territory, their police officers, police ministers, head of their police departments, attorneys-general of those jurisdictions, along with Aboriginal legal services … [to] meet and focus on why people are dying, what can be done to address it,"*[66]

Senator Dodson said these words as a response to ever-increasing Indigenous hyperincarceration and the decades long, ever-rising number of Indigenous deaths in custody directly attributable to Indigenous over-representation in Australian gaols.[67] This chapter, resultingly, furthers the type of causal analysis Senator Dodson desires. Using statistics coupled to scientifically sampled, highly targeted courtroom observations, one can see the NSW DPP is applying its nonreviewable powers of prosecutorial discretion in a directly discriminatory way. How to rectify such discriminatory practices is a matter for future research and likely requires democratic reform. Nevertheless, every Indigenous

[65] T Anthony, 'FactCheck Q&A: are Indigenous Australians the most incarcerated people on Earth?' *The Conversation* (6 June 2017).

[66] C Gooley, 'Pat Dodson calls for Peter Dutton to convene police ministers meeting on deaths in custody,' *ABC News* (online, 16 March 2021).

[67] *Royal Commission into Aboriginal Deaths in Custody* (Final Report, 15 April 1991) 1.3.

accused person kept on remand before being prosecuted on weak evidence that cannot reasonably sustain a conviction could potentially become the next preventable death in custody. Correcting that system saves lives, whereas failing to do so is paid for with Blak Australia's blood.

Progressing forward from this point, readers will notice that the thesis now turns a corner of sorts. Both this chapter and the immediately prior dealt with specific aspects of the NSW criminal legal system that demonstrably discriminate against Indigenous males accused of indictable offences. The following chapter, on the other hand, does not claim to have found provable racial discrimination but takes a step outward to look at a number of aspects of the NSW criminal legal system with potential negative impacts on Indigenous males accused of indictable offences. That chapter, A Troublesome Tendency, primarily relies on more traditional legal research methods, namely the Rombauer method, described in Testing for Inequity. Afterwards, Racial Realities returns to the ethnographic courtroom observational methods used in this chapter, relying on them more heavily than any other chapter in the thesis.

VI.

A Troublesome Tendency

A recent trend in NSW criminal law negatively impacting Indigenous Australia

Purpose and Scope

The prior two chapters in this thesis utilised a combination of the Rombauer method of legal research, anti-discrimination litigation statistics, ethnographic courtroom observations, and practitioner interviews. This chapter more closely resembles traditional legal research yet remains guided by interview responses and courtroom observations. By using the Rombauer method to investigate a theme in practitioner interviews, this chapter argues recent tough on crime legislative reforms to the NSW criminal litigation process will disparately affect the number of negative outcomes for Indigenous Australian males accused of indictable offences in NSW District Court. Importantly, it does not argue that any of the legislative reforms discussed herein are racially motivated, or even that all such legislation necessarily falls within The Laws of the Lands' functional, diagnostic typology of racial discrimination in the law. The core thrust of this chapter's argument is simply that an overarching, multiyear trend of increased Indigenous incarceration rates (i.e., negative outcomes) correlates to an ongoing, multiyear legislative reduction in rights for the criminally accused.

The scope of this chapter also differs from those preceding it. The chapter discusses, in a broad way, several recent changes to NSW criminal, procedural, and evidence law that disparately disadvantage Indigenous people accused of indictable crimes in order to correlate those changes to the rising Indigenous custodial population. The first section illuminates a recent trend in NSW Indigenous incarceration rates before the next turns to the interview data guiding doctrinal legal research. The third then addresses a selection of recently curtailed common law protections for the accused in NSW District Court. Following these sections is a discussion of the particular changes to NSW criminal, procedural, and evidence law that disproportionately disadvantage Indigenous accused persons. These sections, in turn, lead into the fifth and final substantive section correlating rising Indigenous incarceration rates to weaker protections for the criminally accused.

Ultimately, this chapter questions whether NSW needs a course correction in its criminal, evidence, and procedural legislation that reverses recent legal reforms likely to disproportionately

impact Indigenous people. In the modern era, any criminal justice system hoping to maintain institutional legitimacy must equally protect all ethnicities and peoples. However, if left uncorrected, several recent legislative curtailments to the rights of the criminally accused risk further aggravating existing racial disparities in NSW criminal justice.

Recent Trends in Indigenous Incarceration

Following the introduction, this section frames the chapter's inquiry as an exploration into the interrelationship between legislation governing NSW District Court criminal proceedings and racially disparate Indigenous incarceration. As was stated in prior chapters, Indigenous Australian hyperincarceration first came to the forefront of Australian public consciousness when the Royal Commission into Aboriginal Deaths in Custody released its final report in 1991. The ultimate finding of the commission is summed up in the following quote:

> *Aboriginal people are in gross disproportionate numbers, compared with non-Aboriginal people, in both police and prison custody and it is this fact that provides the immediate explanation for the disturbing number of Aboriginal deaths in custody.*

Ever since the RCIADIC released its final report, Indigenous Australian incarceration has been considered a national travesty. The RCIADIC issued a series of recommendations to the various governments of Australia specifically targeted at addressing the nationwide hyperincarceration of Indigenous Australians. Many were implemented. Many were not.[1]

One might assume that following the RCIADIC's recommendations would reduce disproportionate Indigenous over-representation in custody. However, in spite of a number of reforms, Indigenous incarceration across Australia continues trending upwards (both in absolute numbers and on a per capita basis) over multiple decades. According to Cunneen, 'In Australia, the imprisonment of Indigenous people has been increasing since the 1980s and growing more rapidly than non-Indigenous imprisonment rates.'[2] Likewise, the Australian Law Reform Commission inquiry into the incarceration rate of Aboriginal and Torres Strait Islander peoples addressed the issue directly in the 2017 report titled *Pathways to Justice*:

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[1] L Kelly, '10 Years On: The Continuing Poor Health of Indigenous Prisoners' (2001) 5(8) *Indigenous Law Bulletin* 16.
[2] C Cunneen, 'Sentencing, Punishment and Indigenous People in Australia,' (2018) 3 *Journal of Global Indigeneity* 1.

Over-representation is both a persistent and growing problem— Aboriginal and Torres Strait Islander incarceration rates increased 41% between 2006 and 2016 and the gap between Aboriginal and Torres Strait Islander and non-Indigenous imprisonment rates over that decade widened.

Australia's nationwide trend is the worst among developed nations, and at the time of field research, showed no signs of stopping.

New South Wales Indigenous over-representation in state custody aligns with the national Australian trend. Recent Australian Bureau of Statistics reports put NSW adult Indigenous incarceration rates at 1,884 per 100k persons,[3] whereas the overall adult incarceration rate (including Indigenous adults) is 193 per 100k.[4] Despite a minor dip in over-representation in the most recent data, the overall trend shows the problem continuing to snowball out of control. To date, every governmental attempt at reducing Indigenous incarceration, long term, has failed. Furthermore, in NSW, Indigenous incarceration rates often increase for reasons unrelated to Indigenous offending rates. According to Weatherburn and Holmes, changes to enforcement practices, not offending rates, elevated Indigenous incarceration for family violence offences in 2017:

The question arises as to whether the growth in convictions for these offences reflects an increase in offending behaviour or a change in policing/enforcement policy. The increase in convictions for Stalking/Intimidation offences since 2011 and the absence of any reason for expecting a growth in this sort of offence suggests that it is more likely to reflect changes in policing policy than a change in criminal behaviour. Since most breaches of bonds (including breaches of s.9 bonds and s.12 bonds) are discovered by police (or parole officers) rather than reported to them it seems likely that the increase in court appearances for these offences also reflects a change to enforcement policy rather than a real increase in offending behaviour.[5]

Likewise, more recent data suggests a new rule, passed in January 2022, mandating NSW Police ask all arrestees their Indigenous status, statistically *increased* Indigenous remand rates.[6] This

[3] ABS, 'Corrective Services Australia' (online, March Quarter 2022) <https://www.abs.gov.au/statistics/people/crime-and-justice/corrective-services-australia/latest-release>.

[4] Ibid.

[5] D Weatherburn and J Holmes, *Indigenous imprisonment in NSW: A closer look at the trend* (Report for NSW Bureau of Crime Statistics and Research. Bureau Brief No. 126 November 2017) *citations removed*.

[6] NSW Bureau of Crime Statistics and Research, 'NSW Criminal Justice Aboriginal Over-representation Quarterly Report' (March 2022).

data, similarly to Weatherburn and Holmes' and Fitzgerald's[7] research, aligns with this project's research findings in earlier chapters. Therefore, this thesis, other academic research, and existing government data all show rising Indigenous incarceration cannot be directly tied to increased occurrences of Indigenous criminality. As such, the remainder of this chapter explores another potential cause: NSW's systematic removal of protections for persons accused of crimes by the Crown. The following sections begin with a discussion of the interviews guiding this aspect of the research. The next explores a number of historical protections that existed at common law, which leads into a section addressing recent limitations on the rights of an accused. After doing so, the final substantive section in this chapter correlates those recent changes to the rising Indigenous hyperincarceration rate in NSW.

Foundational Interview Data

Having now framed the investigation contextually, this section addresses the ethnographic methods and data guiding the doctrinal legal aspect of the research. Whilst this chapter primarily relies on The Rombauer Method in making its argument, it is equally important that interview data guided the researcher towards specific areas of law in which to search. This section, therefore, briefly explains the interconnection between practitioner interviews and the remainder of the chapter. Insofar as formal interview responses, the three most relevant questions guiding this chapter's textual research are questions 11, 26, and 27. The text of those questions follows:

> *11. How do procedural and evidence law impact Indigenous male accused?*
>
> *26. What impact will any of the recent changes in criminal procedure (such as EAGP) have on Indigenous males as a group?*
>
> *27. If you could change one thing about District Court trials to make things more just for Indigenous males accused of an indictable offence, what would that change be?*

The answers to these questions varied, and the scope of the ethical agreements with interview correspondents precludes quoting interviewees' responses directly. However, there were themes within the interview responses that led the researcher towards the specific common law protections for accused persons, and the curtailments thereof, addressed by this chapter. Where those specific themes become relevant, they are mentioned explicitly.

[7] J Fitzgerald, *Why are Indigenous Imprisonment Rates Rising?* (Report for NSW Bureau of Crime Statistics and Research. Report no. 41, August 2009).

More broadly, the single most common theme gathered from both formal and informal interviews is that NSW criminal law, evidence, and procedure is presently in a state of flux. The population of NSW continues to grow, and judicial hiring has not kept pace with that growing population. As a result, the NSW criminal legal system became unable to handle matters efficiently. Seeking to address a growing NSW District Court backlog, the NSW Legislative Assembly authorised funding to hire not less than twelve new District Court judges and implemented major legislative reforms to streamline and expedite criminal litigation. However, these recently legislated procedural solutions removed rights for the criminally accused and created additional pressures to plead guilty. Furthermore, multiple practitioners reported a professional belief that several recent legislative reforms may disparately impact Indigenous accused persons due to Blak Australia's ongoing over-representation at every stage of the NSW District Court criminal litigation process.

Using this interview data to guide its textual research, the remainder of this chapter now: (a) explores the foundational bases for several recently curtailed common law procedural protections for the criminally accused that were mentioned by legal practitioners during interviews, (b) shows the manner in which those protections have been legislatively curtailed, and then (c) correlates this recent reduction in a criminally accused person's rights with the rising Indigenous custodial population in NSW.

Old Common Law Protections and Reasons Therefor

In NSW, the Legislative Assembly has systematically eroded common law protections for the criminally accused, often for the sake of judicial efficiency. However, these protections (some of them ancient) have legitimate, legal and logical bases that often get overlooked in New South Wales political discourse. This section, therefore, discusses those historical and logical bases along with explaining what the relevant common law protections for accused persons served to do. This chapter necessarily only mentions a selection of common law rights recently encroached upon by the NSW Legislative Assembly and understandably limits itself to encroachments reasonably likely to disproportionately impact Indigenous accused persons. As an additional point of refence, the Australian Law Reform

Commission (ALRC) compiled a more exhaustive list of common law rights that have been recently abrogated or curtailed by various Australian jurisdictions up to the point it was published in 2015.[8]

The General Prohibition Against Evidence of Bad Character

At common law, evidence of prior bad acts, misconduct, and prior criminality are traditionally inadmissible in the guilt/innocence phase of criminal litigation. Excluding such evidence prevents the Crown from trying the character of an accused (instead of their alleged actions) by barring the Crown from using prior acts to show the accused committed a more recent act. The core objective for doing so is forcing the Crown to prove beyond a reasonable doubt that the accused committed the *specific* offence named in the indictment. There is a strong, logical basis for doing so. By prohibiting evidence of prior criminality, the government is required to prove the individual offence, not merely that the accused is a bad person or even that the accused is likely to have committed the offence for which they were indicted. In a way, this prohibition is part of the wider presumption of innocence, particularly for those accused whom have been previously charged or were formally convicted of committing prior criminal acts.

Even after Australia began statutorily weakening the common law prohibition against using tendency or propensity evidence, a general proposition in Australian evidence law requiring the probative value of potential evidence outweigh the prejudicial impact thereof, largely forbade its introduction at trial.[9] At common law, in Australia, the '*Pfennig* test' only allows the Crown to introduce propensity or tendency evidence when 'no rational view of the evidence . . . . is consistent with the innocence of the accused.'[10] As such, under *Pfennig*, evidence of prior bad acts (even 'strikingly similar' prior bad acts) remained largely excluded. In the Australian jurisdictions yet to adopt the *Uniform Evidence Act*[11] *Pfennig* still applies, and character evidence usually remains excluded.

With two exceptions,[12] the prohibition against character evidence still exists in United States federal criminal litigation where it is enshrined in *Federal Rules of Evidence* s 404(b)(1) (US). Similarly, in Australia, the common law prohibition against character evidence historically applied to all criminal

[8] ALRC, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (Report no. 129, December 2015)
[9] The first major case barring the introduction of 'similar fact' evidence was *Perry v R* [1982] HCA 75.
[10] *Pfennig v The Queen* (1995) 182 CLR 461, 482–483.
[11] See *Evidence Act 1929* (SA).
[12] At a federal level, the United States follows the more recent trend across the common law jurisdictions by allowing the introduction of evidence an accused committed prior sexual assaults or acts of child molestation. *See*, US FRE R 413-14.

litigation, as a general rule of evidence, until recently. However, this protection was initially weakened during a global paedophilia scandal when Australia introduced narrow exceptions to the general common law rule against character evidence into the *Uniform Evidence Act*. Whilst these exceptions were initially targeted at paedophiles, the High Court eventually broadened said exceptions into a general interpretation of the Uniform Evidence Act in *Hughes v The Queen* [2017] HCA 20. Post *Hughes*, evidence of substantially similar prior criminality (or uncharged accusations thereof) is largely admissible, regardless of the charges.[13]

The Right to a Jury

Of the common law protections for the accused, the only one enshrined by Australia's Commonwealth Constitution is a right to a fair trial, by a jury of one's peers, for those charged with indictable offences against the federal polity.[14] The common law right is known to have emerged in late antiquity or the early medieval period but due to its ancient origins, legal historians remain uncertain of where, exactly, an accused's right to a jury evolved. Most scholars believe the right to a jury was birthed in Frankish, Viking, Saxon, or Britannic law, and that juries originate from the idea that a group of laypersons is more apt to correctly decide a case than a singular legal professional acting alone.[15] Notwithstanding its ancient history, an accused's right to a jury in present day New South Wales originates in Ch 29 of the 1215 Magna Carta. The Federal Court of Australia's translation from the Latin follows:

> *"NO free man shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor [condemn him,] but by lawful judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right."*[16]

Despite the absolutist language of the Magna Carta, most common law jurisdictions historically placed limits on an accused's right to a jury, particularly with petty crimes. For minor offences without the possibility of significant gaol time, only a few extant common law jurisdictions (most of them in the

[13] *Hughes v The Queen* [2017] HCA 20.

[14] Aust. Const. s 80.

[15] The historical accuracy of the traditional position has been called into question, but is voiced most clearly in a 1921 University of Pennsylvania Law Review chapter by then CJ of the PA Sup Ct, Robert von Moschzisker. *See,* Chief Justice v Moschzisker, R 'The Historic Origin of Trial by Jury' (1921) 70 *University of Pennsylvania Law Review* 1.

[16] Justice S Rares, 'Why Magna Carter Still Matters' (Conference paper, Judicial Conference of Australia Colloquium, Adelaide, 9 October 2015).

United States) guarantee jury trials.[17] Being a more mainstream common law jurisdiction, NSW aligns with the majority of common law nations by trying minor offences before a magistrate. However, with more serious criminal matters carrying the possibility of significant custodial sentences, jury trials remain the near absolute right found in the Magna Carta.[18]

To better understand the lasting power of an accused's right to a trial by jury, it pays to consider a colonial English case so egregious, it played a major role in starting the English Civil War. In 1603, the British Crown convicted Sir Walter Raleigh, relying on the written confession of a self-claimed co-conspirator, whilst denying him the right of confrontation. Nevertheless, the Crown dared not deprive Sir Walter his right to a jury. Such distinctions in basic procedural fairness may appear comical to modern legal scholars but depriving a male 'peer' of his right to a jury was inconceivable even before England democratised.

Resultingly, an accused's right to a jury for serious accusations remains effectively sacred in all modern common law and Nordic legal systems.[19] This right has also developed a distinct, democratic character that conspicuously coincides with ongoing processes of democratisation and political inclusion. History, therefore, has imbued a non-trivial, democratic function to an accused's right to a trial by jury that has become deeply ingrained in the public psyche. In many ways, the democratic nature of juries makes intuitive sense. Effectively, a jury removes power otherwise resting in the state (where such power is situated in Civil Code jurisdictions) and places said power into the hands of ordinary citizens. Modern Anglophone nation-states consider jury service to be a critical civic duty so essential to democratic governance that, unusually, individual citizens are generally compelled to exercise their 'right' to do so – even in jurisdictions where voting remains non-compulsory.

Furthermore, in many common law jurisdictions, the right to a jury trial racially diversifies criminal proceedings for accused persons of colour, and a later chapter in this work discusses comparative jury district demographics. In this chapter, however, the issue of relevance is that the

[17] One of these unusual jurisdictions is Texas, where an accused is permitted to demand a jury trial for minor traffic violations. *See TX Code of Crim Pro* Ch. 45. This is somewhat controversial outside of Texas, but in this author's experience, Texans consider their near absolute right to a jury in all matters (both civil and criminal) 'natural law.'

[18] The High Court has previously determined the Aust. Const. s 80 guarantee to a jury trial for indictable offences against the Commonwealth precludes an accused electing a judge-alone trial. *See, Brown v The Queen* [1985] HCA 11.

[19] The Nordic System uses lay judges sitting alongside trained professionals in a system not unlike a jury. *See,* P Garde, 'The Danish Jury' (2001) 71(1-2) *Dans Revue internationale de droit penal.*

NSW Bench is significantly less diverse than the state's population, despite recent efforts to correct judicial whiteness.[20] While jury diversity in Australia is not protected to the same extent as in the United States or Canada, the *Jury Act 1977* (NSW) still mandates drawing jury pools from a cross section of the community. Since that cross section is nearly always more diverse than the Bench or Bar, using juries provides a more racially diverse process.

Therefore, increasingly limiting the use of juries gives rise to concern, even when those limits also provide a reduction in sentences. Similarly, it stands to reason that by limiting jury trials, the NSW Legislative Assembly is simultaneously vesting more power over who wins and loses at trial in its own governmental institutions, which, in turn, disempowers the registered voters who traditionally compose juries. As discussed previously, there is an inverse argument to this particular issue but reducing the term of incarceration does not reinstate the power lost by 'the people' to decide a case. Nor do reduced sentences restore rights to the accused, who was previously entitled to a jury of their peers.

The Right to Silence

The ALRC defines the right to silence as:

> *The privilege against self-incrimination allows a person to refuse to answer any question, or produce any document or thing, if doing so would tend to expose the person to conviction for a crime.*[21]

The common law right to silence has a somewhat uncertain history that is debated by legal historians. However, legal historians agree the right to silence has changed significantly in nature over time, primarily due to the gradual birth of the adversarial process. Furthermore, the limits thereof are in a state of flux in both New South Wales and the wider nation of Australia.[22] As such, it is somewhat unclear exactly what the right to silence currently protects under both at common law and in evidential statutes. However, it is widely agreed that, at common law, the right to silence prevents the Crown from compelling an accused person to give evidence against themselves at trial. The right to silence remains a central protection for the accused at trial and is universally protected by the courts. Likewise,

[20] ALRC, *Without Fear or Favour: Judicial Impartiality* (Report number 138, 2 August 2022).
[21] ALRC, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (Report number 129, December 2015) 309.
[22] Ibid 310.

that right is enshrined in a number of anglosphere constitutions and is widely protected by acts of the various common law legislatures.

Under the traditional view, the right to silence originates in continental Europe, where it was based on ideas of Christian obligation and natural justice originally found in the Civil Code's ancestral Roman law.[23] Most legal historians believe the right to silence originally protected the sanctity of the Catholic confessional,[24] which remained entirely impenetrable by courts until recently.[25] These sacred protections for Christian confession led to the legal maxim, *nemo tenetur prodere seipsum*.[26] Upon reaching the British Isles, the concept further evolved, and grew into its current incarnation during the trans-Atlantic, Anglo-American shift to adversarial procedures in criminal process. As the adversarial process arose, the right to silence gained additional importance, eventually allowing the accused to remain silent during police investigations, not just the trial itself.[27]

Case law and legislation over numerous, passing centuries gave birth number of exceptions to this right, and Australia gradually became one of the few jurisdictions still protecting accused persons from being compelled to disclose documents showing guilt. In this way, Australia differs from other common law jurisdictions like the UK and US. In the UK specifically, the only 'thing' an accused may refuse to produce is their own oral testimony at trial.[28] Additionally, there is universal consensus in common law jurisdictions that the right to silence does not prevent the Crown from compelling an accused to provide physical evidence from their person. Such compellable evidence includes fingerprints, DNA samples, pictures taken for identification, and submitting to an in-person identification process.[29]

However, due to the recent changes across the wider common law, there are questions regarding whether Australia's common law right to silence still prevents an accused from being

[23]AS Alschuler, 'A Peculiar Privilege in Historical Perspective: The Right to Remain Silent' (1996) 94(8) *Michigan Law Review* 2625.
[24] Ibid.
[25] While beyond the scope of this chapter, Australian law now permits using evidence obtained through a religious confession under certain circumstances.
[26] Latin, 'No man is required to accuse himself.'
[27] L Levy, *Origins of the Fifth Amendment* (Macmillan, 1986); J Wigmore, *Evidence in Trials at Common Law* (Little Brown, 1961) vol 1.
[28] Ibid.
[29] Ibid.

compelled to produce potentially incriminating documents.[30] On this issue, as well as others, the right to silence is in a state of flux. Nevertheless, the right to silence itself still exists at common law and the majority of common law jurisdictions guard it accordingly. Still, the common law right to silence was recently limited by statute in NSW when an accused is legally represented during a formal police interview. This limitation is the subject of some controversy and is discussed later in the chapter.

The Right to (or Presumption of) Bail

According to the Australian Law Reform Commission, the common law presumption of bail is an essential attribute of the wider presumption of innocence in common law criminal procedure:

> *9.99 In its broader sense, the presumption of innocence encompasses the criminal process more generally, including the notion that 'pre-trial procedures should be conducted, so far as possible, as if the defendant were innocent'. Procedures relating to bail engage the presumption of innocence in its wider sense.*

Likewise, a number of legal professionals and legal services providers provided formal submissions to the ALRC regarding how the presumption of bail interfaces with the related presumption of innocence:

> *9.101 The Law Council submitted that Commonwealth laws that reverse the presumption in favour of bail 'may undermine the presumption of innocence, as a key component of a fair trial.' Legal Aid NSW argued that 'a reversal of the presumption in favour of bail effectively removes an important check and balance on the power and decision-making capacity of law enforcement officers.'*

One can safely state the right to remain at liberty during criminal proceedings protects the accused's ultimate presumption of innocence. Similarly, the wider legal community views the right to bail as inexorably intertwined with the presumption thereof, and more importantly, a right worthy of protection. Similarly, recent research shows the right to bail has real world impacts on the final outcome in criminal litigation and The Racism of Remand demonstrated far more accused persons granted bail prevail at trial than accused persons kept in pre-trial detention.

The presumption of bail is by no means universal, and there are some 'progressive' Nordic jurisdictions (notably Sweden),[31] where it remains relatively commonplace for an accused to be placed in custody for the duration of criminal litigation. Nevertheless, bail and other forms of pre-trial release

[30] ALRC (2015) 310.
[31] World Prison Brief, 'Sweden' (online, retrieved 2021) <https://www.prisonstudies.org/country/sweden>.

have grown into an internationally protected human right. According to the Canadian NGO, Lawyers Rights Watch Canada:

> *Consistent with the presumption of innocence and the presumption in favour of liberty, the international standards provide that pre-trial detention should be the exception and not the rule, and should be used as a means of last resort only, and for the minimum necessary period. Release may be conditioned by guarantees to appear for trial.*[32]

In short, a state of affairs in which pre-trial detention rates climb disproportionately high violates the presumption of innocence both as a common law construction and as an international legal norm. Recalling an issue mentioned previously in the thesis, NSW has significantly weakened an accused's presumption of receiving bail, in line with a similar trend among the majority of Australian jurisdictions.

A Recent Trend in NSW Criminal Law and Process Reform

Where the prior section is a discussion of common law protections for the accused, this section is a discussion of the current trend in NSW criminal law, criminal procedure, and evidence law (as it applies to criminal litigation) to systematically remove previously existing protections for persons accused of crimes by the DPP. There are a number of recently removed protections for the accused that existed at common law, and while the logical and historical bases for why those protections existed have not changed, the current political climate in Australia places less emphasis on those considerations than on the other aim of the criminal justice system: protecting society from crime.

Tendency Evidence

An earlier chapter already addressed the impact of tendency evidence on pre-trial detention, and the impact it may have on Indigenous males accused of indictable offences. In addition, during field research conducted from 2018 to 2020, this researcher observed a number of trials using tendency evidence, propensity evidence, and coincidence evidence. As Hoitink and Hopkins point out, tendency evidence was initially intended for child sexual offence prosecutions but was implemented in manner that created an elevated risk of wrongful convictions.[33] However, it is important to note that Hoitink and Hopkins published their research before the High Court of Australia reinterpretation of the

[32] Lawyers Rights Watch Canada 'Pre-Trial Release and the Right to Be Presumed Innocent' (Lawyers Rights Watch Canada, 2013) 21.

[33] D Hoitink and A Hopkins, 'Divergent Approaches to the Admissibility of Tendency Evidence in New South Wales and Victoria: the Risk of Adopting a More Permissive Approach' (2015) 39(6) *Criminal Law Journal* 303.

Uniform Evidence Act in a manner that further broadens the power of tendency evidence. As such, under the current reading of Evidence Act 1995 (NSW), Hoitink and Hopkins' legitimate concerns appear to be significantly understated.[34]

At its core, tendency evidence (and its twin siblings) allow the Crown to introduce prior bad acts in order to prove an accused having committed a later act at issue in extant criminal litigation. Such evidence will always be controversial despite its arguable relevance. This is because allowing the Crown to deploy evidence of prior actions to prove the commission if a later act in question risks conflating issues and thereby prejudicing the fact finder. However, in Australia generally, and New South Wales specifically, there are other, highly problematic ethical quandaries present in allowing tendency evidence. These quandaries only compound when the accused is Indigenous.

In a number of formal interviews (and other informal discussions) with Aboriginal Legal Service NSW/ACT lawyers conducted from 2017 to 2021, it became apparent that in NSW tendency evidence may indirectly discriminate against Indigenous accused persons because Indigenous accused persons are more likely to have lengthy criminal records. In one of the trials observed during field research, the strongest evidence against an Indigenous accused male was a series of convictions obtained via guilty plea in which the accused did not contest the Crown's version of events. This led to a situation where an accused was facing trial primarily on the weight of past acts, despite the fact the accused's disability rendered them physically incapable of committing the crime for which they were presently indicted.[35]

While the potentiality that tendency evidence is indirectly discriminatory is worrying enough, there are other concerns that the use thereof, raises in practice. It is a settled matter of historical fact that the NSW Police have a prior history of corruption. At one point, police corruption in NSW became such a problem that a Royal Commission was convened on the subject[36] in 1995, and the Australian State of NSW brought in a new Director of Police, as an outside hire, from the United Kingdom.[37] Likewise, the RCIADIC directly addressed NSW Police racism, and meaningful steps to correct that institutional racism were not taken by NSW Police until after the RCIADIC made its final recommendations.

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[34] Ibid.
[35] This matter has been described at length in two other chapters in this thesis and will not be discussed again here.
[36] *Report of the Royal Commission into the NSW Police* Service (Final Report, May 1997) vol. I *Corruption*.
[37] NSW Police, 'About Us: History 1988 to Present' (online, retrieved December 2022).

Allowing evidence from that prior time period is plainly problematic. Nevertheless, there is not a date before which tendency evidence is disallowed, meaning it is entirely possible for the NSW Crown to introduce convictions from this previous, racist and corrupt period in NSW Police history into evidence. This failure to establish a date before which tendency evidence is inadmissible thereby keeps both historical police corruption and institutional racism alive in the present – and introduces the possibility that an Indigenous accused must fight against suffering a present legal injury flowing from a previous racist and/or corruptly obtained conviction. Should the *Evidence Act 1995* (NSW) remain unchanged, all Indigenous persons alive during this time period would have to die before the Crown is unable to introduce potentially racist and corrupt evidence against the same individuals who suffered from police racism and corruption.

Likewise, there is another, equally problematic racial issue inherent in using tendency evidence against Indigenous males, even its originally intended narrower form than it is used in today. Indigenous Australian men living in the Outback were historically accused collectively, as a cohesive legal class, of culturally institutionalised paedophilia, by wider Australian society.[38] The myth of 'petrol kings' raping children alongside other racist tropes stemming from allegations against Indigenous Australians first made in the '*Ampe Akelyernemane Meke Mekarle: "Little Children are Sacred*"'[39] report were among the foundational bases used to justify the Northern Territory Intervention.[40] The Northern Territory Intervention has been repeatedly decried as institutional discrimination against largely remote Indigenous communities, and passing the enabling legislation required suspending the *Racial Discrimination Act 1972* (Cth) because the act facially discriminates on the basis of race. So, while the criminological science is clear that Indigenous males are less likely to sexually abuse their own children than non-Indigenous Australians are to abuse non-Indigenous children,[41] one cannot avoid the historical, invidious racial stereotype of the Indigenous male 'other' as a sexual predator. By failing to account for this racial trope in *Evidence Act 1995* (NSW), tendency evidence potentially allows an invidious racial stereotype to raise its head in extant criminal litigation.

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[38] Northern Territory Government *Ampe Akelyernemane Meke Mekarle: 'Little Children are Sacred'* (Final Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, 2007) Recommendations 1-2.

[39] Ibid.

[40] M Brough, (Minister for Families, Community Services and Indigenous Affairs), *National emergency response to protect children in the NT* (Media Release, 21 June 2007).

[41] J Stanley, A Tomson, J Pocock, 'Child abuse and neglect in Indigenous Australian communities' (2003) 19(Spring) *Australian Institute of Family Studies Bulletin* 1.

While not strictly tendency evidence, another related form of evidence, termed 'coincidence evidence,' is worth mentioning briefly since it also suffers from the same risks. However, the greater breadth of coincidence evidence also introduces additional risks, particularly when the accused already has a weak defence. To demonstrate the additional risks inherent in coincidence evidence, consider a fact pattern from a matter observed, in 2020, during field research. In this matter, the accused (an immigrant with a South Slavic-language name)[42] faced a charge of 'deemed supply'[43] of methylamphetamine. The Crown alleged NSW Police found saleable amounts of methylamphetamine secreted behind the stereo head unit of a car that the accused could prove he had recently purchased from a known drug dealer. The accused claimed he did not know about the methylamphetamine in the car, and claimed the drugs were likely in the car when he purchased the vehicle.

In an evidential voir dire, the Crown sought to introduce coincidence evidence based on the accused's prior convictions for drug possession and supply. In those convictions, the accused had hidden marijuana under the front passenger seat and behind the front seat of two different cars nine and 11 years prior to the offence in question. Despite the age and variability of the fact patterns, the court allowed the Crown to introduce coincidence evidence at trial. In the ruling, the court stated that the current accusations were similar enough to the accused's prior convictions that a jury could come to its own determinations about whether the accused's defence was honest and forthright. In deciding the evidential issue, the court noted that such evidence may not be allowed as tendency evidence but stated coincidence evidence requires fewer similar circumstances in both Australia and the UK.[44] The court further noted that UK case law allows, in certain instances, the Crown to introduce an accused's entire criminal record at trial.

The Bail Act

The NSW Legislative Assembly's systematic changes to *Bail Act 2013* (NSW) spawned discussions across public, practitioner, and academic circles alike. Prior to the current act's passing, NSW bail law operated off the common law presumption of an accused's entitlement thereto. However, the

[42] Within the Australian ethno-racial hierarchy, Mediterranean and Mediterranean-adjacent people groups were viewed as the ethnic 'other' as recently as the 1980s. *See*, A Piperoglou, 'From Dago to Wog: Remembering stinging slurs' *Freilich Project for the Study of Bigotry* (Blog post, 18 October 2022).

[43] *Drug Misuse and Trafficking Act 1985* (NSW) s 29.

[44] I Barker, 'Circumstantial Evidence in Criminal Cases' (2011) 42(Winter) *Bar News: Journal of the NSW Bar Association* 32.

presumption of bail has been dismantled piece by piece, and currently, the common law presumption of bail only exists in certain instances. [45] For most minor summary offenses listed in *Bail Act 2013* (NSW) s 21 there is a 'right of release.' However, if an accused is facing a criminal allegation listed in s 16B, the presumption of bail was statutorily abrogated by s 16A, so the accused must 'show cause' to avoid pre-trial detention. Section 22A is even more restrictive, since it requires the accused demonstrates special or exceptional circumstances to obtain pre-trial release. All other charges not explicitly listed in *Bail Act 2013* (NSW) are considered standard offences and the courts weigh and balance several mandatory factors in determining whether to grant bail.[46] These changes are hotly debated and highly politicised, but one thing is certain: far fewer Indigenous accused receive bail than their non-Indigenous counterparts.[47]

The Australian Law Reform Commission report, 'Pathways to Justice' Chapter 5, expressly discusses the issue of bail and Indigenous Australians in depth. Section 5.1 specifically notes that:

> *5.1 Up to one third of Aboriginal and Torres Strait Islander people in prison are held on remand awaiting trial or sentence. A large proportion of Aboriginal and Torres Strait Islander people held on remand do not receive a custodial sentence upon conviction, or may be sentenced to time served while on remand. This particularly affects female Aboriginal and Torres Strait Islander prisoners, and suggests that many Aboriginal and Torres Strait Islander prisoners may be held on remand for otherwise low-level offending.*[48]

The ALRC further notes, throughout *Pathways to Justice* Chapter 5, that several Indigenous-specific bail rules exist in certain Australian jurisdictions. Among the specific mechanism listed by the ALRC is the *Bail Act 2013* (NSW) requirement that a magistrate takes into account an accused's Aboriginality when granting or denying a bail application.

It pays to recall that the Racism of Reman found only 34.92% of Indigenous accused males gain pre-trial release in NSW Criminal District Court whereas 57.88% of non-Indigenous accused males receive some form of liberty during criminal litigation. That chapter argued this disparity to be racially discriminatory, and that it deprives Indigenous Australians of functional equally before the organs of

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[45] S Yeong and A Poynton, *Crime and Justice Bulletin: Did the 2013 Bail Act increase the risk of bail refusal? Evidence from a Quasi-Experiment in New South Wales* (Report for NSW Bureau of Crime Statistics and Research. Report no. 212, 2018).

[46] *Local Court Bench Book* (NSW) s 20.240 – *Practical application of the Bail Act*.

[47] Fitzgerald, J *Why are Indigenous Imprisonment Rates Rising?* (Report for NSW Bureau of Crime Statistics and Research. Report no. 41, August 2009).

[48] Australian Law Reform Commission *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report no. 133, 1 December 2017).

justice. Additionally, bail status directly correlates with overall success rates at trial, leading to a situation in which 19% of non-Indigenous accused prevail at trial but only 14% of non-Indigenous accused do the same. Earlier chapters, therefore, appear to show that while Indigenous status is a required component in the granting of bail, it is insufficient to overcome the removal of the common law presumption of bail that has been systematically chipped away at in NSW. It stands to reason that if bail law continues down its current trajectory, Indigenous accused males (and as the ALRC notes more likely females) will be kept in pre-trial detention at increasingly disproportionate rates. If that occurs, the data shows that convictions are likely to also rise, creating a snowball effect.

Restricting the Right to a Jury

This subsection addresses the complex problem in current NSW criminal law where an increasing number of offences are being reduced to summary offences tried before a magistrate as opposed to a judge and jury. This issue could be the subject of its own chapter and therefore cannot be addressed in sufficient detail here. Nevertheless, it must be included in at least a cursory manner to discuss its impact on Indigenous accused persons. Converting matters from strictly indictable to summary offences does not necessarily harm every accused, since doing so also reduces the available penalties a court may impose. However, restricting the right to a jury removes the procedural protections, and the NSW Legislative Assembly has done so for a large number of specific offences.

Over the last several years in NSW, many offences have been reclassified as non-indictable, and even some of the matters forming part of this project's observational dataset would no longer be tried before a jury. In particular, the joint robbery in company trials discussed in another chapter would now be summary offences tried before a Local Court magistrate, without a jury. Those joint trials were messy and unpredictable, but both accused were acquitted. There is no way of telling if a magistrate would handle the matter differently, although those matters looked like a hairline call from this researcher's observational standpoint. As such, there is the real possibility a magistrate may have found guilt where the jury did not.

The legal practitioners interviewed for this project disagreed as to whether reclassifying offences and removing an accused's right to a jury for a specific offence helps or harms the accused. On the one hand, reclassifying a specific offence reduces the range of penalties, including the length of potential custodial sentences. On the other hand, doing so eliminates protections inherent in jury trials and exchanges the more formal processes used in the NSW District Court for the comparative informality of the NSW Local Court. The long-term impacts of these changes remain to be seen, and further

research is necessary to determine the overall net benefits or harms for accused persons flowing from NSW's reduced use of juries.

Finally, from a racial discrimination law perspective, reducing the number of jury trials will likely reduce racial diversity in the overall totality of NSW criminal proceedings. In NSW there are very few ways to challenge a jury array for a lack of representativeness, yet over the course of this research project, visibly all-white juries were the exception, not the rule. Furthermore, the NSW DPP Guidelines prohibit the Crown from exercising a peremptory challenge on the basis of race, and other chapters show the DPP appears to abide by that guideline.[49] Notwithstanding the legitimate questions of jury diversity in NSW,[50] neither racial nor ethnic diversity on the bench is particularly common,[51] so reducing the number of juries will likely reduce diversity in NSW criminal trials.

Early Appropriate Guilty Plea Reform

Related to restrictions of an accused's right to a trial by jury are institutional discouragements against the exercise thereof. While termed a discount scheme, the end result of the plea discount system arguably penalises an accused who exercises their right to a jury trial, and is then, convicted. Likewise, the Early Appropriate Guilty Plea Reform (EAGP) system largely abolished committal hearings,[52] removing the protection inherent in a mandatory, external review of the charging process. This subsection addresses each of these two rights and protections that have been legislatively eroded, in turn.

The fundamental purpose of EAGP is expediting the court process in NSW with a statutorily provided, euphemistically termed, sliding scale 'discount scheme' for accused persons. The discount is greatest for those who plead guilty from the time they are charged, and discounts remain until such time as a jury gets empanelled. Whether or not EAGP will expedite matters through the court process remains to be seen.[53] However, whether the 'discount' is, in fact, a discount, is up for debate. The

[49] NSW Law Reform Commission *Jury Selection* (Report no. 117, September 2007).
[50] For offences retaining jury trials there are other factors impacting jury diversity, one of which is discussed by a later chapter, An Infrastructural Institution. *See also,* T Anthony and C Longman, 'Blinded by the white: A comparative analysis of jury challenges on racial grounds' (2017) 6(3) *International Journal for Crime, Justice and Social Democracy* 25, 28-30.
[51] P Gregorie and U Nedim, 'The Lack of Ethnic Diversity in the NSW Magistracy' *Sydney Criminal Lawyers* (online, 18 September 2019).
[52] *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* (NSW).
[53] L Trimboli, *Crime and Justice Bulletin: Early Appropriate Guilty Plea reform program Process evaluation*. (Report for the NSW Bureau of Crime Statistics and Research. Report No. 238, August 2021).

inverse of the EAGP coin is an institutionalised pressure for an accused to plead guilty instead of forcing the Crown to prove its case before a jury. For Indigenous Australians specifically, pressures to plead often aggregate to the point many Indigenous accused plead guilty even when they may have ultimately prevailed at trial. Likewise, EAGP's discount scheme can be viewed as doublespeak. One can legitimately argue that accused persons with valid defences who lose at trial are penalised more harshly than those who plead guilty, rendering EAGP not simply a carrot, but also a stick. The insertion of a stick into the legal equation is arguably problematic since it elevates penalties for the wrongfully convicted. Admittedly, wrongful convictions are rare, but under EAGP a wrongfully convicted person serves more time than a guilty person pleading guilty at the earliest possible opportunity.

Furthermore, EAGP does more than create new pressures to plead and harm an accused who loses at trial after exercising their right to a jury. The EAGP enabling legislation also largely removed committal hearings from NSW pre-trial procedure.[54] Doing so further reduced judicial oversight in the charging process. Now, the state, not the independent judiciary, fully controls which cases progress, and the state does so without an effective check on its own power. The Oppression in Discretion explored how removing committal hearings may further aggravate the existing system in which the DPP already withdraws far fewer charges against Indigenous male accused, and as such, the EAGP reforms are likely to further increase existing racially disparities.

Evidence of Silence

In 2013, NSW passed *Evidence Amendment Act (Evidence of Silence) 2013* (NSW). This introduced Evid*ence Act 1995* (NSW) s 89A, which contains an exception to the common law right to silence. Using unambiguous language,[55] s 89A enables the Crown to introduce evidence of silence against an accused who was given a special caution and was legally represented in a police interview for all crimes carrying a sentence of five or more years.[56] In a number of interviews conducted with defence lawyers from Legal Aid NSW and the Aboriginal Legal Service NSW/ACT, this researcher was routinely informed that s 89A creates a conundrum for both defence solicitors and the accused.

This problematic issue arises due to the express wording of s 89A:

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[54] Ibid s 55.

[55] This is a legal test under the Australian principle of legality necessary to abrogate or curtail a common law right. *See*, *Electrolux Home Products Pty Ltd v The Australian Workers' Union* [2004] HCA 80 (Gleeson CJ).

[56] *Evidence Amendment Act (Evidence of Silence) 2013* (NSW).

(1) In a criminal proceeding for a serious indictable offence, such unfavourable inferences may be drawn as appear proper from evidence that, during official questioning in relation to the offence, the defendant failed or refused to mention a fact--

(a) that the defendant could reasonably have been expected to mention in the circumstances existing at the time, and

(b) that is relied on in his or her defence in that proceeding.[57]

Under s 89A, when an accused person is legally represented, their silence during a police interview can be introduced into evidence. As such, it may prove more beneficial for a legal practitioner to allow their client to speak with the police in their absence. Alternatively, the text of s 89A might prevent an innocent person from providing exculpatory evidence that could have prevented them getting charged in the first instance. These questions are not insurmountable, and defence lawyers regularly make these decisions as part of their everyday legal practice. However, by creating the special caution and enabling the subsequent erosion of an accused's right to silence that came along with it, the NSW Legislative Assembly further empowered its own governmental organs at the expense of persons accused of serious criminal acts. Furthermore, the admissibility of silence serves as yet another example of recent NSW legislation curtailing prior legal protections for the criminally accused as part of a broader tough on crime campaign.

A Problematic Correlation

In both Australia generally, and in NSW as a jurisdiction, any change to the criminal-legal regime is intrinsically an Indigenous peoples' issue. The sheer disproportionality of Indigenous Australians coming before the courts makes such a conclusion logically unavoidable. However, certain, specific changes problematically correlate to rising Indigenous incarceration rates.

Beginning with the issue of bail, this thesis previously demonstrated the *Bail Act 2013* (NSW) discriminatorily impacts Indigenous males accused of crimes. Indigenous males accused of offences are far less likely to remain at liberty prior to trial, and The Racism of Remand shows the extreme impact such discrepancies have on trial success rates. In fact, that chapter argued disproportionate pre-trial detention rates cross the line from a simple over-representation into indirect discrimination. Additionally, since a significant number of the total Indigenous prison population is the pre-trial

[57] *Evidence Act 1995* (NSW) s 89A.

detention population,[58] increasing the unsentenced prisoner population will further compound the impacts of legislative bail changes.

Likewise, the EAGP system, discussed earlier, abolished committal hearings and placed the sole power of discretion in the hands of the Crown DPP.[59] By removing oversight from the Crown, EAGP risks further increasing Indigenous incarceration. Further isolating power may appear to create a degree of autonomy, The Oppression in Discretion demonstrates such changes are likely to exacerbate existing discrimination in the laying and withdrawing of charges.

Additionally, reducing the use of juries will likely reduce opportunities for diversity in criminal proceedings. Indigenous accused can be and often are tried before an tried before an all-white jury in regional and remote Australia, but in coastal NSW that is uncommon. However, being tried before a white or non-Indigenous magistrate is the overwhelming *norm*. American[60] and Israeli[61] literature shows, judges and magistrates are more likely to favour members of their own ethnic group, even if the judicial decision makers are not overt racists. Therefore, future research is necessary to determine the long-term impact of these changes, but they raise the real possibility of further negative impacts on Indigenous males accused of crimes at the lower court levels (which are outside the remit of this research project).

Importantly, this chapter contains only a few of the overall legislative changes to the NSW criminal litigation system, and there are a number of similar reforms it does not discuss. However, there is a correlation between the NSW legislative reforms mentioned in practitioner interviews (some of which have been shown to have a discriminatory impact) and the rising Indigenous incarceration rate in NSW. As a result, there is a strong possibility that the NSW Legislative Assembly's recent tough on crime reforms are somehow connected to NSW's steadily increasing Indigenous incarceration

[58] Fitzgerald (2009).
[59] *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* (NSW) s 55.
[60] D Abrams, M Bertrand, S and Mullainathan, 'Do Judges Vary in Their Treatment of Race?' (2012) 41(2) *The Journal of Legal Studies* 347.
[61] O Gazal-Ayal and R Sulitzeanu-Kenan, 'Let My People Go: Ethnic in-group bias in Judicial decisions' (2010) 7(3) *Journal of Empirical Legal Studies* 403.

rate.[62] Further research is required to establish causality, but any correlation provides evidence of far reaching and large-scale impacts on Indigenous Australia.

Summation and Conclusion

According to Blackstone, 'it is a maxim of English law that it is better that ten guilty men should escape than that one innocent man should suffer.'[63] Notwithstanding this chapter proffering no evidence of causality, it would seem special legislation protecting Indigenous accused persons fails to overcome the current pendulum swing in NSW law and politics further tipping the scales of justice in favour of the Crown. Existing research has already shown Australia's rising incarceral population is not the result of a national crime epidemic. Quite the contrary, criminality in Australia is actually declining, even whilst incarceration climbs.[64]

Seeking an alternate explanation, this chapter utilised this thesis' methods to illuminate a correlation between rising Indigenous incarceration rates and contemporaneous legislative reforms governing NSW District Court criminal trials. While still relying primarily on the Rombauer Method, this chapter adds to the existing body of literature by grounding doctrinal legal research in ethnographic methods. In accomplishing its task, the chapter opened by demonstrating an ongoing trend of rising Indigenous over-representation in custody before discussing the interview themes guiding its textual legal research. Next, this chapter displayed a selection of previous legal protections for the criminally accused, the history thereof, and the historical logic behind those protections. The following section proceeded similarly and addressed recent legislation eliminating and curtailing an accused's legal rights. Afterwards, this chapter's final substantive section explored a correlation between reduced rights for all criminally accused persons tried by the NSW District Court and rising per capita Indigenous incarceration.

The scope of this chapter prevents claiming the general correlation it interrogates to be causal in nature. However, a wider correlation between legislation and incarceration is well enough

[62] This remains true despite a recent statistical reduction in the total NSW sentenced prisoner population as it is coupled to a rise in the remand population. *See*, NSW Bureau of Crime Statistics and Research, 'NSW Criminal Justice Aboriginal Over-representation Quarterly Report' (March 2022).

[63] Justice W Blackstone, *Commentaries on the Laws of England* (The Legal Classics Library, 1765) 352.

[64] R Sarre, 'Australia's prison rates are up but crime is down. What's going on?' *The Conversation* (online, 22 October 2021). <https://theconversation.com/australias-prison-rates-are-up-but-crime-is-down-whats-going-on-170210>.

documented within the existing literature that said correlation becomes difficult to deny. Furthermore, this chapter adds to the literature in a manner permitting a limited inference that a potential causal link deserves further study. Future research should investigate possible ways to walk back the regressive reforms potentially driving Australia's skyrocketing custodial population, even if for no other reason than Australian Indigenous incarceration rates being causally unrelated to Australian Indigenous offending rates.[65]

As will be shown in the following chapter, Racial Realities, NSW District Court criminal trials are heavily, and almost invariably, racialised. Thus, one can see powerful reasons to explore the potential benefits for Indigenous Australia should NSW legislatively restore curtailed rights, or maybe even create additional rights, for all individuals criminally accused by the Crown. The Australian Indigenous incarceration rate is a national tragedy – so if something as simple as legislatively granting greater rights to the criminally accused might play a significant part in reducing Indigenous incarceration without increasing the overall crime rate, it would seem politically foolhardy not to implement such changes.

[65] Weatherburn and Holmes (2017).

VII.

Racial Realities

Observations of NSW criminal District Courts

…setting the stage…

Its 09:15 on a Monday morning.[1] People are crowding into a relatively small room in a rather strikingly beautiful, converted department store. Most are dressed in expensive wool suits, pulling wheeled carryon luggage behind them. Just like any place of business, people are milling about, speaking to colleagues and 'customers' alike: talking about their weekends almost as much as they talk shop. And yet, this is quite obviously no ordinary workplace. There is a deep-seated pain and fear in the eyes of the customers – none of whom are here by choice. The customers' loved ones sit alongside them, trying to calm their pain while the suit-wearing workers explain to the compelled customers what is about to begin. I have seen this drama play out untold dozens of times, because I *am* one of the suits, and this is the scene on every Monday morning at Sydney Downing Centre's courtroom 3.1, the busiest courtroom in the Australian state of New South Wales.

According to the GaWC 2018,[2] Sydney is a global 'Alpha+ city,'[3] and as global cities tend to be, Sydney's central business district (termed the CBD or 'City') is a diverse place. The faces in the courtroom cover a wide swath of the spectrum of visible human phenotypes. There are plenty of persons in the room with visibly South Asian, East Asian, Central Asian, Middle Eastern, Sub-Saharan African, Mestizo, Polynesian and Melanesian features – all in addition to the 'Anglo-Celtic' majority ethnic group,[4] just like one would expect to see in a city of millions built on immigration. In a beautiful

[1] This introductory section requests readers to 'waltz into court' with the researcher. *See generally,* S Dusty, *Waltzing Matilda* ('A-side' 7" 45RPM single, Columbia Records Australia, 1960). This section is therefore written in first-person narrative format, in accordance with ethnographic convention.

[2] Globalization and World Cities Research Network, 'The World According to GaWC 2018.'

[3] After fieldwork, Sydney has been 'demoted' to an 'Alpha' city, but at the time of fieldwork Sydney was ranked as an 'Alpha+' city. *See,* Globalization and World Cities Research Network, 'The World According to GaWC 2020.'

[4] Anglo-Celtic Australians are still the vast majority of the population and are the predominant privileged ethnic ingroup. *See*, J Wilson, C Chihota, and G Marks, 'Teaching white privilege: an auto-ethnographic approach' (2021) *International Journal of Inclusive Education*. (Accepted for publication).

testament to the legal profession in Sydney,[5] there is probably an over-representation of younger lawyers and legal assistants of colour in the room. However, one obvious bit of over-representation stands out above all others: there are far too many Aboriginal and Torres Strait Islander faces in the room for their tiny share of the Australian population (3%).[6] It is this over-representation that drew me here to conduct observational research; I came here to discover the racial realities of NSW District Court criminal proceedings.

Purpose and Scope

Having already set the stage, introduced the cast of characters, and raised the curtain, this chapter now evolves from the ones it follows. This chapter is, specifically, a legal-ethnographic analysis of the role played by the social construction of race in NSW District Court criminal trials. As with every chapter in the thesis, the placement of this chapter is intentional, and there are multiple reasons for placing this chapter in this location. Firstly, it follows two heavy hitting chapters showing demonstrable racial discrimination and a chapter correlating the rising overall custodial population to changes in NSW criminal legislation in order to provide subtlety and context to the NSW criminal litigation process in ways unamenable to statistical analysis. The second is to tell the story of how race, as societal construction, affects NSW District Court criminal trials prior to the next chapter's telling of a story that race and colonisation have made upon the NSW District Court as a state institution.

Unlike several other chapters in this thesis, this chapter contains no argument the Westphalian state is racially discriminating against Indigenous males. Neither does it embark on a detailed discussion of specific areas of substantive law. Part of this distinction is the slightly different focus in this chapter, but more importantly, that distinction is driven by the observational data itself. Unlike the statistical analytics, observational data collection did not witness direct judicial discrimination. Furthermore, while this chapter does employ counts and explicitly mentions some troubling patterns, the ethnographic sample used in this part of the study is too small to produce a finding of indirect discrimination utilising the observational data alone. That said, by combining observational data collection with formal legal analysis, this chapter discovers race to be an inescapable factor in the everyday operation of NSW District Court criminal proceedings.

[5] Law Society of NSW, *2018 National Profile of Solicitors Final* (Report for the Law Society of NSW. Report no. ESA12418, 17 July 2019).
[6] ABS, 'Estimates of Aboriginal and Torres Strait Islander Australians' (online, June 2016).

Existing Research on Race, itself, in Australian Criminal Justice

That race and institutional racism are prevalent in Australian criminal justice is well established both in both the historical record and academic literature. The first Australian royal commission into Indigenous persons and the justice system (The Royal Commission into Aboriginal Deaths in Custody) dates to 1991.[7] In its aftermath, the various Australian governments implemented significant procedural protections implemented to comply with the commission's recommendations, yet not much has changed.[8] Once again, it must be noted that Indigenous Australians are the single most incarcerated ethnic group in the developed world,[9] and Indigenous Australians continue disproportionately dying in governmental custody.[10] As shown throughout this thesis, racially disparate impacts in Australian criminal justice are commonplace, and it is well established that the Australian Crown refused to prosecute the law enforcement and corrections officials who physically, sexually, and psychologically abused Indigenous children in the Northern Territory's governmental custody.[11] Australian Indigenous peoples' negative experiences with the various Australian criminal justice systems are so pervasive that the Uluru Statement from the Heart expressly states:

> *Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are aliened from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.*
>
> *These dimensions of our crisis tell plainly the structural nature of our problem. This is the torment of our powerlessness.*[12]

Nevertheless, the more traditionalist camp in Australian criminology and conservative political circles,[13] continue arguing that the *real* cause of Indigenous over-representation, at every level of

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[7] *Royal Commission into Aboriginal Deaths in Custody* (Final Report, 15 April 1991).
[8] H Blagg, *Crime Aboriginality, and the Decolonization of Justice* (Federation Press, 2nd ed, 2016).
[9] T Anthony, 'FactCheck Q&A: are Indigenous Australians the most incarcerated people on Earth?' *The Conversation* (6 June 2017).
[10] *Uluru Statement from the Heart.*
[11] The Royal Commission into the Protection and Detention of Children in the Northern Territory recommended not prosecuting any of the prison or law enforcement officers who tortured children. At the time of the Commission, every child in custody in the Northern Territory was Indigenous. *See*, T Anthony, 'The perils of positivism in the NT Royal Commission into youth detention: the case for a post-positivist frame for First Nations justice' (2020) 29(1) *Griffith Law Review* 1. *See also,* T Anthony, 'Foreword' in *Indigenous Children's Right to Participate in Law and Policy Development* (Routledge, 2021).
[12] *Uluru Statement from the Heart.*
[13] M Koziol, 'We have atoning to do but not for Indigenous incarceration: Abbott' *Sydney Morning Herald* (14 June 2020).

Australian criminal justice, is an elevated Indigenous offending rate, not discrimination or race.[14] Noel Pearson, a respected Australian legal practitioner and politically influential Aboriginal Elder, ascribes the elevated Indigenous offending rate to government welfare policies specifically targeted at impoverished First Nations communities. [15] According to Pearson, governmental policies collapsed the precolonial Indigenous Australian political and social superstructures that once prevented Aboriginal intragroup violence.[16] The traditionalists have been significantly criticised,[17] and key figures among their ranks have periodically conceded that Indigenous offending patterns cannot singlehandedly explain recent increases to Indigenous Australian encounters with NSW criminal justice.[18]

As for the impact of race and Indigeneity on the criminal judicial process itself, the Racism of Remand established that Indigenous males are denied bail at a discriminatory rate, and that pre-trial detention rates are directly correlated with increased conviction rates for Indigenous males accused of indictable offences. Likewise, The Oppression in Discretion shows that the NSW Office of the Director of Public Prosecutions discriminates, as an institution, when applying its prosecutorial discretion to withdraw charges. Furthermore, Stephen Hagen's work[19] establishes ongoing judicial bigotry against Indigenous Australians, dating to the colonial era. Despite this wealth of pre-existing research, up to now, there is a shortage of ethnographic research investigating how race, as a social construct, presents itself qualitatively in Australian criminal trials. Currently, the most in-depth work on the subject is Kieran Finanne's book, '*Trouble.*'[20] *Trouble* is the product of a well-respected career in journalism, and while not being an academic text, the book contains well-founded, insightful observations of race and Indigeneity in Northern Territory criminal trials. Still, there remains a significant gap in the academic literature. This chapter, therefore, seeks to fill that gap with its scientific observations of NSW District Court criminal trials.

[14] D Weatherburn, *Arresting Incarceration: Pathways out of Indigenous Imprisonment* (Aboriginal Studies Press, 2014).
[15] N Pearson, *Our Right to Take Responsibility* (Black Inc, 2000).
[16] Ibid.
[17] C Cunneen, 'Racism, Discrimination and the Over-Representation of Indigenous People in the Criminal Justice System: Some Conceptual and Explanatory Issues' (2006) 17(3) *Current Issues in Criminal Justice* 329.
[18] D Weatherburn and J Holmes, *Indigenous Imprisonment in NSW: A closer look at the trend* (Report for NSW Bureau of Crime Statistics and Research. Report no. 126, June 2017).
[19] S Hagen, *The Rise and Rise of Judicial Bigotry* (University of Queensland Press, 2017).
[20] K Finanne, *Trouble: On Trial in Central Australia* (University of Queensland Press, 2016).

Methods and Dataset

As initially stated in the introduction, this thesis returns to methods in a number of chapters. The methods relevant to this chapter are legal-ethnographic courtroom observations. However, it is worth recalling, the wider thesis also employs traditional legal reasoning, adapted from the Rombauer method of legal research,[21] anti-discrimination statistics, such as the 80% rule and impact ratio test,[22] and multisite photographic analysis. How this chapter's methods interface with the others was addressed in detail in the methodological chapter, Testing for Inequity.

Before proceeding further, one must note the dataset used in this chapter is not a statistically representative sample of trial outcomes, because despite using random sampling techniques, the most common verdict at trial (guilty on all counts,) never occurred. There are multiple reasons for that data anomaly, but the primary causes are last minute settlements (primarily guilty pleas) and what appears to be an endemic shortage of NSW District Court judges. These two factors prevent ever knowing if any specific matter scheduled for trial will proceed as planned, despite recent NSW law reforms streamlining District Court procedure, and numerous, new judicial appointments. Furthermore, this observational study was conducted by a single ethnographer. Other studies, notably Walter and Ostrander,[23] attempted large scale (or even complete) sampling by using numerous volunteers observing specific issues of law. However, despite being compiled by a single legal ethnographer, and having observed only positive trial outcomes for accused (acquittals and mixed-verdicts), the near universal presence of racial issues at trial still enables a qualitative argument regarding the sheer power of race in NSW District Court criminal trials.

Field sites

Observations took place across what the Aboriginal Legal Service considers the 'coastal region' of New South Wales from August 2018 to October 2019. This dividing line is significant, because the coastal cities in NSW are orders of magnitude larger than inland cities. Resultingly, that inland region (on the western side of the 'Great Dividing Range') is termed the country region. Specifically, the

[21] M Rombauer, *Legal Problem Solving* (West, 1991).
[22] S Morris, and R Lobsenz, 'Significance Tests and Confidence Intervals for the Adverse Impact Ratio' (2020) 53(1) *Personnel Psychology* 89.
[23] J Walter and S Ostrander, 'An Observational Study of a Juvenile Court' (1982) 33(3) *Juvenile and Family Court Journal* 53.

observational trial dataset and list court observations were entirely drawn from the following NSW District Court locations:

- Sydney Downing Centre
- Sydney Western District Court (Parramatta, Penrith, and Campbelltown)
- Wollongong District Court
- Newcastle District Court

In addition, this project involved travel by automobile to the following NSW Courthouses in both the coastal and country regions of NSW. As is discussed in The King's Courts appended to this thesis, travel via auto was an intentional choice undertaken to experience, see and respect what Indigenous Australians refer to as 'Country.' The following sample represents all NSW courthouses with District Court criminal jurisdiction sittings over the course of this research project:

- Albury
- Armidale
- Bathurst
- Bega
- Bourke
- Broken Hill
- Campbelltown
- Coffs Harbour
- Coonamble
- Dubbo
- Gosford
- Goulburn
- Grafton
- Griffith
- Katoomba
- Lismore
- Moree
- Newcastle
- Nowra
- Orange
- Parkes
- Parramatta
- Penrith
- Port Macquarie
- Queanbeyan
- Sydney Downing
- Tamworth
- Taree
- Wagga Wagga
- Wollongong

Dataset

The final observational dataset itself consisted of a random, single-blind sample of 7 trials, 8 late guilty pleas, and 1 special hearing where an accused was found unfit to plead between October 2018 and May 2019. Eight matters had Indigenous Australian accused males represented by the Aboriginal Legal Service, and eight had non-Indigenous accused males represented by Legal Aid NSW. There were not female defendants in the dataset, specifically to avoid confounding factors since race and gender create unique issues for Indigenous Australian female accused persons.[24] This is not to claim that gender can ever be eliminated as a confounding factor, because (as a later section will show) even when attempting to control for gender, the powerful social construct inevitably made itself apparent on at least one occasion.

[24] M Wilson, J Jones, and T Butler, et al., 'Violence in the Lives of Incarcerated Aboriginal Mothers in Western Australia.' (2017) 7(1) *Criminology and Criminal Justice*.

The following table (*Table 1*) contains the makeup of the final observational dataset by a visual estimation of the race of the accused and victim combined with the final outcomes:

Outcomes by accused and victim identity (Table 1)

Matter	Accused Identity	Victim Identity	Outcome
Guilty Plea 1	Indigenous	Unknown	Guilty
Guilty Plea 2	Indigenous	Unknown	Guilty
Guilty Plea 3	Indigenous	Unknown	Guilty
Guilty Plea 4	Indigenous	Unknown	Guilty
Guilty Plea 5	White Australian	Unknown	Guilty
Guilty Plea 6	White Australian	Unknown	Guilty
Guilty Plea 7	White (Other)[25]	Unknown	Guilty
Guilty Plea 8	African	Unknown	Guilty
Trial 1	Indigenous	Latino	Full Acquittal
Trial 2	Indigenous	White Australian	Full Acquittal
Trial 3	Indigenous	South Asian	Full Acquittal
Trial 4	Indigenous	White Australian	Mixed verdict
Trial 5	Mideastern	Not Applicable	Full Acquittal
Trial 6/7	White Australian	White Australian	Full Acquittal
Trial 6/7	White (Other)	White Australian	Full Acquittal
Fitness hearing 1	White Australian	White Australian	Unfit to plead

Likewise, the following table (*Table 2*) contains the makeup of the final observational dataset by visual estimation of the race of all the lawyers and judges:

[25] White (other) is used for Australian born persons of European descent who are not part of the majority ethnic group (Anglo-Celtic) and White immigrants with distinguishable non-Australian accents. These individuals are still *white* but with a limitation to the claim and the social privileges thereof in Australia.

Legal professional identities by matter (Table 2)

Matter	Lead Defence Identity	Lead Crown Identity	Judge Identity
Guilty Plea 1	White Australian	White Australian	White Australian
Guilty Plea 2	White Australian	White Australian	White Australian
Guilty Plea 3	White Australian	White Australian	White Australian
Guilty Plea 4	White Australian	White Australian	White Australian
Guilty Plea 5	White Australian	White Australian	White Australian
Guilty Plea 6	White Australian	White Australian	White Australian
Guilty Plea 7	White Australian	White Australian	White Australian
Guilty Plea 8	White Australian	White Australian	White Australian
Trial 1	White Australian	White Australian	White Australian
Trial 2	White Australian	White Australian	White Australian
Trial 3	White Australian	White Australian	White Australian
Trial 4	White Australian	White Australian	White Australian
Trial 5	White (Other)	White Australian	White Australian
Trial 6/7	White Australian	White Australian	White Australian
Trial 6/7	White Australian	White Australian	White Australian
Fitness hearing 1	White Australian	White Australian	White Australian

Table 2 shows, by visual estimation, all judges, senior defence counsel, and senior prosecutors were of European origins. That said, in Australia, any visible estimation of race comes with qualifications; Indigenous Australians frequently pass as white. Furthermore, there were visibly several legal assistants and 'second seat' lawyers of colour, although it was impossible to distinguish paralegals from young briefing solicitors. As a result, the second-seat group is not included in these metrics. Likewise, there were a significant number of courtroom officers and courtroom staff who were visibly people of colour, but those individuals did not play an active role in the trial procedure and are therefore not included. Visual estimates of jury racial and gender composition did become an issue in one matter, and where jury composition became relevant to the trial process, it is included in the observational summaries section.

Observational Data Collection

Recalling the methodology, observational data collection utilised a word processing file (for verbose variables) and a chapter notebook (to collect counts of process such as objections and question totals for every witness). Using a computer in NSW District Court matters required specific ethical clearance and permission from the Chief Justice. That clearance was granted in December 2017. Further ethical clearances and written consent were obtained from the NSW Office of the Director of Public Prosecutions, the Aboriginal Legal Service NSW/ACT and Legal Aid NSW. At no point in the research was there any interaction between the researcher and jurors, witnesses (other than NSW Police), or with any of the accused. This was done to minimise the observer's impact on proceedings,

although prior studies have found a researcher's presence unlikely causes significant impact.[26] In NSW, years 10-12 legal studies students and university law students working on school assignments regularly enter and leave the courtroom carrying notebooks. Furthermore, in more significant trials there are usually journalists, and occasionally there are other observers. In one instance, those observers included visiting lawyers from a foreign jurisdiction.

That said, it is worth noting that how one dresses for court can impact proceedings, even when nobody knows the differently dressed individual is a researcher. When first piloting methods in the ACT law courts, this researcher wore a polo, chinos, and a blazer; the researcher was mistaken for a journalist by a party's solicitor. Likewise, when wearing a button-down shirt without a suit jacket, a prosecutor mistook the researcher for a law student. As a result of these occurrences in the ACT, wore a suit, tie, and boots[27] throughout the entirety of field research in NSW. This uniform, of sorts, acted like camouflage in a building filled with legal professionals. As a suit, in a building full of suits, the researcher simply disappeared into the background.

Observational Summaries

This section is the story of race, as social construction, in a series of NSW indictable criminal trials. In all matters save one, race played some role in the proceedings. In some, the race of the accused or Indigenous cultural obligations were prominent factors in the evidence against the accused males, and in others race or racism was used as part of the defence case. Regardless, these trials go to illustrate the power of race in the day-to-day operation of NSW District Court trials. Only one matter did not feature any evidence of race whatsoever, as in that matter, the accused was a white male and the issue at the hearing was the accused's fitness to plead and stand trial on account of his severe dementia. The remainder of this section contains an observational account of the impact of race over the course of the trials and fitness to plead hearing.

Trial 1

To begin the observational results, there was a singular moment in a trial that sums up the NSW criminal legal system as one that can completely fail Indigenous males. This one moment above all

[26] Walter and Ostrander (1982).

[27] Australia's local boot design is a statement of national identity. The largest domestic manufacturer (R.M. Williams) supplies the standard-issue dress boots for the Australian military. *See, Army Dress Manual 2013* (Cth) s 3.33.

others shows how poor evidence against Indigenous males can be incredibly striking. The accused was remanded to custody at the time of trial, despite having been born with a pronounced physical disability rendering them entirely incapable of committing the offence on the indictment. His disability was overlooked by police due to a prior criminal record and the accused having been in possession of stolen property he likely knew to be stolen at the time of his arrest.

When testifying in his own defence, the accused admitted to purchasing a cell phone and a significant weight of illicit drugs, but also stated that Indigenous cultural obligations required him to do so, because the seller was a relative of the accused's former romantic partner desperately in need of money. NSW Police tracked the cell phone in the accused's possession using a lost phone app, since the phone had recently been stolen by a visibly Indigenous male from a third-floor apartment in central Sydney during a home invasion. The victim (himself an immigrant) was entirely unable to identify the perpetrator in multiple cross racial photo identification arrays.

During direct examination, the accused denied committing the offence on the indictment but admitted committing the prior offences to which he pleaded guilty. He testified to pleading guilty to those prior offences because of his moral duty to take responsibility for crimes he actually committed. The accused's ALS solicitor then asked the judge to permit the accused to demonstrate his disability for the court. The judge granted that request. Before a white judge and white lawyers, an Indigenous Australian male illustrated his physical incapability of committing the crime in question by hobbling around a Sydney Downing Centre courtroom. Everyone in court went completely still. Even the judicial associate stopped typing.

Thankfully, in this case, the accused was acquitted, but to stop there would be to ignore the harm done to this accused for which there no legal remedy in New South Wales law. Justice cannot be served for this accused, because unlike many European jurisdictions, NSW does not compensate people incarcerated pre-trial who are later exonerated.[28]

Prior to his acquittal, the accused had been remanded to a maximum-security facility for over a year. On the day he was denied bail, the accused was already physically incapable of having committed

[28] Domenech-Pascual and Navarro, 'Compensating Acquitted Pre-Trial Detainees' (2015) 43 *International Review of Law and Economics*.

the offence on the indictment – just as he was on the day he proved his disability in the courtroom. Furthermore, there was no positive identification. In fact, there had been four inaccurate identification attempts using a deeply flawed ID panel that contained few Indigenous males other than the accused, let alone relatively similar looking Indigenous males.

To make matters worse, police admitted searching beneath the accused's clothing in public. Such searches are not allowed by New South Wales law, so both: (a) the failed cross racial ID attempts, and (b) the drugs found by police were excluded from evidence.[29] What little admissible evidence remained was far too weak to convict. Despite a well-run case, tried by a prosecutor observably educated in Indigenous Australian cultures, the Crown could not overcome the NSW Police's failure to provide him with lawfully obtained evidence to sustain the drug charge. Similarly, the accused simply could not have committed the home invasion he was indicted for, regardless of his prior criminal record. In the end, the justice system failed this accused person repeatedly, and it appears the system failed, at least *partially*, due to the accused's race and Indigenous cultural obligations.

Trial 2

In this second trial, the accused had allegedly: (a) broken into his former flatmate's apartment, (b) attacked the victim, and (c) robbed the dwelling. The victim was incapable of giving coherent evidence due to a severe mental impairment, and an alcoholic relapse on the night in question. Years of alcoholism had caused severe brain damage, so the victim could not remember a single name, could not remember faces, and could not make a positive identification. The only other eyewitness to the home invasion was a neighbour who identified three 'African American' men entering the victim's apartment. The significance of this witness' testimony cannot be overstated. There is an obvious and stark difference between the visible, ethnic appearance of African American males and Indigenous Australian males. The two ethnic groups look nothing alike beyond having Brown or Black skin. Furthermore, the specific shades of Black and Brown skin common to African Americans rarely resembles the common skin tones among visibly Aboriginal Australians.

The only other significant evidence against this accused was a now-expired, uncontested apprehended violence order, dating to when the accused lived with the victim. When the victim initially sought the order, the NSW Police entered an interim order against the accused ex parte (meaning the

[29] *Evidence Act 1995* (NSW) s 138.

accused was not present). When the matter was finalised in NSW Local Court, the accused failed to appear or secure legal representation, so a final order was granted, in his absence, by the magistrate. As with trial 1, the court acquitted the accused on all charges. In the acquittal, the court specifically noted the difference in appearance between Aboriginal Australians and African Americans, going so far as to state that reasonable people would not confuse the two ethnic groups.

Once again, in this second trial, the accused was on remand without a reasonable possibility of being convicted. Just as with the previous accused, this second accused will never be compensated for the time they spent in pre-trial detention. Furthermore, this trial featured significant discussions of race and the differences between two unrelated Black ethnic groups. As such, race was likely *the* dispositive factor in the accused's acquittal.

Trial 3

In another proceeding, a third Indigenous accused was *clearly* exonerated by police-obtained closed circuit television evidence. The timetable of events alleged by the Crown was practicably implausible to the point of impossible unless the accused could jump over or through a car in order to attack the victim between camera frames like the Aboriginal superhero from 'Cleverman.'[30] Furthermore, the victim failed to cross-racially identify the accused from a photographic ID panel on at least three different occasions, and the Crown-introduced closed circuit television evidence clearly showed a *different,* visibly Indigenous Australian male committing the violent offence for which this accused was being tried. The actual perpetrator of the robbery fled the scene in a completely different direction from the accused and had not been located by police.

Paradoxically, the same CCTV footage exonerating the accused of the offence alleged on the indictment also showed the accused committing a summary offence. Had the accused been properly charged, the Crown could have guaranteed his conviction. However, the police and DPP brought an unreasonably weak indictable charge reliant on a joint criminal enterprise theory for which there was no objective evidence and allowed the statute of limitations to run on the summary offence the accused had plainly committed. In the end, overzealous charging not only derailed a young Indigenous

[30] Cleverman is an award winning Indigenous Australian superhero TV miniseries drawing from Indigenous Australian Dreamtime, the Indigenous spiritual leaders called Cleverman, and then woven into a western palatable comic book mythos. *See* R Griffen, J Bell, and J Gavin, 'Cleverman.' *Australian Broadcasting Corporation* (2016-17).

man's life for over a year, but also deprived the victim, an immigrant of colour still visibly suffering from the attack, any closure whatsoever.

Trial 4

In this fourth trial, race played two significant roles. The first was jury composition. During jury selection, the first jury panel consisted almost entirely of middle-aged, white females. The ALS and DPP *both* challenged the composition of the panel several times, which altered the composition of the panel to include both younger persons and males. However, at a visible estimation, the jury remained entirely white. The second, and more important, role race played in this trial was the way the jury appears to have reacted negatively to an openly racist victim. Contrary to what might be expected from an all-white jury, racism seems to have given the jury cause to partially acquit an accused who was most likely guilty.

The accused was a strikingly large, visibly Indigenous male charged with a home invasion using melee weaponry and unlawful entry into a dwelling. The accused pleaded guilty, in the alternative, to the lesser offence of unlawful entry into a dwelling, and was in pre-trial detention at the time of the trial. The accused was ineligible for bail because his guilty in the alternative plea constituted a legal admission to having breached parole. The prior conviction was narcotics related.

In an evidential voir dire, one of the victims (a white male) threatened suicide rather than testify and had to be cautioned for contempt of court before he would testify against his narcotics supplier (the accused). Furthermore, one of the witnesses who initially called the police (an older Aboriginal woman), recanted her prior statement of events in what appeared to be an example of the well-documented, Indigenous cultural distrust of Australian criminal justice systems.[31] The other victim (a white female), was friends with the accused's sister. This second victim gave the most complete version of events in her witness testimony.

The white female victim had been drinking alcohol and using narcotics with the accused's Indigenous sister; the two women got into an argument. During this argument, the female victim used

[31] Blagg (2016).

a racial slur about Aboriginal Australians ending in the letter 'o.' The accused's sister immediately stormed out of the house, ostensibly intending to have the accused settle the score by attacking the female victim's significant other (the male victim). As a cultural side note, one of the ALS solicitors informed the researcher that an Indigenous woman collecting an Indigenous male relative to attack another male as part of an argument between two females was a modern perversion of precolonial Aboriginal justice. The ensuing attack on the victims' home was significant. Doors and furniture were destroyed by chains and machetes. Frankly, had the police not arrived so swiftly, at least one of the victims would have come to serious bodily harm, if not death.

The evidence against this accused objectively appeared quite strong. The police acted heroically and played everything by the book. The accused left his 'man bag' at the scene, and there was a 000 call (the Australian emergency services number) that appeared to describe the accused. However, in this trial race played another, unexpected role. In testimony, the victims both used racially loaded language. This language included allegations the accused repeatedly called the victims 'white dogs' and various other racial insults. Notwithstanding (or maybe because of) the obvious racial overtones to the victims' testimony, upon learning a white person deployed a highly offensive, anti-Indigenous racial slur towards the Indigenous accused's similarly Indigenous sister, the jury noticeably changed. At the end of a week-long trial, the jury acquitted the accused in what may have been a compromise verdict since the jury was aware the accused pleaded guilty to one of the lesser included offences. After the mixed-verdict acquittal, when sentencing the accused for the lesser included offence to which he pleaded guilty, the judge told the accused that the jury was overly kind to him, on the record. The accused was then sentenced to time served.

Trial 5

Nothing observed in trials of non-Indigenous accused males came close to the unreasonable prosecutions of some Indigenous males. However, this is not to say that non-Indigenous males are all treated fairly, nor that race does not exist in non-Indigenous trials. Among non-Indigenous matters, there was clear police misconduct in the trial of a non-Indigenous male of Middle Eastern origin accused of transporting narcotics. At trial, it became apparent that a young training group of police officers from the 'proactive policing' unit pretextually stopped a modified enthusiast car for a minor traffic infraction. What happened next is impossible to know for certain, but what is certain is the NSW Police made a series of major mistakes that the young officers further compounded with problematic testimony.

Significant evidence was lost by the police, including the outer wrapper containing the allegedly smuggled drugs. The impounded car was also sold at auction before the police took enough photographs. Furthermore, the photographs tendered into evidence by the Crown were not of the car in question, but a similar model from a used car dealer's website. The defence solicitor advocate, using the licence plate and Vehicle Identification Number from the car the accused had actually been driving, introduced repair schematics illustrating the car in question had an entirely different centre console arrangement. The actual car the accused would have been driving contained a split centre console arrangement that was fundamentally inconsistent with the police officer's testimonial claims of having found a large stash of drugs in the centre console. The drugs physically could not have fit. Furthermore, of the four officers present, only one filed a timely written report, and some of the other officers did not file their reports for over a year. These later reports all appeared heavily influenced by the initial written report, even using the same language to describe non-technical terminology. Likewise, the reports described physically improbable sightlines, and referenced Middle Eastern gang activity in the neighbourhood, which raised questions of racial profiling.

Additionally, there were translation issues in the accused's original recorded police interview. When the trial translator questioned the quality of the recording's translation, the judge ordered the trial translator to review the original police interview transcript. Upon receiving that review, the judge effectively disregarded the police interview's evidential value. At the time of trial, the translator in the initial police interview had already been terminated for repeatedly taking significant licence in translation. According to the evidence introduced in court, that translatory licence was known to include substantive additions that significantly altered semantic meanings. Unsurprisingly given the police misbehaviour, the fired translator, and the poor evidence introduced by a prosecutor unfamiliar with automobiles, the accused was quickly acquitted in this judge-alone trial. Notably, the court openly scolded the four young police officers and implied their actions verged upon actionable police misconduct and contempt of court. Nevertheless, the court chose not to sanction the officers, so they only suffered professional embarrassment.

Trials 6 and 7

Civil code lawyers sometimes joke that the common law does not hold court, but instead holds theatre. These two concurrent trials illustrate a potential kernel of truth in their humour. In less polite terms, these joint trials were a circus. The two accused persons were charged with a 'robbery in company' (with one another) involving a trivial amount of cash from a victim they had just injected IV narcotics with, in a parking garage. Notably, this was the first indictable criminal trial for the judge,

who had yet to learn courtroom control. Adding to the shenanigans, all three barristers clearly loved theatrics, and one of the two co-accused was entirely incapable of remaining silent in the dock. At one point, after a particularly egregious outburst by this accused, the Crown prosecutor alluded to subpoenaing the researcher's field notes in order to charge said accused with witness intimidation. No subpoena eventuated, but the threat thereof illustrates how cartoonishly absurdist these joint trials periodically became.

In these trials, all the actors were white (beyond the jury, whose membership included several visible people of colour). Interestingly, some of the jurors of colour appeared to have difficulty understanding the lower-class dialect of Sydney slang English used throughout the trial, and white jurors were periodically observed explaining terminology to jurors of colour. Despite containing all-white lawyers, judges and parties, race also managed to interject itself into the proceedings in another, more unexpected way. Other than the alleged robbery, itself, all the events at issue took place on the streets of a major business district, which, like most such districts in Australia, is almost completely covered in CCTV recording systems. There was over an hour CCTV footage played, and then replayed, for multiple witnesses, including the victim and both accused. The individual who sold the trio IV injectable narcotics was a large male this researcher visibly estimated to be of Pacific Islander heritage. However, the specific nationality/ethnicity of this narcotics seller was indeterminable from the CCTV footage. This person was not present in court but was known to police. His actual ancestry and heritage appeared unknown to everyone.

Throughout the entirety of these concurrent trials, this narcotics-selling individual was called numerous things without ever being referred to by name (apparently nobody knew it). The individual was interchangeably termed 'the Māori,' 'the Sāmoan,' 'the Islander,' 'the pusher,' and 'the dealer.' While the three trial lawyers all appeared to be deliberately utilising various names for this individual theatrically, there was a distinctive subtext of the pervasive negative, racialised stereotypes regarding Māori involvement in the drug trade and organised crime. The trials ended with a total acquittal for both accused males. Since these trials turned on the alleged victim's credibility, not the nature of the narcotics transaction, there is little chance the racial tropes used to reference the narcotics seller played any factor in the verdict. Nevertheless, racial tropes and stereotypical, racialised allusions to the unnamed narcotics selling individual were repeatedly used by both defence and prosecution, thereby demonstrating the presence of racial dynamics in a trial involving what visibly appeared to be solely white actors.

Fitness to Plead Hearing 1

Race had absolutely no appearance in this one-day hearing. Race was simply irrelevant to the specific proceeding beyond the pervasive white normativity of Australian society. The accused was white, the victims were not present, the victims' race went unstated, and the accused was visibly suffering from late-stage dementia. The accused was already living out the remainder of his days in an aged-care centre, and the evidence showed he would spend the rest of his life in that facility regardless of what occurred at the hearing. From the manner in which the hearing was conducted, events appeared more formalistic than substantive – as if the conclusion were self-evident and the hearing was simply an act of legally required ritualism.

Analysis and Findings

This section contains the analysis and findings of how race presented itself as a social force over the course of courtroom observation alongside how the NSW District Court reacted when confronted with real-world racial dynamics. While two previous chapters of this thesis demonstrate racially discriminatory aspects of the NSW District Court criminal litigation process, this chapter shows one cannot claim the story of race in NSW District Court criminal proceedings is a purely positive tale. On the other hand, this chapter also establishes that neither can one claim the story of race in those same criminal matters is an entirely negative narrative. Nevertheless, the most important finding is that only one NSW District Court criminal matter within this observational dataset lacked any racial dynamic beyond non-Indigenous Australia's cultural white normativity.

From trial observations, it appears the NSW District Court ameliorates most of the worst miscarriages of justice for accused males of colour. Most notably, the NSW District Court visibly ameliorates racial issues in cases where the police laid bad charges without sufficient evidence, because, in such instances, the NSW District Court quickly acquits. However, a NSW District Court acquittal cannot ameliorate the years an accused may spend in pre-trial detention. Likewise, the NSW District Court observably seems wary of police misconduct, so when police misconduct occurs, the accused is more likely to receive an acquittal.

Changing course, one of the more interesting observations during field research was how NSW District Court juries reacted to victims' apparent racism. During trial observations, subtextual racism was largely ignored by juries, but when a victim directly admitted having used overt anti-Indigenous racial slurs against an Indigenous accused's sister, the jury became visibly upset. Afterwards, that jury appeared to lack sympathy for the victims, who had plainly violated the Australian social taboo against

overt anti-Indigenous racism. This jury's behaviour, therefore, fits neatly into the analytical framework posited in Nils Christie's theorisation of the ideal victim.[32] According to Christie, societies view victims through a moral lens, so when a purported victim lacks the personal characteristics that a particular society deems worthy of protection, the alleged perpetrator is far less likely to be convicted. Regarding the applicability of Christie's ideal victim theory to Trial 4, the overall strength of the physical evidence and the judge's comments after the verdict show the accused may well have committed the acts in question. Nevertheless, the jury appeared unwilling to convict once one of the complainants prevented their own legitimate claim to ideal victim status[33] by making racially offensive remarks to the accused's sister. Notwithstanding a large percentage of the non-Indigenous Australian population holding negative opinions about Indigenous Australians,[34] overt racism against Indigenous Australians is unacceptable in polite Australian society. As such, the alternative guilty plea may have enabled the jury to socially punish this victim's overt racism without allowing the accused to walk away scot-free.

Next, it would appear the NSW District Court struggles with cross racial eyewitness identification evidence. Under *Evidence Act 1995* (NSW) s 114, in-court identifications are disallowed in NSW District Court criminal litigation,[35] but photo array identifications are largely admissible. These photo arrays, for whatever reason, are rarely representative when the accused is Indigenous. In extraordinary situations where the photographic array lacks any reasonable resemblance to the accused, the eyewitness' identification evidence can be excluded separately from the witnesses' oral testimony under *Festa v The Queen*[36] and *Alexander v The Queen*.[37] However, in this observational sample, a nonrepresentative photo array was only excluded once, and both parties' legal practitioners commented on the rarity of such exclusions. Similarly, the problems with eyewitness identification evidence extend far beyond unrepresentative photo arrays, and in one matter, an Indigenous male was arrested, held without bail for over a year, and then put on trial even though the only eyewitness saw three 'African Americans.' Notably, the ongoing debates surrounding Australian eyewitness identification evidence are both longstanding and recurring. The ALRC has raised two prior objections[38]

[32] N Christie, 'The Ideal Victim' in *From Crime Policy to Victim Policy: Restructuring the criminal justice system* (MacMillan, 1986).
[33] Ibid.
[34] S Shirodkar, 'Bias against Indigenous Australians: Implicit association test results for Australia' (2019) 22(3-4) *Journal of Australian Indigenous Issues.* 3.
[35] *R v Tahere* [1999] NSWCCA 179, 27 & 32; *Walford v DPP* [2012] NSWCA 290.
[36] *Festa v The Queen* [2001] HCA 72.
[37] *Alexander v The Queen* (198)] 145 CLR 395.
[38] *See*, ALRC *Evidence*, (ALRC Interim Report no. 26, 1985) 421.

in two separate inquiries[39] to the High Court's current interpretation of the *Uniform Evidence Act*,[40] but neither succeeded in changing the law. At this point, it appears poor photographic eyewitness identification arrays will remain lawful unless the NSW Legislative Assembly amends *Evidence Act 1995* (NSW). As a result, this research observed the NSW District Court admirably attempting to mitigate and minimise the risks posed by routinely unreliable, yet largely admissible, cross racial eyewitness identification evidence.

Lastly, yet still importantly, race was rarely deployed by prosecutors, but it was routinely raised by the defence. Sometimes, the defence raised Indigenous culture as a fact issue. Other times, the defence objected to an eyewitness' poor cross racial identification. At still other times, an unknown person of colour was used as a racialised red herring for the benefit of white accused persons. In all of these situations, race was deployed for a unique tactical purpose, and every purpose was purely intended to benefit the accused. Defence lawyers' tactical uses of race for their client's benefit presents an interesting wrinkle to the story of race, itself, as a social construction, in NSW District Court criminal trials. Furthermore, that wrinkle appeared with surprising frequency throughout the course of fieldwork. This unexpected finding opens the door for future research investigating how and why criminal defence lawyers benefit an accused by deploying the social construct of race.

Conclusion

Ostensibly, Lady Justice is blind. Nevertheless, legal-ethnographic observation shows race and Indigeneity are powerful social forces significantly impacting the daily operation of NSW District Court criminal trials. In many cases, cross racial identifications are skewed by how poorly human beings identify the racial other. At other times, race is a culturally appropriate defence, justifying otherwise untoward acts. In some situations, race might influence police process. And in others, racially loaded comments may be used by the defence to establish reasonable doubt. In still other cases, race itself visibly influences the verdict of blind justice.

These findings represent a significant contribution to the legal and academic understandings of how Indigeneity, race, and racism influence applied court process and courtcraft. By continuing work such as this chapter, political, social, and law reformers alike will become better able to design systems

[39] *See,* ALRC, *Uniform Evidence Law* (ALRC Report no. 102, 2006) 13.9.
[40] Ibid.

that properly account for differences between peoples and cultures. Further, larger scale research is required to verify whether these findings apply more universally, and future research would benefit greatly from using a large enough research team to gather a statistically representative sample.

Such work must continue, because as this study shows, while Lady Justice may be blind, at least sometimes, she still sees colour through her blindfold. In the following chapter, An Infrastructural Institution, why Lady Justice sees race through her blindfold will become more apparent. She was once called Dike: an imperial goddess in her own right.

VIII.

An Infrastructural Institution

NSW District Court courthouse design, capacity and supporting infrastructure

Purposeful Perspective

On the heels of a chapter telling the story of race in NSW District Court criminal trials, this final substantive chapter tells the story that race imprints upon the very structures housing the NSW District Court, as an institution. Originally, the chapter grew out of an artistic gallery show from which this sociolegal inquiry draws data; thus, that photographic collection, replete with captions, is reproduced in its entirety as *Appendix vii*. Collectively, this chapter and its corresponding gallery show represent four years of work in and around the District Court of New South Wales. Each and every NSW courthouse with a District Court criminal jurisdiction sitting date (during this project) is photographically present in the appended captures and captions: from Sydney Downing Centre all the way to Broken Hill. That show, titled The King's Courts, serves to ground readers in the localities where NSW District Court trials are conducted, as well as establishing some of the racialised, colonial, and cultural context to the courthouses of NSW. By seeing the structures in which the criminal matters in this thesis appear, readers all over the globe are better able to understand the places and spaces where the research takes place. However, these joint works seek to do more: both chapter and show extend an open invitation to join the author-artist on a series of journeys across New South Wales, so that reader-viewers may share in joint discoveries regarding what NSW courthouses say about the criminal legal system residing therein.[1]

This chapter, itself, is a mixed method, sociolegal analysis demonstrating present, racially disproportionate shortcomings in NSW criminal legal infrastructure that are only correctable through democratic means. Using existing legislation, existing literature, novel architectural-photographic analysis, new count data, and distance measurements, this chapter engages with the interrelationship

[1] S Smith, et al., 'Courthouse Size and Its Impact on Judicial Performance: Insights from Weber's Theory of Rationality (2019) 7(2) *Journal of Law and Courts* 215.

between judicial infrastructure and criminal process in order to demonstrate their adverse effects on Indigenous males accused of indictable offences in NSW. In doing so, this chapter addresses intergenerational trauma and social exclusion as they relate to an accused's conduct during trial before then moving into a conversation regarding resource allocation and the impact of trial relocation on an Indigenous accused.

Distinguishing it from A Troublesome Tendency, that focused on areas where NSW criminal legislation is rapidly regressing, this chapter openly acknowledges areas where the NSW criminal litigation process is slowly improving – while also pointing out where additional changes need to occur. Similarly, this chapter notes the NSW District Court's difficulties in providing functionally equal access to justice across such a vast territory, with such disparate population density, as well as the struggles it faces because of inadequate infrastructure in western NSW. As such, this chapter does not place blame on the NSW legal system, and repeatedly returns its core theme: certain structural inequities remain outside the scope of present legislation. Nevertheless, this chapter, like the rest of the thesis, consistently reiterates the foundational ideas and principles of racial anti-discrimination law. Therefore, this chapter repeatedly references the similarities between colonial legacies visibly observable in NSW courthouses, and legacies of American school segregation as they pertain to the first indirect discrimination case in modern legal history, *Griggs v Duke Electric Power Company.*[2]

In addition to its sociolegal analysis, this chapter brings together several of the philosophical and theoretical viewpoints found throughout the thesis, thereby providing an overview of the macro-level, social frameworks this researcher believes to be in play. In the immediately following section, there are references to courthouses being built as temples to the Greek goddess Dike, who was later called Justicia by the Romans, from whom the English language derives the word justice. Both Dike and Justicia come from the faiths of empires long since fallen. Yet, because Rome colonised Britannia in late antiquity, a later British Empire eventually exported symbols of a faith that British people had abandoned over a millennium before they, in turn, became colonisers. Such allusions unavoidably imply an underlying social force at work: imperium begetting empire. That social force is particularly prescient in New South Wales, where the ongoing penal colonisation of Blak Australia[3] is carried out

[2] *Griggs v Duke Electric Power Co.,* 401 U.S. 424 (1971). *See Also*, *Swann v Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971).

[3] R Emory, 'It Didn't End with the Hougoumont – the ongoing penal colonisation of Indigenous Australia' (Presentation for the Balmain Institute, 14 November 2019).

under the symbols of a long dead faith, itself the product of an empire that previously colonised a more recent, imperial coloniser.

Monumental Meanings

There is a burgeoning, though not new, academic literature in Australia describing and critiquing existing racialised courthouse designs, in an activist manner, seeking to influence the future temples of justice. The term 'temples of justice' is deliberate: Lady Justice, her scales, and her sword are a collective figment of the Western mind. Much of the West's modern criminal law began developing during the ancient Imperium Romanum,[4] and even today, Lady Justice remains depicted as Justicia, the Roman Pantheon's demigoddess incarnation of the Greek goddess Dike. It is to this imperial deity that the West builds palatial temples, with some of their designs (notably the neoclassical US Supreme Court building designed by Cass Gilbert) making the Greco-Roman connection explicitly clear from the moment one first lays eyes upon the structure.[5] On account of her ancestral origins, Dike's judicial temples tend to be overtly Western in nature, and as this chapter demonstrates, New South Wales is no exception to the rule.

The High Court of Australia provides an excellent example of the intentional symbolism involved in courthouse design. The High Court's oral history project provides both verbose descriptions and audio-visual recordings demonstrating the time, money and effort involved in creating a deliberately symbolic space, and place, for the highest court in the land. Everyone involved in the project was required to adhere to predetermined symbolism that showcase the values Australia intentionally included in the building. [6] Similar societal statements in courthouse design are the norm the world over. Courthouses are monuments, much like the Australian National War Memorial or the Colosseum in Rome. Monuments make statements about those who build them, and courthouses are no exception.

[4] To provide an example, the Western sexual assault concept that violence nullifies consent first evolves in ancient Rome and is discussed in *Corpus Iuris Civilis libre* XLVIII. *See,* Papakonstantinou, N and Stevens, A 'Raptus and Roman Law' (2020) 52 *CLIO Women, Gender, History* 21.

[5] B Schwartz, *A History of the Supreme Court*. (Oxford University Press, 1993).

[6] E Russel, et al., 'The Building' *High Court of Australia 40th Anniversary Building Oral History Project* (online, retrieved 09 August 2022).

In this vein, the US Supreme Court building's design provides insight into how a society's values influence courthouse construction. It is well established that US President Howard Taft first proposed the United States' current palatial, supreme temple of Justicia in order to demonstrate the American government's constitutional separation of powers in 1912. It is likewise well documented that he continued lobbying for such a building after becoming Chief Justice Taft of the US Supreme Court, the position he held when he eventually commissioned the building's construction in 1929.[7] Taft claimed the space in which a court sits to pronounce justice is both a symbolic statement of governmental structure and an expression of societal values. Therefore, it should surprise nobody that a nation fancifully declaring itself the most legitimate heir to Athenian Democracy and Roman Republicanism (going so far as to name its upper house the Senate) would house its highest court in an overt temple to the Greek goddess Dike.[8]

Viewing courthouse design as a monumental statement of societal values is by no means a uniquely Western phenomenon. It is in fact global. Consider the now democratic South Africa, where the 'Constitutional Court sits on the site of the prison that held activists during apartheid and it's design symbolizes South Africa's post-apartheid search for reconciliation.'[9] In South Africa, one cannot escape the choices made by a young democratic state to symbolically use the placement and presentation of its new Constitutional Court to signify its core values. The design and placement of the South African Constitutional Court announces to the world what matters to that young Westphalian state. More importantly, the design and placement also denote *who* matters to South Africa's young democracy. These are unavoidably intentional statements of national identity on every level. As a monument, the Constitutional Court represents South Africa's intentional, postcolonial conversion of pain and white supremacist oppression into a symbol of newfound freedom and formal equality. As a legal symbol, the courthouse represents South Africa's postcolonial government reclaiming its people along with its territory.

The intentional symbolism of the High Court of Australia, US Supreme Court, and South African Constitutional Court poses two interesting questions regarding New South Wales judicial infrastructure. The first question is 'what values does New South Wales espouse through its

[7] Ibid.

[8] The US Supreme Court building was sadistically ironic at the time of construction: it was formally dedicated to 'equal justice under the law' during American apartheid. *See,* Schwartz (1993).

[9] T Anthony and E Grant, 'Courthouse Design Principles to Dignify Spaces for Indigenous Users: Preliminary Observations' (2016) 8(1) *International Journal for Court Administration* 43.

courthouses?' Similarly, the second asks 'whom does New South Wales value?' Some of these answers can be found in the literature. Anthony and Grant[10] argue that 'court design can signify an imperial and oppressive past' in a place where 'Indigenous sovereignty was never ceded.' Likewise, Spaulding[11] alludes to Australian courthouse design as an allegory for the unilateral imposition of British common law as part and parcel to the overarching British colonial endeavour. This seems unsurprising, since a physical symbol of literal heraldry hangs in every courthouse in New South Wales: the Commonwealth Coats of Arms.

Furthermore, the academic literature shows that interior courtroom design may directly impact the outcome of individual criminal trials. Shortly before this project began conducting field research, Rossner et al. conducted an experimental study by conducting mock trials in Sydney, seeking to measure how the dock influences procedural fairness for the accused.[12] Their empirical results were striking:

> *A logistic regression analysis, with punitiveness as a covariate, indicated that jurors who saw the defendant in the dock – either a glass or an open dock – were 1.8 times more likely to view him as guilty than jurors who saw the accused at the bar table ($\chi 2$ (1)= 6.0, p = .014). This effect size was virtually identical for the two dock types. Expressed in percentage terms, those who saw the accused in a dock had a guilt level 14 percentage points higher (47 per cent) than those who saw him at the bar table (33 per cent).*[13]

Rossner et al.'s findings are significant, particularly the elevated likelihood of conviction regardless of whether a secure dock or non-secure dock is used. Similarly, they state that the dock may lead juries to view the accused as an 'outsider,' which raises significant questions of procedural fairness for Indigenous Australian males, who are already the racial 'other.'

Later sections in this chapter explore how exclusionary colonial symbolism can impact current NSW criminal litigation and ask whether such symbols might disparately impact Indigenous Australians in a way that echoes *Griggs.*[14] Nevertheless, it bears mentioning that not every courthouse or courtroom in NSW overtly symbolises colonisation, imperialism, and Indigenous dispossession. NSW

[10] Ibid.

[11] N Spaulding, 'The Enclosure of Justice: Courthouse Architecture, Due Process, and the Dead Metaphor of Trial' (2012) 4 *Yale Journal of Law & the Humanities* 311.

[12] M Rossner, et al., 'The dock on trial: courtroom design and the presumption of innocence' (2017) 44 (3) *Journal of Law and Society* 317-344.

[13] Ibid.

[14] *Swann v Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971).

Indigenous-specific, restorative justice courts (termed Circle Sentencing Courts) are intentionally designed in a manner that minimises distinctions between all participants, including the Indigenous person who pleaded guilty as a precondition to entering the process.[15] Rossner and Tait provide an elegant description of the intentional design of a Circle Sentencing Court space:

> *The two-sided Bar table, sometimes softened into an oval shape, signifies two sides of a contest, even if both sides are less well defined than in a traditional court setting. In contrast, the circle symbolically suggests all participants belong to the same team, or permits the development of multiple groupings.*[16]

Interestingly, the impact of these deliberate interior design choices may be slowly expanding beyond the unique spaces created for Indigenous-specific diversionary programs. In a recently constructed NSW courthouse, NSW Communities and Justice made overt, deliberate efforts to increase cultural inclusivity, whilst also improving local infrastructural capacity.[17] Coffs Harbour's new courthouse (that opened in 2015) is hailed as an achievement in both political and empirical-driven design.[18] In stark contrast to many other NSW courthouses that speak to empire, Coffs Harbour Courthouse speaks to 'Country,' in the Indigenous Australian sense of the term. As in South Africa, the design considerations implemented at Coffs Harbour Courthouse were not accidental nor were they made in passing. There was, at every moment in the design timeline, an intentional effort to include the local custodians of 'Country' in the process of building a new, intercultural space, where Indigenous people feel safer in court.[19] In addition, the new building's larger size and up to date technological capabilities increase judicial capacity in the region, thereby improving access to justice. Only time will tell whether Coffs Harbour Courthouse foreshadows broader legal changes, or whether such changes lead to fewer Indigenous convictions at trial. For the moment, it is a creature of policy, people, and purchasing,[20] beyond the scope of existing racial anti-discrimination legislation.

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[15] M Rossner and D Tait, 'Contested emotions: adversarial rituals in non-adversarial justice procedure' (2011) 37(1) *Monash Law Review*.

[16] Ibid.

[17] E Rowden and D Jones, 'Design Dignity and Due Process: The Construction of the Coffs Harbour Courthouse' (2015) 14(2) *Law, Culture and the Humanities.*

[18] Rowden and Jones (2015).

[19] Anthony and Grant (2016).

[20] Ibid.

Dated Designs

Having now discussed the societal meanings of courthouse architecture, this section establishes how NSW's overwhelmingly Western-designed courthouses exclude Indigenous culture. In turn, this section enables an upcoming analysis of how social exclusion impacts procedural equity in NSW criminal trials. As already mentioned, Anthony and Grant demonstrate how courthouse design often reminds Indigenous people of their colonisation. However, this author would go further. Courts are still the buildings where Indigenous people are being actively colonised.[21] Indigenous Australians are among the most incarcerated peoples on earth, [22] and they are all sentenced in courthouses —so the trauma suffered by past Elders is still being re-inflicted on those Elders who are living and emerging.[23] Criminal courts are generally awful for almost all people who find themselves in need of using them, but existing NSW courthouse designs remaining as they are force Indigenous Australians to relive intergenerationally traumatic experiences[24] at times they are highly vulnerable.

To illustrate how courthouse design plays into Indigenous social exclusion, *Table 1* shows the number of courthouses built in discrete historical periods as they relate to the legal status of Indigenous Australians in NSW.[25] [26] The first period, Colonisation to Federation is relatively straightforward: it includes courthouses built by the British colony of NSW. The second category includes all courthouses built by the Australian state of NSW prior to Indigenous Australians gaining statutory equality from the passing of the RDA in 1972. The next period includes courthouses built between 1972 and the point at which Indigenous Australians gained Native Title rights in 1992, which then leads to the final category: courthouses built during the present legal era.

Importantly, *Table 1* shows NSW courthouse construction within an Indigenous *Australian* historical context. Such context matters, because without context, the individual histories of unique Indigenous people groups fade into the overarching stories of European colonialism and imperialism.

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[21] Emory (2019).
[22] T Anthony, 'FactCheck Q&A: are Indigenous Australians the most incarcerated people on Earth?' *The Conversation* (6 June 2017).
[23] A Bombay, K Matheson, and H Anisman, 'The intergenerational effects of Indian Residential Schools: Implications for the concept of historical trauma' (2014) 51(3) *Transcultural Psychiatry*; *Equality Before the Law Bench Book* (NSW) s 12.2.
[24] *Equality Before the Law Bench Book* (NSW) s 12.2
[25] Please note this is the date of the original courthouses still in use. Expansions and renovation dates are not included here.
[26] While the Downing Centre building dates to the early Federation period, it was not converted to a courthouse until after the RDA.

For instance, American Indians look sideways at Native Title because *McIntosh*[27] initiated an all-out colonial land grab from which Tribal Nations will never recover.[28] Aboriginal and Torres Strait Islander peoples, on the other hand, view *Mabo (no. 2)*[29] as the moment when an Indigenous Elder finally forced non-Indigenous Australia into recognising First Nations' pre-existing sovereign land rights. *Table 1,* therefore, dates structures using legislation and landmark judicial decisions to demonstrate Indigenous Australia's ongoing struggle for functional legal equality:

Courthouses by construction era (Table 1)

Era	**Colonisation to Federation**	**Federation to the RDA**	**The RDA to Mabo no. 2.**	**Post Mabo Era**
Number of Courthouses	13	6	6	5

Within this context, only 11 NSW courthouses currently in-use were built after Indigenous Australians gained formal legal equality. Likewise, only 5 NSW courthouses were built after Blak Australia gained Native Title land rights. The remaining 13 courthouses were built during eras when Australian Indigenous peoples were either legally unequal or actively being colonised by the British Empire.

Keeping in mind that the architecture itself is discussed, at length, by the appended gallery show's captions, *Table 2* shows the total number of courts with visibly Indigenous exterior design elements. Within this research, visibly Indigenous exterior design elements should be understood to mean: architectural elements, of the buildings themselves, an observer reasonably versed in Indigenous Australian cultures, would consider overt references to NSW Aboriginal culture. Definitionally, this would not include public art (such as sculptures or paintings) not forming part of the building's structure but would include permanent fixtures. In line with the thematic structure of the thesis, this definitional distinction originates at common law. In a common law realty transaction, permanent fixtures are considered 'annexes' a buyer acquires in the purchase of real property, differentiating them from an owner's chattels, which remain with the seller after transfer of title. This is a deliberate choice, made in recognition of the colonial nature of the British Empire's imposition of pure common law over Indigenous Country, [30] using Terra Nullius.

[27] *Johnson & Graham's Lessee v McIntosh,* 21 U.S. 543 (1823).
[28] *See, Cherokee Nation v Georgia*, 30 U.S. 1 (1831). *See also, Indian Removal Act of 1830* (United States).
[29] *Mabo v Queensland* (1992) 175 CLR 1 (*Mabo (no. 2)*).
[30] Spaulding (2012).

Courthouses by visibly Indigenous design elements (Table 2)

Courthouses with Indigenous design elements	Courthouses without Indigenous design elements
2	28

Table 2 serves a similar purpose to the others in this section by illustrating that only two of the currently used NSW courthouses with District Court criminal sitting dates have visibly Indigenous exterior design elements. Coffs Harbour Courthouse is visibly Indigenous to any reasonable observer versed in Aboriginal Australian cultures, whereas Newcastle Courthouse required cursory research.[31] Nevertheless, both courthouses willingly and intentionally reference Indigenous culture in their design and construction. Notwithstanding the inclusivity of these two buildings, the courthouses in Coffs Harbour and Newcastle are two of the newest judicial structures in New South Wales. This, in turn, leads to the following table demonstrating the number of courthouses with visibly Indigenous exterior design elements by legal era:

Visibly Indigenous design elements by construction era (Table 3)

Era	Colonisation to Federation	Federation to the RDA	The RDA to Mabo no. 2.	Post Mabo Era
Number of Courthouses	0	0	0	2

From the count data in *Table 3*, the most reasonable inference one draws is that the majority of courthouses in NSW maintain exclusionary exterior designs, and the primary cause thereof, is the advanced age of existing courthouses. Such an inference gives rise to a question about how NSW can remedy the social exclusion experienced by Indigenous people in existing court buildings. If money were no object, NSW could theoretically replace all the colonial structures with newer, more inclusive designs like Coffs Harbour Courthouse. However, money is an object, which leaves open the possibility that Indigenous people in NSW will remain socially excluded until existing courthouses reach the end of their functional lifespans. Change is plainly possible – Coffs Harbour Courthouse proves so. Still, under present legislation, those changes remain entirely in the hands of the NSW democratically elected legislature and executive.

[31] Cox Architecture, 'Newcastle Courthouse Project' (online, retrieved December 2022).

Intergenerational Impacts

The impact of social exclusion, particularly in design, on individual trial outcomes is difficult to measure. Nevertheless, it has been accomplished empirically.[32] Furthermore, the effects of traumatic stress were first described in human writing as early as the Epic of Gilgamesh,[33] and the impacts of intergenerational trauma have been scientifically researched since shortly after the Shoah.[34] Within Australia, Aboriginal and Torres Strait Islander intergenerational trauma receives explicit mention in the *Equality Before the Law Bench Book* (NSW):

> *Emeritus Professor Judy Atkinson AM, a Jiman and Bundjalung woman, in Trauma Trails writes that Western models of post-traumatic stress disorder are not applicable to First Nations people as they are premised on an individualistic understanding of mental illness. She argues that collective trauma affects the whole society, rather than only affecting people on an individual level. Atkinson views First Nations trauma as "cumulative" or "compounding", which distinguishes it from a one-off traumatic event such as a natural disaster or unique event of interpersonal victimisation. Colonisation, she submits, "set in motion a series of disasters, one precipitating another, to propagate trauma on trauma on trauma" In this model, trauma is both individual and collective and is passed on through survivors to their descendants. Trauma is further entrenched through policies, structures, and systems of control that disempower First Nations people.*[35]

When an Indigenous accused person is facing criminal charges, there are additional factors relating to Indigenous Australian intergenerational trauma in the criminal justice process. Two of those factors were previously raised in A Troublesome Tendency. Namely, the historical corruption and institutional racism within the NSW criminal justice system prior to the Royal Commissions into NSW Police corruption[36] and Aboriginal Deaths in Custody.[37] Another is a shared Indigenous belief in Australia's nationwide judicial bigotry against Indigenous Australians; according to the Indigenous author, Stephen Hagan, judicial bigotry against Blak Australia began during the colonial era and continues to this day.[38] Similarly, it is an historical fact that Australian colonial and early federation

[32] Rossner et al., (2017).
[33] MA Crocq, L Crocq, 'From shell shock and war neurosis to posttraumatic stress disorder: a history of psychotraumatology' (2000) 2(1) *Dialogues in Clinical Neuroscience* 47.
[34] P Fossion, et al. 'Family approach with grandchildren of Holocaust survivors' (2003) 57(4) *American Journal of Psychotherapy* 519.
[35] *Equality Before the Law Bench Book* (NSW) s 12.2 *citations removed*.
[36] *Royal Commission into the NSW Police Service* (Final Report, May 1997) vol. I *Corruption*.
[37] RCIADIC
[38] S Hagen, *The Rise and Rise of Judicial Bigotry* (University of Queensland Press, 2017).

period police committed almost half of the bush massacres of mainland Aboriginal Australians.[39] Likewise, the 2017 Report of The Royal Commission into the Protection and Detention of Children in the Northern Territory[40] demonstrates that state violence against Indigenous Australians *also* continues to this day. When considering such facts alongside the *additional* ongoing truth that Australia's Indigenous peoples continue to die in custody at a racially disparate rate,[41] it then becomes unsurprising that Australia's First Nations remain collectively aware of their shared trauma within the Weberian state's criminal justice systems.[42]

That external, psychosocial factors (including traumatic stress) impact an outgroup minority member's individual behaviour has scientific support dating back to the foundational literature in modern sociology. WEB DuBois addresses the topic at length in 'The Negro Criminal,'[43] Durkhiem in *Le Suicide*,[44] and Marx in *Das Kapital*.[45] Durkheim, in particular, describes an individual's emotional sense of non-inclusion within the rapidly changing societies of the Industrial revolution as the proximate causal factor in 'anomic' suicides.[46] More recently, there is scientific documentation of the effects that both vicarious trauma and traumatic stress have on everyone involved in the trial process,[47] as well as the general impacts of traumatic stress on individual behaviour.[48] With regards to mens rea and criminal culpability, Yacoub and Briggs argue the scientific research on traumatic stress and its resultant mental health conditions has reached such an overwhelming agreement that, 'PTSD's effects on an individual's decision-making abilities have become almost a non-disputable scientific fact in the twenty-first century.'[49] Considering this longstanding scientific consensus, one would be hard pressed

[39] Ryan, L, et al. 'Colonial Frontier Massacres in Australia 1788-1930' *University of Newcastle* (online, retrieved 01 March 2022).

[40] *Royal Commission into the Protection and Detention of Children in the Northern Territory* (Final Report, 2017).

[41] M McAlister and A Bricknell, *Deaths in custody in Australia 2021-22* (Report for the Australian Institute of Criminology, Statistical Report no. 41, 2022).

[42] B Kwan, 'New citizens welcomed as thousands rallied across Australia in solidarity with First Nations people' *SBS* (online, 26 January 2023). *See Also*, *Uluru Statement from the Heart.*

[43] WEB DuBois, 'The Negro Criminal' in *The Philadelphia Negro* (University of Philadelphia Press, 1899).

[44] E Durkheim, *Le Suicide: Étude de sociologie* [French] 'On Suicide, a Study in Sociology' (Ancienne Librairie Germer Baillière, Paris 1897).

[45] K Marx, *Das Kapital: Kritik der politischen Ökonomie* [High German] 'Capital: A Critique of Political Economy' (Verlag von Otto Meisner, 1867)

[46] Durkheim (1897).

[47]M Miller, J Reichert, B Bornstein, and G Shulmand, 'Judicial stress: the roles of gender and social support' (2018) 25(4) *Journal of Psychiatry Psychology and Law* 602.

[48] K Jetelina, et al., 'Cumulative, high-stress calls impacting adverse events among law enforcement and the public' (2020) 20 *BMC Public Health.*

[49] A Yacoub, and B Briggs, 'Posttraumatic Stress Disorder ('PTSD') Effect on a Defendant's Action and State of Mind: The Future of Criminal Culpability' (23 December 2021) SSRN: https://ssrn.com/abstract=4024522.

to argue against the existence of documented, overarching psychosocial factors, and traumatic stressors that would, at times, detrimentally influence an Indigenous accused's behaviour during trial.

Despite this wealth of research into the general impacts of vicarious trauma, intergenerational trauma, and traumatic stress, there is little direct research into how constructed realities impact an accused's ability to aid in their own defence; none directly measures the impact of architecture on colonised peoples. Nevertheless, existing literature on courthouse design, intergenerational trauma, and acute traumatic stress provided a useful basis for interpreting this project's practitioner interview data. On reviewing the interviews first mentioned in Testing for Inequity, several practitioners provided answers echoing ideas contained within these interrelated bodies of extant literature.[50] The question most likely to produce such responses was question 14:

How do Indigenous males behave in the dock? Does that behaviour alter trial outcomes?

Notwithstanding the small size of the interview sample, there was nearly unanimous agreement[51] among respondents that Indigenous male behaviour in the dock impacts trial outcomes. Furthermore, several practitioners recounted stories of Indigenous males experiencing stress-induced emotional outbursts. One ALS interviewee stated older Indigenous males raised on missions are more likely to experience behavioural issues due to their more traditional upbringings (which this researcher also notes would still presently include first-hand, lived experiences of pre-RDA Australian society). Another ALS interviewee reported that while psychological stressors impact all accused persons, those stressors are more pronounced for an Indigenous accused person, thereby rendering them more prone to emotional outbursts.

Both acute and compound trauma responses leading to emotional outbursts can be explained using the existing scientific literature. An Indigenous accused person, like any accused person, will be experiencing an acute instance of traumatic stress. What differs for an Indigenous accused person is that an Indigenous accused will also have a baseline level of ongoing intergenerational trauma that elevates and aggravates the more immediate (or proximate) acute stressor trauma.[52] Bombay, Matheson and Anisman discussed how such combined traumas result in present-day, self-destructive

[50] Anthony and Grant (2016); Spaulding (2012).
[51] Among interviewees with substantial practice experience with Indigenous male accused persons.
[52] *Equality Before the Law Bench Book* (NSW) s 12.2.

Indigenous behaviours in their 2013 study[53] on the ongoing, intergenerational effects of Indigenous Canadian residential schools:

> *Historical trauma theory similarly suggests that, like the person that experienced the original trauma, subsequent generations might also be exceptionally reactive to stressors. Moreover, when these post-memories comprise more than just a single experience, but a collection of horrific events, it is possible that reactions to current injustices, or even to unrelated stressors, would be greatly increased.*
>
> . . . .
>
> *It was suggested that discriminatory acts may trigger a sense of loss or serve as a reminder of historical traumas, and alcohol may serve to numb these negative feelings, or might represent anger manifested in self-destructive behaviors.*[54]

Like alcohol abuse, an Indigenous accused's emotional outbursts in the dock are plainly self-destructive, albeit a more acutely self-destructive behaviour with more immediate harm. However, for an Indigenous accused, the stress of being in the dock is also more acute than the perceived injustices and discrimination described by Bombay, Matheson and Anisman. Similarly, the exclusionary, colonial nature of most NSW courthouse designs likely increases an Indigenous accused's intergenerational trauma response, thereby increasing the chance an Indigenous accused person will express these 'compounded traumas'[55] via emotional outburst. Such outbursts in the dock are plainly detrimental to any accused and reduce their chances of acquittal.

Therefore, colonial courthouse designs disparately impact Indigenous Australian accused persons on account of their unique historical interactions with the non-Indigenous Australian state. In that way, there is an argument to be made that NSW's legacy courthouse architecture is a similar form of discrimination to the ongoing effects of historical educational discrimination addressed by the US Supreme Court in *Griggs,*[56] even if courthouse architecture does not actionably violate the law. Importantly, both NSW Justice and the architectural firm designing Coffs Harbour Courthouse deliberately considered Australian Indigenous people's historical trauma and emotional wellbeing when designing the structure.[57] By doing so, the new building became a safer space, less likely to affect compound trauma responses amongst Indigenous accused persons, which in turn enables objectively fairer, more functionally equal criminal proceedings. These decisions were plainly underpinned by

[53] Published in 2014.
[54] Bombay, Matheson, and Anisman (2014).
[55] *Equality Before the Law Bench Book* (NSW) s 12.2.
[56] *Swann v Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).
[57] Rowden and Jones (2015).

ICERD art. 5(1) ideals of racial and cultural equality before the organs of justice – but in a way that cannot presently be forced upon the system through existing legislation. So, while these changes where deliberate, they were not the result of existing anti-discrimination legislation.

Courthouse Capacity

Inherently related to questions of courthouse design are questions of *courthouse capacity*: the direct link between NSW courthouse designs, procedural fairness, and functional procedural 'equality before the organs of justice.'[58] In this instance, courthouse capacity should be taken to represent the physical capabilities and physical limitations of an individual courthouse structure. Numerous separate elements play into a courthouse's infrastructural capacity, and this section only addresses those most relevant to NSW District Court jury trials. The first (and most obvious) is whether a courthouse is even capable of hosting jury trials. While all 30 of the NSW courthouses with District Court criminal sitting dates can accommodate a jury trial, the number of jury capable courtrooms in each courthouse varies considerably. In terms of courthouse capacity, each additional jury-capable courtroom increases the number of matters that can be heard simultaneously and allows for redundancy to account for technical failures or safety concerns.

Similarly, certain matters require a secure dock, or in matters tried jointly, even two secure docks and multiple in-courthouse detention cells to prevent high risk accused persons from harming others and/or their co-accused. Another factor is the comparative availability of the necessary closed circuit television equipment, secure remote witness rooms, and other related technological infrastructure required by *Evidence Act 1995* (NSW) to try domestic and sexual violence matters. *Table 4* shows the number of jury capable courtrooms and remote witness rooms available at all 30 NSW courthouses hosting District Court criminal jury trials.[59] It does not include the availability of secure docks because NSW Communities and Justice does not presently maintain a central count.

[58] ICERD Art 5.

[59] This data was obtained from NSW DCJ via a *Government Information (Public Access) Act 2009* (NSW) (GIPA) request dated 15 February 2023 and answered 31 May 2023.

Jury-capable courtrooms and remote witness rooms (Table 4)

Courthouse	Jury-Capable Courtrooms	Remote Witness Rooms
Sydney	20	6
Campbelltown	3	1
Parramatta	10	4
Penrith	3	3
Albury	1	3
Armidale	1	1
Bathurst	1	3
Bega	1	1
Bourke	1	1
Broken Hill	1	1
Coffs Harbour	2	1
Coonamble	1	1
Dubbo	2	3
Gosford	2	3
Goulburn	1	1
Grafton	1	1
Griffith	1	1
Katoomba	1	2
Lismore	2	3
Moree	1	1
Newcastle	5	5
Nowra	2	1
Orange	1	1
Parkes	1	1
Port Macquarie	1	2
Queanbeyan	1	2
Tamworth	1	1
Taree	1	3
Wagga Wagga	2	3
Wollongong	3	3

In light of the substantial variance in NSW courthouse capacity, it becomes unsurprising that both of the formal NSW District Court judicial interviewees reported capacity limitations being a primary consideration taken into account when allocating individual matters to particular courthouses. This researcher similarly observed disparities in courthouse size and technological capabilities across regional and remote NSW, which further confirmed the interview data collected from experienced NSW District Court judges and obtained from the NSW Department of Communities and Justice. Therefore, multiple forms of data establish courthouse capacity as a substantial factor in determining whether the NSW District Court tries a particular criminal matter locally or transfers the matter

elsewhere. Due to the sheer size of NSW, when trials are relocated, the distances involved are often extreme.

Using the same statistical dataset as other chapters in this thesis, *Table 5* lists the distances between the accused's residence at time of NSW Police contact and the trial courthouse in relocated matters. To avoid conflating issues, *Table 4* is limited to matters appearing in multiple courthouses, in which the accused was represented, that proceeded to a trial verdict, and in which the accused was at liberty pending trial. In total, there were 17 cases in the dataset meeting these criteria, all of which are represented below:

Distance in kilometres between accused residence and trial court (Table 5)

Residence	Courthouse	Distance
Brewarrina	Parramatta	582.69 km
Bourke	Dubbo	349.35 km
Brewarrina	Coonamble	184.38 km
Brewarrina	Coonamble	184.38 km
Brewarrina	Coonamble	184.38 km
Brewarrina	Coonamble	184.38 km
Brewarrina	Coonamble	184.38 km
Brewarrina	Coonamble	184.38 km
Lightning Ridge	Sydney Downing	584.46 km
Coonamble	Sydney Downing	419.11 km
Coonamble	Sydney Downing	419.11 km
Coonamble	Sydney Downing	419.11 km
Walgett	Sydney Downing	520.19 km
Walgett	Sydney Downing	520.19 km
Cobar	Dubbo	274.08 km
Lightning Ridge	Coonamble	175.81 km
Lightning Ridge	Coonamble	175.81 km
	MEAN DISTANCE	**326.2464706 km**

Within *Table 5*, only three cases are non-Indigenous, showing how distance disproportionately impacts regional and remote Indigenous populations. The dataset does not contain any information regarding why these matters were relocated off Country, but both Coonamble and Bourke have courthouses with NSW District Court sitting dates. Since this extraction only shows matters where the accused was at liberty pending trial, there would have been no need for a secure dock, though the charge categories for multiple matters found in *Table 4* would have required secure remote witness rooms and closed-circuit television equipment to comply with NSW evidence law. At the time these trials occurred, neither Bourke nor Coonamble had the necessary remote witness rooms or closed-circuit television

equipment required to try sexual violence allegations, meaning courthouse capacity limitations would have prevented trying certain matters in those courthouses.

While many trials are transferred for reasons other than insufficient courthouse capacity, Sydney's CBD-based Downing Centre has the greatest capacity of any courthouse in NSW, and unsurprisingly hosts the largest number trials originating elsewhere.[60] To demonstrate the logistical challenges involved in trial relocation, *Table 6* lists the distance between Sydney Downing Centre and the 26 courthouses where the NSW District Court holds criminal jury trials outside Sydney:[61]

Courthouse distances in kilometres to Sydney Downing Centre (Table 6)

Albury	461.25 km	Gosford	51.56 km	Orange	206.19 km
Armidale	376.54 km	Goulburn	168.10 km	Parkes	292.98 km
Bathurst	159.36 km	Grafton	493.00 km	Port Macquarie	315.36 km
Bega	334.81 km	Griffith	477.75 km	Queanbeyan	244.32 km
Bourke	651.44 km	Katoomba	84.77 km	Tamworth	310.98 km
Broken Hill	933.91 km	Lismore	597.24 km	Taree	247.54 km
Coffs Harbour	437.33 km	Moree	507.50 km	Wagga Wagga	377.38 km
Coonamble	419.20 km	Newcastle	117.98 km	Wollongong	67.24 km
Dubbo	303.07 km	Nowra	124.50 km		

Notably, the distances found in *Tables 5 and 6* are measured 'as the crow flies,' because NSW rural roads often close during inclement weather. This author experienced the unpredictability of travelling across western NSW first-hand, when an unexpected thunderstorm added over 500 kilometres in driving distance between the Australian Capital Territory (Canberra) and Broken Hill, NSW. Even 500 kilometres is usually drivable in a single day in ideal conditions, but this occasion, inclement weather necessitated the researcher finding high ground to camp in an elevated tent.

Due to extreme distance and poor infrastructure, when smaller courthouses in NSW are incapable of hosting particular criminal matters on account of their insufficient capacity, it only compounds existing problems posed by NSW's expansive 800,000+ square kilometres of geographic area. NSW's sheer size and infrastructural limitations are most starkly displayed in western localities

[60] This is drawn from the same BOCSAR-purchased dataset used to produce The Racism of Remand and The Oppression in Discretion.

[61] Data taken from Google Maps using aerial distance measurement tool.

such as Bourke, where over one quarter of the population is Indigenous,[62] and the next closest courthouse hosting jury trials is 265 kilometres away in Coonamble.[63] However, Coonamble is also home to a courthouse with relatively limited capacity, so as shown in *Table 5*, matters transferred out of Bourke are more likely to be heard in a larger courthouse like Dubbo, 353 kilometres away.[64] An even more extreme case is Broken Hill, where roughly 10% of the population is Indigenous,[65] and the two closest courthouses holding jury trials (Bourke and Griffith) are both over 480 kilometres away.[66] Again, Bourke is another courthouse with relatively limited capacity, and within the dataset used throughout this thesis, matters transferred out of Broken Hill were more likely to be relocated to Wagga Wagga (651.68 km) or Sydney (933.91 km).

In closing this section, it is important to remember this thesis displays a temporal snapshot. Courthouse capacity in NSW is demonstrably improving, and one can safely assume the NSW government will continue upgrading infrastructure over time. Even whilst travelling across NSW producing the gallery show this chapter grew out of, it became overwhelmingly apparent that NSW Justice took the unexpected opportunity provided by the COVID-19 pandemic to retrofit, upgrade, and refurbish its physical judicial infrastructure. That process remains ongoing; extensive renovations, preservation, and upgrades to the heritage-listed, W.L. Vernon-designed portions of Wagga Wagga courthouse commenced in mid-2023.[67] However, there are still substantial courthouse capacity limitations across western NSW, and an uneven distribution of judicial resources throughout the state that disparately impact Indigenous persons accused of an indictable offence. As with everything else raised in this chapter, such imbalances exist beyond the ambit of present legislation and therefore require additional democratic solutions.

[62] Data extracted from ABS, *Census of Population and Housing - Counts of Aboriginal and Torres Strait Islander Australians* (Catalogue number 2075.0, 2022).
[63] Data taken from Google Maps using aerial distance measurement tool.
[64] Ibid.
[65] Data extracted from ABS, *Census of Population and Housing - Counts of Aboriginal and Torres Strait Islander Australians* (Catalogue number 2075.0, 2022).
[66] Data taken from Google Maps using aerial distance measurement tool.
[67] A Harza, 'Wagga courthouse clock tower to be restored to original detail as part of $4.5 million renovation' *The Daily Advertiser* (online, 29 August 2023) <https://www.dailyadvertiser.com.au/story/8326196/facelift-for-clock-tower-as-courthouse-gets-multimillion-dollar-restoration/>.

Relocation's Ramifications

As a first order matter when discussing the procedural fairness in relocating criminal trials to courthouses with greater capacity, existing research shows massive courthouses are less effective organs of justice.[68] In 2019, Smith et al.'s empirical study of criminal court performance found the following:

> *Findings from multilevel models suggest that there is a positive relationship between size and formal rationality and a negative relationship between size and substantive rationality, even when controlling for workload by research design. Results suggest that abundance of formal rationality or substantive rationality facilitates injustice.*[69]

Therefore, when matters are relocated to Sydney Downing Centre, specifically, Smith et al. suggest judges may focus less on the individual nature of a criminal matter, and more on the formalistic legal process.[70]

Notably, one of the recurring themes in this project's interview data was that criminal matters involving Indigenous accused persons require a more individualised approach than criminal matters involving a non-Indigenous accused. However, relocating trials into larger courts with 'greater . . . . number[s] of divisions (consequential boundaries), the less individual autonomy the judge should perceive.'[71] Earlier in this thesis, The Racism of Remand noted that Indigenous-specific provisions of NSW pre-trial detention law have proven largely ineffective, and other research shows the difficulty of applying Indigenous-specific aspects of sentencing law in practice.[72] When combining such findings with Smith, Smith and Auyong's 2022 research,[73] further judicial homogenisation of the NSW criminal process adversely affects Indigenous accused persons, since legal formalism impedes the necessary individualised analysis of an Indigenous accused's personal circumstances.

Additionally, when a NSW District Court criminal trial is relocated, judges and Crown witnesses fly via the former national airline (Qantas) whereas other interested persons, including the accused's

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[68] Smith et al. (2019).
[69] Ibid.
[70] S Smith, J Smith, and Z Auyong, 'Evaluating Judges in State Courthouses: The Potential Effects of Organizational Size' (2022) *Crim R xiv* (online, 20 January 2022). < https://www.crimrxiv.com/pub/xz80iqwp/release/1>.
[71] Ibid 5.
[72] T Anthony, L Bartels, and A Hopkins, 'Lessons lost in sentencing: welding individualised justice to Indigenous justice' (2015) 39(1) *Melbourne University Law Review* 47.
[73] Smith, Smith and Auyong (2022).

extended family, usually must travel at their own expense. Travel costs will negatively impact all residents of country NSW, but Indigenous people will experience those challenges more acutely for a mixture of reasons. One of the more pronounced causes is that Australian Indigenous households are one third larger, on average, than non-Indigenous Australian households.[74] Relatedly, Indigenous Australians often maintain large, extended familial-social networks from which local Indigenous communities collectively draw support.[75] Along with having larger families, Indigenous Australia's widespread economic disenfranchisement[76] disparately increases family travel costs for an Indigenous accused person as an overall proportion of their family's available monetary resources. Taken together, when an Indigenous accused is tried hundreds of kilometres away from home, they are far less likely to receive assistance from the collective members of their existing social support networks. As is discussed in the following section, these support networks often extend beyond the local Indigenous community, especially for disabled Indigenous persons who rely on their local healthcare practitioners for culturally aware disability supports.

On top of being deprived access to their existing social support networks, trial relocation also introduces an evidential disadvantage for the accused. When a trial is held locally, an accused is able to call most witnesses in person, including last-minute rebuttal witnesses whom defence counsel had not previously intended to call. Alternatively, when matters are relocated, witnesses who are able to travel at their own expense are generally required to do so by *Criminal Procedure Act 1986* (NSW) s 222. If the witness cannot afford their own travel costs, they are allowed to object, and the party issuing the subpoena for their appearance is required to bear the cost of their attendance by s 224. The NSW government has no problem paying transport costs due to its immense, tax-based resources, whereas many Indigenous accused persons cannot afford to bear those same costs, especially on short notice. Once again, widespread economic disenfranchisement serves to disparately impact an Indigenous accused, as does the Aboriginal Legal Service's comparatively smaller budget than that of Legal Aid NSW.[77]

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[74] Data extracted from ABS, *Census of Population and Housing - Counts of Aboriginal and Torres Strait Islander Australians* (Catalogue number 2075.0, 2022).

[75] Ibid.

[76] D Howard-Wagner, 'Success in Closing the Socio-Economic Gap, But Still a Long Way to Go: Urban Aboriginal Disadvantage, Trauma, and Racism in the Australian City of Newcastle' (2019) 10(1) *International Indigenous Policy Journal*. *See also,* K Curchin, 'If the market is the problem, is the hybrid economy the solution?' in *Engaging Indigenous Economy. Debating diverse approaches* (ANU Press, 2016).

[77] M Schwartz and C Cunneen, 'Working Cheaper, Working Harder: Inequity in Funding for Aboriginal and Torres Strait Islander Legal Services' (2009) 7(10) *Indigenous Law Bulletin* 19. *See also*, National Aboriginal and Torres Strait Islander Legal Services, '2018-2019 Pre Budget Submission' (Submission to Department of the Treasury (Australia), 2018)

In some ways, witness travel costs are potentially becoming less prejudicial on an accused due to the introduction of remote witness testimony. However, Australia's notoriously poor broadband internet performance[78] often impedes the efficacy thereof. As an ethnographic example, during this project's final methodology piloting trial, several witnesses testified from remote locations away from the courthouse. Even in Sydney's Central Business District, remote witness testimony often became disjointed. Due to poor network connections, witnesses struggled to answer questions, the video connections routinely pixellated, and the audio connections periodically dropped out. On account of these recurrent problems, the matter dragged out days longer than planned, and the judge repeatedly noted her frustration on the record. In the NSW District Court's defence, that matter was unusually buggy. Still, Australia's poor internet connectivity routinely interfered with remote witness testimony throughout field research, and this project's observational results have been confirmed by other research conducted during the COVID-19 pandemic.[79] Adding yet another complication, NSW's internet performance degrades as one travels west[80] into regions with higher per capita Indigenous populations. Relatedly, private industry ISPs[81] often provide superior products in wealthier areas (with proportionally lower Indigenous populations) compared to the government-funded broadband projects in regional and remote NSW. [82] In more direct terms, while remote witness testimony might eventually cure an accused's evidential disadvantage in the future, Australia's current technological infrastructure cannot support it effectively today.

The last negative impact of insufficient courthouse capacity and trial relocation addressed by this section is the inextricable relationship between trial relocation and the *Jury Act 1977* (NSW) catchment system.[83] In NSW, the Sheriff places an electoral district (or part thereof) into a geographic

[78] Australian Broadcasting Corporation, 'FACT CHECK Anthony Albanese says Australia has slipped to 59th in the world for average broadband speeds since the Coalition took office. Is that correct?' *ABC News* (online, 2 December 2021).

[79] M Legg and A Song, 'The Courts, the Remote Hearing and the Pandemic: From Action to Reflection' (2020) 44(1) *UNSW Law Journal* 126.

[80] C Stone and M Davis, 'New evidence: Stark inequity of online access for rural and remote students, (Media release, Australian Association for Research in Education, online, 15 June 2020) <https://www.aare.edu.au/blog/?p=5524>.

[81] Internet Service Providers

[82] Even during this thesis' final editing process in 2023, people living in Sydney are able to purchase up to 100 Mb/s connections, whereas the NSW government regional expansion is aiming for 50 Mb/s connections. *See,* Snowy Hydro Legacy Fund 'NSW Regional Connectivity Program' (online, retrieved February 2023). *See Also,* Australian Competition and Consumer Commission *Measuring Broadband Australia* (Report for Australian Competition and Consumer Commission, 19 December 2022) appendix.

[83] The districts themselves are set via regulation. The present version is *Jury Regulation 2022* (NSW) but during field research the version in force was *Jury Regulation 2015* (NSW).

'jury district,'[84] for a particular courthouse. *Table 7* displays the relevant electoral districts comprising each courthouse's jury district[85] alongside the percentage of that region's population who self-identified as Indigenous in the 2021 Australian Census.[86]

NSW jury districts and Indigenous population percentage (Table 7)

Courthouse	Electoral district(s)	% Indigenous
Albury	Albury	3.6%
Armidale	Northern Tablelands	10.3%
Bathurst	Bathurst	7.0%
Bega Court	Bega	5.0%
Bourke	Barwon	16.5%
Broken Hill	Barwon	16.5%
Campbelltown	Campbelltown	5.3%
Coffs Harbour	Coffs Harbour	5.8%
Coonamble	Barwon	16.5%
Dubbo	Dubbo	14.3%
Gosford	Gosford	4.0%
Goulburn	Goulburn	3.7%
Grafton	Clarence	8.0%
Griffith	Murray	5.7%
Katoomba	Blue Mountains	2.7%
Lismore	Lismore	5.4%
Moree	Northern Tablelands	10.3%
Newcastle	Newcastle	3.7%
Nowra	South Coast	6.5%
Orange	Orange	8.8%
Parkes	Orange	8.8%
Parramatta	Parramatta	0.9%
Penrith	Penrith	5.8%
Port Macquarie	Port Macquarie	5.0%
Queanbeyan	Monaro	3.4%
Sydney Downing	Sydney	0.8%
Tamworth	Tamworth	13.4%
Taree	Myall Lakes	7.6%
Wagga Wagga	Wagga Wagga	6.5%
Wollongong	Wollongong	3.4%

[84] *Jury Act 1977* (NSW) s 9.
[85] Jury district data produced by NSW DCJ in response to a GIPA request dated 15 Feb 2023 and answered 31 May 2023.
[86] Population data taken from D Gilyana and D Montoya, *NSW Electorate Profiles: 2021 Census* (Report for the NSW Parliamentary Research Service. Background Paper no. 03/2022, 2022).

Due to wide-ranging regional variations of NSW state electoral district per capita Indigenous populations shown in *Table 7*, relocating trials from districts with high per capita Indigenous populations into districts with lower per capita Indigenous populations detrimentally alters the jury pool for Indigenous accused persons. Recalling the data in *Table 5*, several of the relocated trials in the dataset used by this project were transferred from the Barwon electorate jury district (16.5% Indigenous) to courthouses with a sub-1% Indigenous population jury district, which would radically alter the jury pool.

While there is relatively little empirical research on jury diversity in Australia, one of this project's ALS interviewees responded that the most beneficial change to ensure racial equality in NSW District Court criminal proceedings (question number 27) would be mandating two Indigenous jurors for every Indigenous accused. Furthermore, decades[87] of international scientific research has shown time[88] and again[89] the ongoing importance of racially diverse juries:

> *By every deliberation measure examined in the present research, heterogeneous groups outperformed homogeneous groups. First, diverse groups spent more time deliberating than did all-White groups. Of course, longer decision-making processes are not necessarily better processes, but diverse groups used their extra time productively, discussing a wider range of case facts and personal perspectives. Arguably, the accuracy of the information discussed by a group is even more important than the sheer number of facts, and on this count as well, heterogeneous groups proved superior.*
>
> *Even though they deliberated longer and discussed more information, diverse groups made fewer factual errors than all-White groups. Moreover, inaccuracies were more likely to be corrected in diverse groups. These findings dispel any notion that the longer duration of heterogeneous deliberations was attributable to decreases in efficiency. Rather, racially heterogeneous groups had discussions that were more comprehensive and remained truer to the facts of the case.*[90]

Within Australian academia, one of the most in-depth analyses on jury diversity comes from Anthony and Longman's international comparison of Indigenous jury representation in Anglophone

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[87] K Klein and B Creech, 'Race, rape, and bias: Distortion of prior odds and meanings changes' (1982) 3 *Basic and Applied Social Psychology* 21.

[88] A DeSantis and WA Kayson, 'Defendants' characteristics of attractiveness, race, and sex and sentencing decisions' (1997) 81 *Psychological Reports* 679.

[89] RW Hymes, M Leinart, S Rowe, and W Rogers, 'Acquaintance rape: The effect of race of defendant and race of victim on White juror decisions' (1993) 133 *Journal of Social Psychology* 627.

[90] S Sommers, 'On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations' (2006) 90(4) *Journal of Personality and Social Psychology* 597.

settler colonies.[91] Their work chronicles the racial failings of Australian jury selection in detail, specifically demonstrating how Australian jurisprudence fails to impose RDA standards to an individual jury's composition. Jurisprudence, therefore, has created a situation in which Australia's constituent states are only required to guarantee population-representative jury pools, as opposed to racially diverse juries. [92] The lack thereof, according to Anthony and Longman, causes both perverse convictions and perverse acquittals.[93] Resultantly, relocating trials from a high per capita indigenous population area into a lower per capita Indigenous population area can (and mathematical probability dictates sometimes will) prevent any Indigenous people from being selected for an Indigenous accused person's final jury. Even more startlingly, when such events occur, an Indigenous accused whose guilt was decided by a fully non-Indigenous jury is often left without actionable legal redress.[94]

Understandably, one might assume that jury pools differ from the other issues raised in this chapter and that the High Court could resolve jury inequity by applying RDA s 10 to the racial composition of an accused's final jury. However, the High Court is unlikely to do so on account of Australian constitutionalist principles far older than the RDA.[95] At the Australian constituent state level, an accused's right to a jury trial for serious criminal allegations is a 'fundamental right'[96] flowing from the Australian national common law. Collectively, these fundamental rights form what a previous High Court of Australia chief justice termed Australia's 'common law bill of rights.'[97] Because Australia has no written bill of rights, Australian courts zealously guard this collective grouping of fundamental common law rights, and numerous judicial decisions forbid their modification by anything short of inescapably clear parliamentary intent.[98] Thus, any enforceable right to a racially diverse jury would likely have to be created democratically, with explicit language. In the absence of such legislation, trial relocation will continue adversely impacting jury composition for Indigenous accused persons.

[91] Anthony and Longman (2017) 28-30.
[92] *See*, *Cheatle v The Queen* (1993) 177 CLR 541; *R v Walker* (1989) 2 Qld R 79.
[93] Anthony and Longman (2017).
[94] Ibid.
[95] *Potter v Minahan* (1908) 7 CLR 277.
[96] *See, Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 (Gleeson CJ).
[97] Chief Justice R French, 'The Common Law and the Protection of Human Rights' (Speech, Anglo Australasian Lawyers Society, Sydney, 4 September 2009).
[98] *Electrolux* (Gleeson CJ).

Supporting Services

In a similar manner to questions of courthouse capacity leading to trial relocations, this chapter's last substantive section deals with the supporting justice infrastructure a courthouse needs for judges to apply the criminal law in a functionally equal manner. Supporting justice infrastructure, in this context, should be taken to mean the presence of personnel and facilities that NSW law and policy requires to enable the complete, effective, egalitarian operation of the criminal law. This includes, inter alia, sufficient availability of drug rehabilitation services, translators, Indigenous liaison officers, mental health facilities, and adequate numbers of sheriff's officers. Without sufficient personnel and facilities, certain aspects of the criminal law cannot function, and at times, a judge is legislatively barred from applying what may otherwise be more appropriate aspects of the criminal law. Much of the existing research in this area focuses on summary offences, such as driving violations.[99] Nevertheless, some of the same issues, and others like them, also apply to indictable offences triable before the NSW District Court.

The most easily proven disparate impact in criminal process for regional and remote localities is a judge's inability to make community corrections orders (CCOs) and intensive correction orders (ICOs) across large swaths of Outback Australia.[100] Today, the supermajority of Indigenous Australians live in cities,[101] but Indigenous people remain twice as likely to live in remote local statistical areas as their non-Indigenous Australian compatriots.[102] As such, Indigenous people are disproportionately impacted, and are more frequently required to be sentenced to custody, rather than within the community. The source of this problem is multifaceted in nature and relates as much to the Sydney-based NSW government's need to allocate economic resources across a staggering amount of rural territory as to any substantive provisions of NSW criminal legislation. Regardless, it is Indigenous Australians who disproportionately suffer from these economic resource allocation decisions, which raises questions of indirectly discriminatory outcomes. In other common law jurisdictions, such outcomes would offend constitutional anti-discrimination law,[103] but in Australia, resource allocation decisions impacting substantive 'equal treatment before the organs of justice' fall beyond the scope of present legislation.

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[99] ALRC (2017).
[100] Ibid.
[101] Data extracted from Australian Bureau of Statistics *Census of Population and Housing - Counts of Aboriginal and Torres Strait Islander Australians* (Catalogue number 2075.0, 2022).
[102] Ibid.
[103] US Const. 14th Amendment.

Another demonstrable difference in the functional operation of the criminal law across NSW outer regional and remote localities is a comparative lack of diversionary programs.[104] Where such processes are unavailable, more criminal matters will be tried in court rather than handled through alternative criminal proceedings. As with ICOs and CCOs, diversionary processes usually apply to summary offences, but where such processes exist, it enables the NSW Police and DPP to exercise discretion in charging.[105] The Crown routinely brings lesser charges than the most severe offence for which it can make a prima facie case, and in the dataset used throughout this thesis, multiple matters originally listed in NSW District Court were later transferred to a diversionary process or specialist criminal tribunal. Where no such processes or specialist tribunals exist, they cannot be utilised, thereby retaining more matters than necessary in generalist criminal proceedings. Whether the absence of such processes and specialist criminal tribunals discriminatorily alters charging and plea-bargaining practice is a matter for future research. Nevertheless, one cannot avoid that, at present, both the Crown and police have fewer trial avoidance tools at their disposal in outer regional and remote NSW. The impact thereof contains echoes of *Griggs*, but as first mentioned in The Laws of the Lands, not all racially disparate impacts necessarily discriminate.

The last issue worth raising within this section is the comparative unavailability of disability support services in outer regional and remote NSW, which requires briefly addressing differing notions of what constitutes a 'disability' between Aboriginal culture, Western medicine, and Western law. There are, indeed, fewer disability support services available in outer regional and remote NSW than are available in cities.[106] However, Western legal conceptions of disability fundamentally clash with traditional Indigenous Australian cultural values because Indigenous Australians (particularly from regional and remote communities) view disability through an entirely different lens.[107] Within the Indigenous Australian context, Puszka et al. show,

> *[T]he construct of disability, describing bodily conditions and their impact on individual capacity and participation in society, does not resonate with many First Nations people in Australia, in urban, regional and remote areas.*[108]

[104] ALRC (2017).
[105] This is visible in the dataset used throughout this thesis. Matters initially brought in District Court can be and are routinely transferred to the Local Court to be handled through alternative processes.
[106] S Puszka, et al., 'Community-based social care models for indigenous people with disability: A scoping review of scholarly and policy literature' (2022) 30(6) *Health and Social Care in the Community* e3716.
[107] Ibid.
[108] Ibid.

Similarly, Walsh found that while ableism still exists within remote Indigenous Australian communities, it is far less pronounced than in non-Indigenous Australian culture.[109] For over a century, Western medicine and Western culture have focused on the able-bodied 'norm,'[110] which Western law more recently sought to correct through anti-discrimination legislation such as the *Disability Discrimination Act 1992* (Cth). Indigenous Australian culture differs from the West in this regard, in that Indigenous Australia still largely focuses on the collective.[111] Even today, Indigenous Australian communities find ways for 'disabled' individuals to contribute to the collective in whatever capacity they are capable.[112] So, while statistically Indigenous Australians are more likely to have medical conditions rendering them eligible for disability support services,[113] Indigenous people are less likely to consider themselves disabled.[114]

This cultural distinction leads to a situation in which the more traditional Indigenous communities in outer regional and remote NSW require *specialist* medical support services provided by persons who understand Indigenous cultural approaches to natural human difference.[115] Paradoxically, these places requiring specialist medical support services are often the very places where generalist disability support services are lacking.[116] In spite of that disparity, local medical professionals across regional and remote Australia have often learned substantial amounts about local Indigenous peoples, their local cultures, and their unique local needs.[117] In so doing, these local medical professionals have become specialist experts who provide rural Indigenous communities with substantial amounts of support. In this vein, Osborne et al. found,

> *Successful outcomes in rural areas appear likely through therapeutic relationships, coordination and support, by using modalities and models of care that are appropriate in rural settings and by paying attention to harm minimisation.*[118]

Therefore, while there is a proven shortage of disability support services in outer regional and remote NSW localities, regional and remote medical professionals are often the best equipped people to assist

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[109] C Walsh, *Falling on deaf ears? Listening to Indigenous voices regarding ear disease ('otitis media') and hearing loss* (PhD thesis National Centre for Indigenous Studies, 2020) 256.
[110] Puszka et al. (2022).
[111] Ibid.
[112] Ibid.
[113] Ibid.
[114] Ibid.
[115] Ibid.
[116] Osborne et al., 'Beyond the black stump: rapid reviews of health research issues affecting regional, rural and remote Australia' (2020) 213(11) *Medical Journal of Australia* 3.
[117] Ibid.
[118] Ibid.

a disabled Indigenous accused person at trial. In this regard, the NSW District Court finds itself in the midst of a conundrum without easy answers. On the one hand, there are insufficient disability support services in rural NSW, but on the other hand, when trials are relocated to a place such services exist, it deprives a disabled Indigenous accused person access to their local medical professionals who can best help them prevail.

As with everything else discussed in this chapter, the effects of NSW economic resource allocation in regional and remote localities are complex, fall beyond the scope of existing legislation, and require a democratic solution. Such democratic solutions are often messier than they first appear, especially where those solutions inherently require correcting wider social inequalities over which the NSW District Court has almost zero control. Still, there is a striking similarity between the disparate impact of NSW's ongoing resource allocation decisions and the facts on the ground in North Carolina at the time of *Griggs*, where demonstrable racial discrepancies in educational attainment were directly attributable to North Carolina's previously segregated public schools.[119]

Closing Comments

At the terminus of this sociolegal analysis of NSW courthouse architecture and judicial infrastructure, the substantive chapters in this thesis have now drawn to a close. The only remaining texts after this chapter are the immediately following conclusion and the text contained within the appended gallery show. The conclusion restates the ideas of this thesis as a holistic work, engages in legal-type fact finding, and offers up the final answers to the overarching research questions first posed in the introduction.

Collectively, this chapter, this thesis, and its accompanying gallery show, are the direct result of several years of sustained work in and around the NSW District Court. The appended gallery show, The King's Courts, represents the first complete photographic sample of all 30 courthouses with NSW District Court criminal sitting dates captured by a single photographer. By using firsthand data collection, this chapter is able to tell a more in-depth, subtle, and complex story of race within the NSW District Court as an Infrastructural Institution. This chapter, therefore, is the unique product of a unique sample, leading to a unique sociolegal analysis, which explores several infrastructural issues

[119] *Swann v Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

negatively impacting an Indigenous accused's ability to prevail against a New South Wales indictment. Importantly, this chapter does so whilst also noting that none of the issues it raises can be corrected by existing Australian racial anti-discrimination law. Not every racially disparate impact is barred by legislation, and this chapter specifically focused on interrelated, infrastructural problems that can only be corrected by the elected government and legislative reform.

There are already changes occurring on the ground. New South Wales began taking the right steps with recent courthouse construction, and the captions contained in the appended gallery show discuss the substantial upgrades to courthouse capacity that NSW Department of Communities and Justice implemented during the COVID-19 lockdowns. Likewise, there have been recent increases to judicial support services in the wake of *Pathways to Justice*.[120] These demonstrable improvements represent an excellent beginning, but for criminal justice to become functionally equal in NSW, there is much more to be done.

What those democratic solutions will look like legislatively and how they will function in practice is a matter for future research and public political debates. The ALRC recently undertook an inquiry on judicial impartiality that recommended major changes in order to increase minority representation on the bench,[121] and NSW Communities and Justice is plainly working towards implementing more inclusive design language in its new courthouse construction projects. Similarly, the ACT's addition of Indigenous inclusivity across the entirety of the space (even in areas physically disconnected from the Galambany and Warrumbul Circle Sentencing courts) when expanding the ACT Law Courts building could provide a model for NSW's future courthouse capacity expansion programs.[122] Unlike the problems raised by the rest of this thesis, the winds of positive infrastructural change are already in the air. Thus, the question becomes how best to harness that wind, ensuring Indigenous Australians receive functional equality before the organs of justice: the ultimate goal of this exercise in racial anti-discrimination praxis.[123]

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[120] ALRC (2017).

[121] ALRC, *Without Fear or Favour: Judicial Impartiality* (Report no. 138, 2 August 2022).

[122] This is statement comes with a caveat: the ACT added docks to the courthouse for the first time, and only uses them for accused persons in pre-trial detention. Considering Rossner et al.'s empirical research on the detrimental impacts of docks, the new ACT Law Courts building might introduce additional procedural unfairness for an accused in pre-trial detention. *See*, Rossner et al. (2017).

[123] As a final comment after concluding this final substantive chapter, readers will have noticed the alliteration. This chapter grew from an artistic endeavour, and the section headers are a bit of what Vine Deloria Junior calls 'Indian humour.' Art should be fun, even when its sombre. *See,* V Deloria, 'Indian Humor' in *Custer Died for Your Sins: an Indian manifesto* (Macmillan, 1969).

IX.

Applying Science to Law

Racial discrimination as an extant feature of NSW criminal law and justice

Executive Summary

This final, concluding chapter ties the entire thesis together and makes the case for the ultimate finding: some aspects of NSW criminal law, evidence, and procedure negatively impact Indigenous Australians in multiple ways, with a subset thereof being discriminatory. Additionally, this conclusion argues the problems raised in the thesis will largely continue to worsen without exploring meaningful areas of law reform leading away from tough on crime policies. After doing so, this conclusion discusses avenues of future research, before coming full circle, returning to the Uluru Statement from the Heart.

Restating Questions and Concepts

At the 'beginning' of this conclusion, it is worth returning to where this project began by restating the questions the entire project is trying to answer and discussing their conceptual underpinnings. The primary research questions of this thesis as stated previously follow:

> *(1) Does race or Indigenous status of Aboriginal defendants as a class negatively impact accused persons in New South Wales (NSW) at trial?*
>
> *(2) If so, do those negative impacts potentially 'racially discriminate' in a general, sociolegal sense of the term?*

As with much research, these two questions guided both methodological design and intellectual analysis throughout this project. The importance of asking the right questions is difficult to overstate, and questioning is frequently an introspective, iterative process. In this research project, the questions developed throughout the project. Likewise, racial discrimination as a concept gradually evolved. When initially framing out this thesis, the researcher maintained an overt focus on narrow legal definitions to the exclusion of other, more commonly used definitions from the social sciences and wider antiracism social discourse. However, as the project played out, the concept of racial discrimination grew, mutated, and changed. Nevertheless, the focus remained legal.

In other terms, the questions themselves were not entirely static – and the concept of discrimination refused to fit squarely into round hole. So, while the questions were indeed iterative, it was not only in their wording, but in how the research approached the concept of racial discrimination. The research data itself drove these introspective, iterative reframings. Particularly, when the researcher travelled across NSW photographing The King's Courts, racial discrimination presented unusually. At first glance, An Infrastructural Institution almost appears to approach racial discrimination as a colonial legacy. However, it repeatedly returns to the present-day impacts of those legacies and ties its arguments back into the ideas originating in *Griggs v Duke Electric Power Company*[1] and the *International Convention on the Elimination of All Forms of Racial Discrimination* art. 5(a).[2] The iterative questioning, therefore, exists not only in the wording of the questions, but in reassessing the legal meanings behind the concepts they imply. In short, the project always returns to the law, ensuring the overall research framework remains consistent.

Briefly Summarising the Thesis thus Far

Having now restated the questions, this section summarises the thesis to this point. This thesis has been an ambitious, wide-ranging investigation into procedural fairness and racial discrimination against Indigenous males in NSW District Court criminal procedure, process, and courtcraft. It began with an introduction that both laid out the overarching issues in play and a short review of Indigenous involvement in the Australian criminal justice system. That introduction made a bold assertion that, for Blakfellas, Australia has always been (and still remains) a prison colony. That claim, alongside the central research questions and hypotheses, has been demonstrated throughout this thesis, hand in hand with the overarching research questions.

The following chapter of this thesis, The Laws of the Lands, provided a functional, diagnostic typology of racial discrimination in the law. It started by defining racial discrimination for the purposes of this thesis before then proposing a typology of racial discrimination flowing therefrom. That definition follows:

> *Racial discrimination is any state or institutional actions drawing distinctions on the basis of race. These distinctions can be intentional, but need not be, and those*

[1] *Griggs v Duke Electric Power Co.,* 401 U.S. 424 (1971).
[2] *International Convention to End All forms of Racial Discrimination* (United Nations 1969).

distinctions can be either as written in a binding text or in how that binding text gets applied.

In the typology proposed by this thesis, there are two overarching forms of racial discrimination: (1) negative and (2) positive discrimination. The chapter first established that both positive discrimination and negative discrimination can be either lawful or unlawful, depending on the relevant objectives and parliamentary draughtsmanship of the legislation and/or policy at issue. The typology then further broke down each form of discrimination into its various subtypes. That breakdown is now restated below:

1. ***Negative Discrimination***
    a. *Facial Discrimination*
    b. *As Applied Discrimination*
        i. Direct Discrimination
        ii. Indirect Discrimination
2. ***Positive Discrimination***
    a. *Strict Formal Equality*
    b. *Direct Positive Discrimination*
        i. Legitimate Uses
        ii. Perverse Uses
    c. *Indirect Positive Discrimination*

Every proposed type and subtype of racial discrimination has a unique position within the international legal order, with each having particular relevancies to an Australian federal constituent state's domestic criminal law. By laying out the various legal types and subtypes of racial discrimination, the remainder of the thesis was enabled to investigate their presence or absence in the New South Wales indictable criminal legal regime. The final aspect of this chapter came in the form of an aid-memoir, a visual diagram built as a logical flowchart to aid readers' understanding and analysis throughout the remainder of the thesis.

Testing for Inequity followed the new diagnostic typology. As the title suggests, this chapter provided a scientific-legal methodology to test a criminal legal regime for negative racial discrimination. The methodology contained a number of interrelated components including: (a) the 'Rombauer Method of [doctrinal] legal research,' (b) objective anti-discrimination statistical analytics using both freely available datasets and datasets purchased from NSW BOCSAR, (c) observational-ethnographic data collection using a single blind random sample of an equal number of matters involving Indigenous and non-Indigenous accused males, (d) practitioner interviews with NSW District Court judges, ALS NSW/ACT solicitor advocates, Legal Aid NSW solicitor advocates, and DPP prosecutors, and (e) multisite architectural photographic analysis. The statistical tests in this methodology were drawn from employment litigation practice since those tests are the most highly

advanced and most often used in extant anti-discrimination testing. Likewise, the methodology demonstrated usability and engaged in basic proof of concept work illustrating its ability to answer the overarching research questions.

The third chapter of the thesis was a targeted application of statistical anti-discrimination tests, specifically applied to assess pre-trial detention in NSW. That chapter, titled The Racism of Remand demonstrated the over-representation of Indigenous accused males in pre-trial detention in NSW so egregiously violates existing anti-discrimination statistical analyses it racially discriminates. Using a dataset purchased from BOCSAR, the tests showed, in aggregate, the discrepancy between whether an Indigenous accused would be placed in pre-trial detention compared to a non-Indigenous accused to be over 37 standard deviations. When the data was disaggregated,

> *Of the ninety-four ANZSOC offence categories for which Indigenous and non-Indigenous males appeared before the courts, only in sixteen offence categories was an Indigenous person more likely to be released prior to disposition than a non-Indigenous person . . . . [and after] . . . . excluding two of the offence categories because n<100, what is left is that in 25.53% of ANZSOC offence categories, an Indigenous male is less likely to be released before final disposition.*

This is an extreme showing statistically, and one that plainly violates existing anti-discrimination statistical tests.

The Racism of Remand then ruled out confounding factors before discussing flow on effects, the most extreme of which is the impact pre-trial detention rates play on overall trial success rates. According to the data, one of the primary reasons behind the lower overall success rate for Indigenous accused males is an extreme over-representation of Indigenous males in pre-trial detention. Using the 80% rule, the overall success rate of Indigenous males accused of an indictable offence in NSW indirectly discriminates, but when disaggregating that data to account for pre-trial detention, the primary difference in success rates at trial flows from elevated numbers of Indigenous males in pre-trial detention. The data showed Indigenous males to be more likely to prevail when in custody during trial, and only slightly less likely to succeed if they are at liberty in the community.

The next chapter, The Oppression in Discretion, also employed anti-discrimination statistical analysis, but also engaged in mixed methods analysis using courtroom observational and interview data to assess NSW DPP prosecutorial discretion. Relying on the Federal Court decision in *Sharma v*

Legal Aid (QLD),[3] this chapter used the same statistical analysis as The Racism of Remand. Along the same lines as pre-trial detention, applying extant anti-discrimination statistics showed discriminatory outcomes for Indigenous accused males. However, to remove confounding factors and thereby establish direct discrimination, this chapter utilised courtroom observation data. Taking matters from a single blind, random sample, a legally trained observer determined several were based on insufficient evidence and should not have been taken to trial. In multiple matters based on insufficient evidence, an Indigenous accused had spent more than a year in pre-trial detention, further compounding harm for those specific individuals. Taking both the statistical evidence, the observational sample data, and corresponding interview data as a whole, it appears the DPP exercises its prosecutorial discretion in a racially discriminatory way.

A Troublesome Tendency investigated further potential correlations between reduced rights for all criminally accused in NSW and rising over-representation of Indigenous persons in government custody. The investigation utilised existing literature, freely available data, and practitioner interviews to engage in a targeted investigation. It began with a brief discussion of Australian and NSW rising Ingenious incarceration and over-representation before turning towards common law protections for those accused of criminal acts. Those protections were specifically: (a) the right to a jury, (b) the presumption of bail, (c) the right to silence, and (d) the prohibition against evidence of bad character. This chapter then embarked on a discussion of the historical and logical bases for why each protection existed at common law, leading into a discussion of their limitations or abrogation thereof in NSW. While laying out the changes to the law the chapter showed how each of those changes could disproportionately impact Indigenous accused males and questioned whether those changed would impact Indigenous incarceration.

The seventh chapter in this thesis, titled 'Racial Realities,' did not directly address racial discrimination per se. Instead, that chapter used observational data to interrogate the racialised nature of criminal trials for both Indigenous and non-Indigenous accused males. This chapter used the same observational sample as the sixth chapter, and also utilised data collected through practitioner interviews. The picture painted by this data demonstrated race to be a near constant factor in NSW District Court Criminal matters. In this sample, only a single matter lacked racial aspects and in the remainder of matters, even for non-Indigenous Australians of European descent, there was some

[3] *Sharma v Legal Aid (Qld)* [2002] FCAFC 196.

overtly racial aspect to the trial and/or hearing process. How race interfaced across NSW Criminal District Court proceedings varied and did not always harm the accused. For example, in two jointly tried matters involving two accused indicted for robbery in company with one another, the defence focused on a drug dealer's race, even though the drug dealer was not present in court. That drug dealer was visibly of pacific islander descent and was referred to by a number of racialised terms, thereby creating a diversion away from the main issue of the trial. In another matter, the overt racism of the alleged victims appeared to alter the jury's perception of the victims. Objectively, it appeared the accused in this matter was guilty, but the jury was visibly turned off by the victim's behaviour. The judge in the matter, one known for their progressive stance on race, flatly told the accused the jury had been kind to him.

However, in other matters discussed in that chapter, race appeared to negatively impact the accused. In one matter, involving visibly Aboriginal male, the only reliable eyewitness stated they saw three 'African Americans' entering the apartment. This Aboriginal male accused was on remand at trial, even though the only visible similarity between African Americans and Aboriginal Australians is the colour of their skin. This was an egregious racial issue, and one that the judge commented on explicitly. From observational data such as this, the chapter draws a reasonable conclusion that race is a pervasive factor in NSW criminal litigation.

The final substantive chapter of this thesis, titled 'An Infrastructural Institution,' also tells the story of race, but as it is baked into the structures and infrastructures of New South Wales courts. Adding to its value, the appended gallery show transports readers to where the Sinclarian sausages[4] of NSW criminal trials get made, thereby aiding readers' understandings of the places and spaces where this research project took place. In addition, this chapter engaged with theory and political philosophy in ways not found elsewhere in the thesis, openly stating some of the macro historical and social forces at work creating colonial legal systems with origins in the ancient Roman Imperium. The sociolegal analysis dove into the interplay between judicial infrastructure and procedural fairness as well as discussing the social implications of how courthouse architecture can serve to either empower or exclude in a modern Westphalian state.

[4] This idiomatic expression references the work of Upton Sinclar, who's fictionalised muckraking journalism exposed corruption, employee mistreatment, and unsanitary practices in the Chicago meatpacking industry. U Sinclair, *The Jungle* (Doubleday, 1906) ch. 14.

Similarly, this chapter demonstrated the limits of the current racial anti-discrimination legislative framework in Australia by noting anti-discrimination law's inapplicability to courthouse designs and economic resource allocation despite the similarity between such colonial legacies and the educational disparities addressed by the US Supreme Court in *Griggs.* To accomplish these aims, this chapter discussed the impacts of geographic distance, physical courthouse infrastructure and judicial support services have on functional equality before the organs of justice, all while noting such problems cannot be corrected with existing legislation. Certain problems in every system require democratic reform, and NSW is no exception.

Analysing the Data and Coming to Findings

Having now restated the issues covered and findings made by each of the prior chapters, this conclusion now pivots to a framework of analysis of the data generated by this research project in order to make a number of overall findings. This conclusion then directly answers the overarching research questions of the research project that has produced this thesis before making suggestions for law reform and future areas of research.

Moving forward, there is sufficient statistical data to show both bail and prosecutorial discretion cross the statistical threshold beyond which a Westphalian state's actions racially discriminate. This finding relies on objective tests based on longstanding legal principles and modern scientific analysis. Likewise, the underlying legal principles are formally enshrined in both treaty and domestic Commonwealth legislation. Accordingly, there is strong evidence the NSW criminal litigation process racially discriminates because these discriminatory outcomes result in unequal treatment by 'the organs of justice.' Furthermore, these racial disparities are so egregious that it 'shocks the conscience.'[5] As a finding of fact, there is a concrete, provable pattern that the NSW criminal justice system (in at least some aspects) objectively discriminates; according to the government's own statistics, the racial discrimination grows worse with time.

Flowing on from those findings, A Troublesome Tendency showed the overall rate of Indigenous incarceration problematically correlates with recent tough on crime reforms in NSW. Those reforms

[5] *Rochin v California*, 342 U.S. 165 (1952) defines the phrase (in a legal sense) as state actions beyond the norms of civilised society. The term has gained traction around the world since being first used in *Rochin* and is rooted in the evolution of the customary international law governing human rights.

and others like them, interrelate with an overall record number of gaol inmates at a time of record low crime. At the same time, Indigenous incarceration rates continue to climb at a disproportionate rate. Recent changes to NSW legislation do not all necessarily discriminate, but they do raise legitimate questions about whether tough on crime legislation might objectively discriminate. Those questions are not answered in this project or by this thesis; nevertheless, such questions warrant further investigation to determine if these new legislative reforms share a similar indirectly or directly discriminatory impact.

Likewise, A Troublesome Tendency leads to another research finding and also provides an analytical framework for answering the overall research questions. Due to an established history of racial discrimination against Indigenous people in NSW criminal justice, researchers must account for that history when attempting to diagnose extant racial discrimination. To some extent, this is a tendency argument, or at least an argument that racial discrimination is an inherent attribute of the historical society that birthed the extant system. However, using such evidence is appropriate, especially when the Crown itself increasingly uses historical character evidence. As such, it seems fitting to use similar evidence against the Crown when determining the current criminal justice system's character. Taking this logic one step further, a historical tendency to discriminate produces a rational inference the current system is continuing to engage in an established pattern of behaviour. Therefore, a historical tendency towards institutionally discriminatory behaviour should lead researchers to view evidence of *possible* racially discriminatory behaviour as *probable* discriminatory behaviour.

In addition, this thesis has shown race to be an ever-present aspect of both the New South Wales criminal justice system and NSW criminal litigation process. Racial Realities established that race does not always negatively impact the accused in NSW District Court criminal trials, and in some instances, the social construction of race actually *benefits* an Indigenous accused. However (as seen in an Infrastructural Institution) race and socioeconomic status are baked into the very architecture of NSW District Courthouses, always have been, and are likely to remain so for the foreseeable future. Much like NSW courthouse architecture, NSW criminal law and applied criminal process are imported from elsewhere; Indigenous people were only recently considered as anything more than an afterthought. Even today, when Indigenous people *are* considered in NSW criminal-legal systems design, Indigenous-centric criminal processes are usually limited to a small number of specific instances largely falling

outside the District Court's jurisdiction.[6] Furthermore, all present Indigenous-centric criminal processes remain entirely subject to the caprice and whimsy of the New South Wales settler colonial enterprise. Unsurprisingly, existing NSW Indigenous-centric criminal processes are yet to demonstrate a sustained, long-term ability to substantially reduce the overall number of Indigenous Australians finding themselves in state custody.

Answering the Overarching Questions

This project has shown time and again that extreme discrepancies exist for Indigenous males accused by the Crown of indictable offences before the NSW District Court. Likewise, it showed race to be an ever-present issue and further demonstrated a history of discrimination against Indigenous males throughout Australian criminal justice. With such extreme discrepancies, there are only two realistic possibilities as to cause. The first possibility is that the system remains as discriminatory today as it was historically. Alternatively, Indigenous males could be committing crimes at extremely elevated rates. Both arguments have proponents in the literature and policy spaces, although defenders of traditionalist view[7] periodically concede changes in enforcement patterns sometimes increase per capita Indigenous convictions resulting in elevated Indigenous custodial sentence rates.[8]

The ongoing argument between traditionalist criminologists and critical criminologists is oft repeated throughout this thesis, but once again need to be addressed here in the conclusion. Weatherburn postulates that the greatest driving factor behind Indigenous hyperincarceration is elevated Indigenous offending rates. Conversely, critical criminology's consistent counterargument is substantially more nuanced and subtle. Notwithstanding a number of widely divergent opinions on the causal factors elevated offence rates, critical criminologists do not deny elevated per capita offending patterns among Indigenous males.[9] In fact, there is a near universal academic consensus Indigenous people, particularly Indigenous males, do commit more crimes than non-Indigenous Australians. However, where the traditionalist view falls short (and has always fallen short) is in its proponents' inability to prove Indigenous males offend at such extreme levels that Indigenous male over-

[6] H Blagg, *Crime Aboriginality, and the Decolonization of Justice* (Federation Press, 2nd ed, 2016).
[7] C Cunneen, 'Racism, Discrimination and the Over-Representation of Indigenous People in the Criminal Justice System: Some Conceptual and Explanatory Issues' (2006)17(3) *Current Issues in Criminal Justice* 329.
[8] D Weatherburn and J Holmes, *Indigenous Imprisonment in NSW: A closer look at the trend* (Report for NSW Bureau of Crime Statistics and Research. Report no. 126, June 2017). *See also*, J Fitzgerald,*Why are Indigenous Imprisonment Rates Rising?* (Report for NSW Bureau of Crime Statistics and Research. Report no. 41, August 2009).
[9] Ibid.

representation at every stage of the criminal justice processes can be scientifically attributed to natural statistical variance.[10] Therefore, the elevated Indigenous male offending patterns cannot explain these extreme discrepancies, and the logical alternative must win out: Indigenous over-representation in New South Wales criminal justice processes is at least partially attributable to the non-Indigenous government's actions.

In a similar vein, crime rates across Australia are at record lows for all racial and ethnic groups, yet the total per capita incarceration rate continues rising.[11] Thus, the increasing, long-term trend of rising Indigenous over-representation in custody (particularly on remand,)[12] becomes even more problematic when there is not demonstrable, scientific causality that directly ties Indigenous offending rates to Indigenous over-representation in custody. Likewise, a recent BOCSAR report notes that a new NSW Police policy requiring that all NSW Police office inquires as to the Indigenous status of all arrestees statistically correlates to a sharp increase in the Indigenous remand rate. Once again, the traditionalist criminology camp's own statistical data raises new questions regarding whether rising Indigenous over-representation stems from institutional implicit biases and/or discriminatory practices.[13]

With this thesis research specifically, pre-existing, objective statistical anti-discrimination analytics demonstrated racial discrimination in both: (a) NSW pre-trial detention legislation and (b) the NSW DPP's exercise of prosecutorial discretion. In addition to the statistics, New South Wales legal history provides additional evidence supporting a finding of extant racial discrimination. NSW, like all Australian jurisdictions, was arguably both formally racist and overtly white supremacist prior to implementing the recommendations of the RCIADIC. This project's photographic research provided still more evidence of extant racial discrimination by demonstrating the ongoing impacts Australian colonial history has over present NSW District Court criminal litigation. Taking into account this project's findings, and then coupling those findings to the pre-existing academic literature, one notices three main disparate effects in NSW District Court criminal litigation, some of which presently fit within existing legal anti-discrimination frameworks. The other disparate effects in NSW District Court

[10] Ibid.
[11] Justice S Rares, 'Australia's prison rates are up but crime is down. What's going on?' *The Conversation* (online, 22 October 2021) <https://theconversation.com/australias-prison-rates-are-up-but-crime-is-down-whats-going-on-170210>.
[12] *See,* NSW Bureau of Crime Statistics and Research, 'NSW Criminal Justice Aboriginal Over-representation Quarterly Report' (March 2022).
[13] Ibid.

criminal litigation are not presently legally regulated, but still negatively impact Indigenous males accused of indictable crimes.

Having now come to findings and restated the applicable legal concepts, it becomes appropriate to restate this project's overarching questions in order to answer said questions directly:

(1) Does race or Indigenous status of Aboriginal defendants, as a class, negatively impact accused persons in New South Wales (NSW) at trial?

In short, yes – *at times.*

This thesis showed that, statistically, an accused's race can objectively detriment Indigenous males in NSW District Court criminal litigation with those negative impacts being most clearly established by the chapters The Racism of Remand and The Oppression in Discretion. The Racism of Remand demonstrated that negative impacts in pre-trial detention rates are directly correlated with elevated Indigenous convictions rates and The Oppression in Discretion observed institutionalised differential treatment of Indigenous males by the NSW DPP. That said, Racial Realities painted a more subtle picture because race is a complex social construction, as is racism. In painting that picture, Racial Realities showed that a skilled legal practitioner can use the accused's race or a victim's racism to benefit an Indigenous male accused of an indictable offence. As shown in that chapter, a victim's racism may beneficially impact jury verdicts because overt racists are social pariahs within polite Australian society, thereby denying racist victims a legitimate social claim to ideal victimhood. Non-ideal victims are viewed with social distaste, so an Indigenous accused is more likely to be acquitted when their accuser is a social pariah.

Nevertheless, Racial Realities also established other aspects of the racialised NSW District Court criminal litigation process objectively detriment Indigenous males. Likewise, An Infrastructural Institution showed that the living legacy of the settler colonial enterprise, itself, negatively impacts Indigenous accused persons by potentially affecting situationally inappropriate compound trauma responses in extant criminal litigation.

(2) If so, do those negative impacts potentially 'racially discriminate' in a general, sociolegal sense of the term?

Beginning again with the short answer, yes – *at times* certain aspects of NSW criminal law and process do racially discriminate in a general, sociolegal sense of the term. Likewise, other aspects grant

continuing power to an overtly racist period in Australian history. NSW pre-trial detention system is demonstrably discriminatory, as is how the NSW Director of Public Prosecutions exercises its prosecutorial discretion to withdraw charges. In addition, this thesis showed that by allowing tendency and coincidence evidence from prior to the Royal Commission into Aboriginal Deaths in Custody and Royal Commission into the NSW Police Service, tendency and coincidence evidence can give new life to a more racist, corrupt period in New South Wales history.

Furthermore, An Infrastructural Institution demonstrated the majority of NSW Courthouses with District Court sitting dates, stand as a living reminder of the Australian justice system's outright rejection of legal pluralism. Grant and others[14] have shown this re-enlivens intergenerational trauma amongst Indigenous people, which itself can impact trial outcomes. Similarly, An Infrastructural Institution also demonstrated how economics and infrastructural investment alter criminal legal proceedings in communities with elevated per capita Indigenous populations. As such, while neither design nor inadequate access to justice services are covered by current racial discrimination *legislation*, they do disparately impact Indigenous Australian males accused of indictable offences in NSW District Court.

In summation, the answer to both core research questions is (conditionally) in the affirmative. Yes, in certain ways, Indigenous males experience negative outcomes in NSW District Court criminal proceedings on account of their race and/or Indigeneity. Likewise, yes, certain aspects of the New South Wales criminal law and NSW District Court criminal litigation process racially discriminate. This thesis stops short of claiming the racial discrimination is unlawful, but the data establishes the extant existence thereof.

Where Reform Could Lead

There are numerous areas of law reform that have been proposed in recent years to reduce Indigenous incarceration, most notably the ALRC report, *Pathways to Justice.* This section, however, limits itself to the issues raised by this thesis.

[14] T Anthony and E Grant, 'Courthouse Design Principles to Dignify Spaces for Indigenous Users: Preliminary Observations' (2016) 8(1) *International Journal for Court Administration* 43.

The first area for legal reform is found in the immediately preceding chapter, An Infrastructural Institution. Indigenous people's right to equal treatment in court is better protected by making courthouses more inclusive spaces and using democratic reforms to reallocate governmental resources into regional and remote NSW communities with higher per capita Indigenous populations. Such reforms are not easily accomplished but considering the present national debate regarding a voice to Parliament, now may be the appropriate time to attempt changes that would right longstanding, intergenerational wrongs. Indigenous Australian hyperincarceration is a thorny topic; one that is further compounded by economics and population disbursement. Nevertheless, such issues are addressable through democratic processes, the reallocation of judicial resources into regional and remote communities, and legislative reform.

This leads into the second area of reform, also flowing from An Infrastructural Institution. The NSW District Court's infrastructural capacity plays a significant role in assigning trials to judges and courthouses, which can potentially impact trial outcomes. Using: (a) the new records created by the Department of Communities and Justice when responding to this project's final *Government Information (Public Access) Act 2009* (NSW) request for information, (b) the count and jury district demographic data generated by that chapter, (c) additional data that could be generated on the NSW District Court's infrastructural capacity (such as the real-time availability of secure docks), and (d) new data that could be generated on the real-time availability of support services, the NSW Department of Communities and Justice could implement a more complete, living database for its courts. By maintaining a real-time database with facilities scheduling functionality, the entire NSW judiciary could share a more cohesive software system for allocating matters to people, places, and spaces. Presently, much of this information is fragmented between systems or is not maintained by NSW DCJ, so a central database for the NSW judiciary could enable better service delivery in ways that materially benefit everyone, including Indigenous people accused of indictable offences.

Another area is reinstating the common law presumption of bail. The Racism of Remand discussed how *Bail Act 2013* (NSW) discriminatorily impacts Indigenous males' overall likelihood of succeeding against an indictment. The strength of this argument is difficult to overstate. The aggregate number of Indigenous males prevailing violates the 80% rule[15] producing a ratio of 74.38 and directly

[15] *Uniform guidelines on employee selection procedures* (United States) 43 FR 38290 4D Federal Register, 44.43 (1979) 6570-06-M [US] s 1607.4(D).

correlates to whether or not an Indigenous accused male remains at liberty in the community pending trial. In one interview, a NSW District Court judge informed the researcher the most beneficial reform for Indigenous males accused of indictable offences would be reinstating the presumption of bail. This is entirely possible at the state legislative level, and it would seem appropriate to carry out such reforms in light of the findings in this thesis.

The next area for reform is the system of deciding how and when charges should be filed and withdrawn. The Oppression in Discretion demonstrates that the NSW DPP withdraws charges at discriminatorily lower rates for Indigenous male accused persons, and in some instances brings unwinnable matters rife with racial problems before the courts. This is not a minor issue, and it is one that cannot be solved with bringing the number of Indigenous NSW DPP prosecutors to population parity. This is an issue that will require innovative thinking and alternative solutions. However, it could also be an area where more recent reforms having a detrimental impact on Indigenous people should be reversed. In NSW the committal hearing has by and large been abolished, in no small part because the previous system of committal hearings was characterised by NSW magistrates rubber stamping charges brought by the DPP. It is entirely possible to build a new way forward, but at the same time it is also entirely possible to reinstate the committal hearing with tweaks and alterations to prevent magistrates rubber stamping the DPP's work.[16] The intrinsic design of Australian democracy is one of separation of powers, and in a situation like the one demonstrated by The Oppression in Discretion, the isolation of power into the Crown allows the natural tendency of humans to discriminate into the system. Reform, therefore, should place checks on that power to limit whatever conscious or subconscious reasons lay behind each decision to bring and withdraw charges does not collectively aggregate into racial discrimination.

The final area and opportunity for reform is reinstating the common law prohibition against using character evidence that has been systematically undermined by broadening tendency, propensity, and coincidence evidence.[17] At their core, tendency, propensity, and coincidence evidence try an accused on their character instead of requiring the Crown to produce sufficient evidence the accused committed the crime in question. For Indigenous people specifically, questions of character can become enmeshed with longstanding, centuries-old racial and ethnic tropes. Likewise, tendency

[16] Prior to EAGP, only 3% of committal hearings resulted in the charges being dismissed by the NSW Local Court. *See,* NSW Law Reform Commission *Encouraging Early Appropriate Guilty* (Report no. 144, December 2014) Appendix C.
[17] *Hughes v The Queen* [2017] HCA 20.

evidence allows convictions from more racist times, characterised by overt racial discrimination and police corruption, without requiring specialised jury instructions thereof. So, if tendency evidence remains present in the system, legislative reform should temporally limit is use, for Indigenous people, to convictions *after* the NSW Royal Commission into the NSW Police Service[18] and the Royal Commission into Aboriginal Deaths in Custody.[19]

Areas for Future Research

Whereas this project made significant strides in research methodologies by applying new, innovative ideas to both science and law, it remains a jumping off point. In some ways, the research was intrinsically limited because it relied on a single researcher, so it could not generate a larger sample size from the observational methods. Future research would undoubtedly benefit from a larger research team and/or generating observational datasets in lower-level courts, with a larger number of shorter trials, that more conducive to generating a larger dataset. The methods developed for this project are sound, and therefore would uncover more areas of discrimination with an observational dataset conducive to anti-discrimination statistical analytics.

While NSW BOCSAR has a substantial amount of useful statistical data, there are also serious limitations. For instance, BOCSAR neither collects nor generates racial data. Instead BOCSAR relies on the standard Australian proxies of national origin and an Indigenous Australian identifier. That said, proxies always come with caveats, and there are obvious limitations to what one can uncover using national origin as a proxy for race. Many nations in the world contain substantial racial diversity, and in those nations national origin cannot denote race. These nations are largely settler colonies, though in some, such as the UK and France, diversity comes from a history of colonial imperialism. Therefore, using more researchers and/or shorter trials to generate race data would allow future research to bypass the proxy and directly address race. Existing ABS data shows other non-Indigenous 'peoples of colour' are overrepresented in Australian criminal detention,[20] so with researcher generated data, future research outputs could directly compare 'white' involvement the criminal justice system with Indigenous Australia. Doing so would allow a more direct comparison to other settler colonial nations like Brazil or the United States that do keep racial statistics.

[18] *Royal Commission into the NSW Police Service* (Final Report, May 1997) vol. I *Corruption*.
[19] RCIADIC.
[20] ABS, *Prisoners in Australia 2022* (online, February 2023) <https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release>.

Likewise, this research should be applied in other nations with a known racial discrepancy in criminal justice. Such nations might include the previously mentioned Brazil, Mexico, the US, and Canada. However, they might also include European nations with substantial racial minority populations like Denmark, Germany, the UK and France. In some European nations, particularly Denmark, there is a known but under-researched over-representation of Inuk (Greenlandic Inuit) and Turkish-descended persons in the criminal justice system. Denmark has previously argued before international courts the doctrine of indirect racial discrimination does not apply to Danish criminal law,[21] but with a stronger body of evidence it might be possible to argue otherwise before international courts like the European Court of Human Rights. The same could be done before the Interamerican Court of Human Rights with Mexico or Brazil. Notably, the Americans do not consent to the jurisdiction of that court and chooses not to apply certain concepts addressed by this thesis at a national level in their criminal case law. As such, another area of research could be a comparative analysis of how racial discrimination in criminal trials is judicially challenged before international and domestic courts in a diverse group of nations.

In short, this thesis took significant steps forward, but one hopes they are the first baby steps of an exciting new area other researchers will build from. Growing this research will require a substantial amount of mathematical training for researchers, though a lack of statistical training in legal academia is itself another area worthy of future research.

Coming to a Final Conclusion

In bringing this thesis to an overall conclusion, it helps to return to the beginning. For the Indigenous peoples of Australia, penal colonialism did not end with the Hougoumont. In fact, for Indigenous Australians, the reality is quite the opposite: at no point in Australian history have there ever been more Indigenous people incarcerated than there are in the present, even when accounting for short term statistical blips in the data. Despite the pre-existing wealth of knowledge surrounding the causes and potential solutions to this problem, until this thesis there was little attention in the academic literature devoted to the intersection of racial discrimination law and ethnographic social science. This thesis, then, demonstrates how applied research in this interdisciplinary field can produce

[21] C Tobler, *Indirect Discrimination: A case study into the development of the legal concept of indirect discrimination under EC law* (Intersentia, 2005).

real-world legal impacts and help right ongoing wrongs suffered by the Western world's most incarcerated ethnic group.

This project took an ambitious, multi-year, innovative methodological approach in assessing the criminal trial itself. Through a mixture of courtroom observation, photographic documentation and analysis, anti-discrimination statistical analysis, and doctrinal legal reasoning, this project showed two aspects of criminal procedural law racially discriminate against Indigenous males accused of indictable offences in NSW District Court. Likewise, this thesis showed a number of evidential issues, and that courthouse design can, at times, make historic racism a living factor in present litigation. These are serious issues that require innovative thinking to make long overdue, much needed reforms – lest the process remain the punishment.[22]

Many innovative thinkers exist in Australia, Indigenous and non-Indigenous alike. One hopes that the methods and findings of this thesis will serve to aid those innovative thinkers in a quest for a more just nation, where race and/or Indigenous status plays no part in the likelihood a particular accused will prevail against a criminal charge. This is entirely possible, and it is unquestionably what Indigenous Australia desires. As such, it is fitting to end the thesis with an excerpt from the Uluru Statement from the Heart. These are the words of the Uncles and Aunties of Australia, our collective Elders; they always were, presently remain, and will always be the true custodians of the land:

> *We seek . . . . reforms to empower our people and take a rightful place in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.*[23]

[22] M Feeley, *The Process is the Punishment: Handling Cases in a Lower Criminal Court* (Sage, 1979).
[23] *Uluru Statement from the Heart.*

Shalom and donadagohvi

Rick Emory

Complete Bibliography

Legislation, Constitutions and Treaties

Aboriginal and Torres Strait Islander Studies Act 1989 (Cth).

Alabama State Constitution.

Army Dress Manual 2013 (Cth).

Australian Constitution.

Bail Act 1995 (NSW).

Bail Act 2013 (NSW).

Building Code of Australia 1988 (Cth).

Capitulo IV de la Ley Para Prevenir y Eliminar La Discriminacion, [Spanish] 'Chapter IV of the Law to Prevent and Eliminate Discrimination' (Mexico 2018).

Commonwealth of Australia Constitution Act 1900 (United Kingdom).

Constitución Política de los Estados Unidos Mexicanos [Spanish] 'Political Constitution of the United Mexican States'.

Crimes (Appeal and Review) Act 2001(NSW).

Criminal Procedure Act 2009 (VIC).

Criminal Procedure Act 1986 (NSW).

Criminal Procedure Regulation 2017 (NSW).

Decreto de la Alhambra, Edicto de Granada [early modern Castilian] 'Decree of Alhambra, Edit of Granada' (Spain 1492).

Director of Public Prosecutions Act 1986 (NSW).

Disability (Access to Premises – Buildings) Standards 2010 (Cth).

Disability Discrimination Act 1992 (Cth).

Drug Misuse and Trafficking Act 1985 (NSW).

Evidence Act 1929 (SA).

Evidence Act 1995 (NSW).

Evidence Amendment Act (Evidence of Silence) 2013 (NSW).

Equality Before the Law Bench Book (NSW).

Federal Rules of Evidence (United States).

Human Rights Act 2004 (ACT).

Indian Removal Act of 1830 (United States).

International Covenant on Civil and Political Rights (United Nations 1966).

International Convention on the Elimination of All Forms of Racial Discrimination (United Nations 1969).

International Convention on the Rights of Persons with Disabilities (United Nations 2006).

Judiciary Act 1903 (Cth).

Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017 (NSW).

Jury Act 1977 (NSW).

Jury Regulation 2015 (NSW).

Jury Regulation 2022 (NSW).

Liquor Act 1992 (QLD).

Liquor Regulation 2002 (QLD).

Loi Informatique et Libertes, [French] 'Law of Information and Liberties' (France 1978).

Local Court Bench Book (NSW).

Northern Territory National Emergency Response Act 2007 (Cth).

NSW, *Parliamentary Debates*, Legislative Assembly, 11 October 2017, (Mark Speakman).

Nürnberger Gesetze 1935 [High German] 'Nuremberg Race Laws of 1935' (Nazi Germany).

Race Relations Act 1968 (United Kingdom)

Racial Discrimination Act 1975 (Cth).

Reichsgesetzblatt 1935 no. 125, p. 1333f [High German] 'The Nuremberg Laws' (Nazi Germany).

Reservation of Separate Amenities Act 1953 (South Africa).

Sex Discrimination Act 1985 (Cth).

Texas Code of Criminal Procedure of 1965 (Texas).

Texas Education Code of 1984 (Texas).

The Code of Alabama, v.1. (Alabama, 1923).

Uniform guidelines on employee selection procedures (United States) 43 FR 38290 4D Federal Register, 44.43 (1979) 6570-06-M [US].

United States Constitution.

Cases

*Alexander v The Queen (*1981) 145 CLR 395.

Australian Building and Construction Commissioner v McConnell Dowell Constructors (Aust) Pty Ltd. [2012] FCA 203.

Australian Iron & Steel v Banovic [1989] HCA 56

Australian Medical Council v Wilson [1996] HCA 591.

Aziz v Trinity Street Taxis Ltd. (1988) 3 WLR 79.

Bropho v Western Australia [2008] FCA 169.

Brown v Board of Education of Topeka, 347 U.S. 483 (1954).

Brown v The Queen [1985] HCA 11.

Caldwell v Texas, 137 US 692 (1891).

Cheatle v The Queen (1993) 177 CLR 541.

Cherokee Nation v Georgia, 30 U.S. 1 (1831).

Dietrich v The Queen [1992] HCA 57.

Electrolux Home Products Pty Ltd v Australian Workers' Union [2004] 221 CLR 309.

Festa v The Queen [2001] HCA 72.

Fisher v University of Texas, 570 U.S. 297 (2013).

Gerhardy v Brown (1985) 159 CLR 70.

Gillard v The Queen [2003] HCA 64.

Gratz v Bollinger, 539 U.S. 244 (2003).

Griggs v Duke Electric Power Co., 401 U.S. 424 (1971).

Grutter v Bollinger, 539 U.S. 306 (2003).

Hughes v The Queen [2017] HCA 20.

Jago v The District Court of NSW (1989) 168 CLR 23

Johnson & Graham's Lessee v McIntosh, 21 U.S. 543 (1823).

Kartinyeri v Commonwealth [1998] HCA 22.

King v Jetstar Airways Pty Ltd [2012] FCAFC 115.

Koowarta v Bjelke-Peterson [1982] HCA 27.

Lawrence v Texas, 539 US 558 (2003).

Loving v Virginia, 388 US 1 (1967).

Mabo v Queensland (1988) 166 CLR 186. (*Mabo (no. 1)*).

Mabo v Queensland (1992) 175 CLR 1 (*Mabo (no. 2)*).

Maloney v The Queen [2013] HCA 28.

Marbury v Maddison, 5 US 137 (1803).

Maxwell v The Queen (1996) 184 CLR 501.

*Nagarajan v London Regional Transport (*2000) 1 A.C. 501.

O'Donnell v Harris County, TX, 251 F. Supp. 3d 1052 (S.D. Tex. 2017).

Perry v R [1982] HCA 75.

Pfennig v The Queen (1995) 182 CLR 461

Plessy v Fergusson, 163 U.S. 567 (1896).

Potter v Minahan (1908) 7 CLR 277.

Qantas Airways Limited v Gama [2008] FCAFC 69.

R v Tahere [1999] NSWCCA 179.

R v Walker [1989] 2 Qld R 79.

Rochin v California, 342 U.S. 165 (1952).

Roe v Wade, 410 US 113 (1973). (Overturned by *Dobbs v Jackson Women's Health Organisation*, 597 US (2022)).

Ruiz v Estelle, 503 F. Supp. 1265 (S.D. Tex. 1980).

Sahak v Minister for Immigration & Multicultural Affairs (2002) 123 FCR 514.

Sahakyan v Armenia [2015] Eur Court HR 11.

Sharma v Legal Aid Queensland [2001] FCA 1699.

Sharma v Legal Aid (QLD) [2002] FCAFC 196.

New South Wales v Amery [2006] HCA 14.

Street v Queensland Bar Association [1989] HCA 168.

Students for Fair Admissions v Harvard, 600 U.S. 181 (2023).

Swann v Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

Texas v Johnson, 491 U.S. 397 (1989).

Walford v DPP [2012] NSWCA 290.

Walker v City of Calhoun, GA, 901 F.3d 1245 (US 11th Cir 2020).

Western Australia v Ward [2002] 28 HCA 213.

Włoch v Poland (no. 2) [2011] Eur Court HR 10.

Yick Wo v Hopkins, 118 U.S. 356 (1886).

Publications, Reports, Books and Media

2017 National Constitutional Convention (Final Report of the Referendum Council, 30 June 2017), *Uluru Statement from the Heart*.

D Abrams, M Bertrand, and S Mullainathan, 'Do Judges Vary in Their Treatment of Race?' (2012) 41(2) *The Journal of Legal Studies* 347.

AS Alschuler, 'A Peculiar Privilege in Historical Perspective: The Right to Remain Silent' (1995) 94(8) *Michigan Law Review* 2625.

American Civil Liberties Union, 'Defending our Right to Learn' (online, 10 March 2022) <https://www.aclu.org/news/free-speech/defending-our-right-to-learn>.

T Anthony, 'Foreword' in *Indigenous Children's Right to Participate in Law and Policy Development* (Routledge, 2021).

T Anthony, 'The perils of positivism in the NT Royal Commission into youth detention: the case for a post-positivist frame for First Nations justice' (2020) 29(1) *Griffith Law Review* 1.

T Anthony, 'FactCheck Q&A: are Indigenous Australians the most incarcerated people on Earth?' *The Conversation* (6 June 2017).

T Anthony, L Bartels, and A Hopkins, 'Lessons lost in sentencing: welding individualised justice to Indigenous justice' (2015) 39(1) *Melbourne University Law Review* 47.

T Anthony and C Cunneen, 'Introduction' in C Cunneen and T Anthony (ed.s), *The Critical Criminology Companion* (Hawkins, 2008).

T Anthony and E Grant, 'Courthouse Design Principles to Dignify Spaces for Indigenous Users: Preliminary Observations' (2016) 8(1) *International Journal for Court Administration* 43.

T Anthony and C Longman, 'Blinded by the white: A comparative analysis of jury challenges on racial grounds' (2017) 6(3) *International Journal for Crime, Justice and Social Democracy* 25.

Australian and New Zealand Standard Offence Classification (3rd ed., 2011).

Australian Bar Association, 'Indigenous Members' (online, n.d.) <https://web.archive.org/web/20190228015841/http://archive.austbar.asn.au/member-information/indigenous-members>.

Australian Broadcasting Corporation 'FACT CHECK Anthony Albanese says Australia has slipped to 59th in the world for average broadband speeds since the Coalition took office. Is that correct?,' *ABC News* (online, 2 December 2021) <https://www.abc.net.au/news/2021-12-02/fact-check-albanese-broadband-speeds-nbn-59th-in-the-world/100663930?utm_campaign=abc_news_web&utm_content=link&utm_medium=content_shared&utm_source=abc_news_web>.

Australian Bureau of Statistics, *Corrective Services Australia* (online, March Quarter 2022) <https://www.abs.gov.au/statistics/people/crime-and-justice/corrective-services-australia/latest-release>.

Australian Bureau of Statistics, *Prisoners in Australia 2016* (Catalogue Number 4517.0, 2016).

Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians* (online, June 2016) <https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/estimates-aboriginal-and-torres-strait-islander-australians/jun-2016>.

Australian Bureau of Statistics, *Prisoners in Australia 2017* (Report for the Australian Bureau of Statistics, 7 December 2017).

Australian Bureau of Statistics, *Prisoners in Australia 2022* (online, February 2023) <https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release>.

Australian Bureau of Statistics, *Aboriginal and Torres Strait Islander population summary* (online, 1 July 2022). < https://www.abs.gov.au/articles/australia-aboriginal-and-torres-strait-islander-population-summary>.

Australian Competition and Consumer Commission, *Measuring Broadband Australia* (Report for the Australian Competition and Consumer Commission, 19 December 2022)

<https://www.accc.gov.au/system/files/Measuring%20Broadband%20Australia%20-%20Report%2019%20-%20Appendix%20December%202022.pdf>.

Australian Human Rights and Equal Opportunity Commission, *Federal Discrimination Law* (AHRC, 2016).

Australian Human Rights and Equal Opportunity Commission, *Background Chapter No.1: An International Comparison of the Racial Discrimination Act 1975* (AHRC, 2008).

Australian Heritage Restorations, 'Port Macquarie Courthouse' (online, retrieved 8 July 2022) <https://www.austheritage.com.au/projects/port-macquarie-courthouse/>.

Australian Law Reform Commission, *Evidence* (Interim Report no. 26, 1985).

Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report no. 133, 1 December 2017).

Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (Report no. 129, 2015).

Australian Law Reform Commission, *Uniform Evidence Law* (Report no. 102).

Australian Productivity Commission, *Australia's Prison Dilemma* (Report for the Australian Productivity Commission, October 2021).

B Ba, D Knox, J Mummolo, and R Rivera, 'The role of officer race and gender in police-civilian interactions in Chicago,' (2021) 371(6530) *Science* 696.

I Barker, 'Circumstantial Evidence in Criminal Cases' (2011) 42(Winter) *Bar News: Journal of the NSW Bar Association* 32.

B Bebber, 'Standard Transatlantic Practice": Race Relations and Anti-discrimination Law across the Atlantic,' (2018) 4(1) *Journal of Civil and Human Rights* 5.

Bega Pioneer's Museum, 'Historic Tour of Bega' (online, retrieved 8 July 2022) <https://pioneersmuseum.wordpress.com/202-2/historic-tour-of-bega/>.

C Bennet, 'This Mesquite artist wants to paint every county courthouse in Texas' *Dallas Morning News* (online, 1 April 2021) <https://www.dallasnews.com/arts-entertainment/visual-arts/2021/04/01/this-mesquite-artist-wants-to-paint-every-county-courthouse-in-texas/>.

P Bickle, E Hammel, and J O'Connell, 'Sex Bias in Graduate Admissions: Data from Berkeley' (1975) 187(4175) *Science* 398.

Justice W Blackstone, *Commentaries on the Laws of England* (The Legal Classics Library, 1765).

H Blagg, *Crime Aboriginality, and the Decolonization of* Justice (Federation Press, 2nd ed, 2016).

P Bloch, 'Diversity and Labor Law in France' (2012) 30 *Vermont Law Review* 717

A Bombay, K Matheson, and H Anisman, 'The intergenerational effects of Indian Residential Schools: Implications for the concept of historical trauma' (2014) 5(1) *Transcultural Psychiatry* 320.

A Braga, R Brunson,and K Drakulich, 'Race, Place, and Effective Policing' (2019) 45 *Annual Review of Sociology* 455.

B Brewster, 'Portfolio. Oct 1881–Jun 1882' (1882) *The Yale Literary Magazine* 47.

M Brough, (Minister for Families, Community Services and Indigenous Affairs) *National emergency response to protect children in the NT* (Media Release, 21 June 2007).

Bureau of Indian Affairs (US), *History of BIA* (online, retrieved 17 March 2023). <https://www.bia.gov/bia>.

A Carson, *Prisoners in 2018* (Report for Bureau of Justice Statistics (United States), April, 2018).

N Chan, *The impact of COVID-19 measures on the NSW adult prison population*. (Report for: NSW Bureau of Crime Statistics and Research. Report no. 149, July 2020).

N Christie, 'The Ideal Victim' in *From Crime Policy to Victim Policy: Restructuring the criminal justice system* (MacMillan, 1986).

J Coates, 'Sex offender slits wrists and throat in Griffith courtroom' *Beaudesert Times* (online, 22 Feburary 2018) <https://www.beaudeserttimes.com.au/story/5245675/sex-offender-slits-wrists-and-throat-in-courtroom/>.

R Clegg, *Disparate Impact and Criminal Justice* (Report for the (United States) Center for Equal Opportunity, 22 March 2016) <https://www.ceousa.org/issues/other-issues/disparate-impact/990-disparate-impact-and-criminal-justice>.

'Conservation Work at Katoomba Courthouse' *Blue Mountains Gazette* (online, 29 June 2021) <https://www.bluemountainsgazette.com.au/story/7309921/conservation-work-at-katoomba-courthouse/>.

K Cooper, 'The Texas Junk Science Writ, A look six years in' (n.d.) *Texas State Bar Journal* <https://www.texasbar.com/AM/Template.cfm?Section=chapters&Template=/CM/HTMLDisplay.cfm&ContentID=47776>.

Correctional Service (Greenland), *Kriminalforsorgen i Grønland Årsberetning* [Danish] 'Correctional Service in Greenland Annual Report.' (Report for the Correctional Service (Greenland), 2020).

Correctional Service (Greenland), *Kriminalforsorgen i Grønland Årsberetning* [Danish] 'Correctional Service in Greenland Annual Report.' Report for the Correctional Service (Greenland), 2013).

Council of the Shire of Bourke, 'Bourke Local Strategic Planning Statement' (online, November 2019) <https://bourke.nsw.gov.au/wp-content/uploads/2019/12/Bourke-Local-Strategic-Planning-Statement-November-2019.pdf>.

Cox Architecture, 'Newcastle Courthouse Project' (online, retrieved 2023) <https://www.coxarchitecture.com.au/project/newcastle-courthouse/>.

A Crouch, 'Courthouses to Be Upgraded' (Media Release, Parliamentary Secretary for the Central Coast (NSW), 13 August 2021).

MA Crocq and L Crocq, 'From shell shock and war neurosis to posttraumatic stress disorder: a history of psychotraumatology' (2020) 2(1) *Dialogues in Clinical Neuroscience* 47.

C Cunneen, 'Sentencing, Punishment and Indigenous People in Australia' (2018) 3 *Journal of Global Indigeneity* 1.

C Cunneen, 'Racism, Discrimination and the Over-Representation of Indigenous People in the Criminal Justice System: Some Conceptual and Explanatory Issues' (2006)17(3) *Current Issues in Criminal Justice* 329.

K Curchin, 'If the market is the problem, is the hybrid economy the solution?' in *Engaging Indigenous Economy. Debating diverse approaches* (ANU Press, 2016).

A Dale, 'Shaken to its Foundations: The Family Court Bombings' *Law Society (of NSW) Journal* (online, 06 October 2020) <https://lsj.com.au/articles/shaken-to-its-foundations-the-family-court-bombings/>.

M Davis, and G Williams, *Everything you Need to Know About the Uluru Statement from the* Heart (UNSW Press, 2021).

Deadly Connections Community and Justice Services 'Bugmy Justice Project' (online, retrieved 2023) <https://deadlyconnections.org.au/bugmy-justice-project/>.

Deadly Story, 'Men's and Women's Business' (online, retrieved 2023). < <https://deadlystory.com/page/culture/Life_Lore/Ceremony/Men_s_and_Women_s_Business >. *Please note, this website is run by an organisation that provides cultural education for Indigenous Australian children residing in out of home care. It contains video interviews with Indigenous Australian Elders who may be deceased.*

Department of Infrastructure (Australia) *Progress in Australian Regions: State of Regional Australia*. (Report for Department of Infrastructure (Australia), 2015).

Department of Corrections (New Zealand/Aotearoa), *Prison Facts and Statistics, December 2015* Report for the Department of Corrections (New Zealand/Aotearoa), December 2015). <https://www.corrections.govt.nz/resources/statistics/quarterly_prison_statistics/previous_years_prison_statistics/December_2015>.

A DeSantis and WA Kayson, 'Defendants' characteristics of attractiveness, race, and sex and sentencing decisions' (1997) 81 *Psychological Reports* 679.

J Dickins, 'Griffith Court House undergoes $1.5 million upgrade' *Area News* (online, 5 March 2020) <https://www.areanews.com.au/story/6661245/more-security-more-jobs-more-efficiency-court-house-renovations-begin/>.

N Dirks, 'Colonial Amnesia and the Old Regime in the Photographs of Linnaeus Tripe' in *Traces of India: Photography, Architecture, and the Politics of Representation, 1870–1900* (Yale University Press, 2003).

District Court (NSW), 'Judges' contact details' (online, 2020) <https://www.districtcourt.nsw.gov.au/district-court/contact-us/judges-contact-details.html>.

W Dobie, J Goldin, and C Yang, 'The Effects of Pre-trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges' (2018) 108(2) The *American Economic Review* 201.

Domenech-Pascual and Navarro, 'Compensating Acquitted Pre-Trial Detainees' (2015) 43 *International Review of Law and Economics*.

WEB DuBois, 'The Negro Criminal' in *The Philadelphia Negro* (University of Philadelphia Press, 1899).

E Durkheim, *Le Suicide: Étude de sociologie* [French] 'On Suicide, a Study in Sociology' (Ancienne Librairie Germer Baillière, Paris 1897).

S Dusty, *Waltzing Matilda* ('A-side' 7" 45RPM single, Columbia Records Australia, 1960).

R Emory, 'It Didn't End with the Hougoumont –the ongoing penal colonisation of Indigenous Australia' (Presentation, Balmain Institute, 14 November 2019).

R Emory, 'The 80% Rule and Indirect Discrimination as a method to assess NSW Criminal Law and Policy' (Conference Paper, Alfred Deakin Institute Conference, 50 years of naming institutional racism: realising racial equity or intensifying injustices? 2 Nov 2017).

R Emory, 'Running the Numbers.' (Conference paper, National Centre for Indigenous Studies annual research conference, 20 October 2017).

European Parliamentary Research Service, *The Principles of Equality and non-Discrimination, A Comparative Law Perspective: Canada.* (Report for the European Parliamentary Research Service Comparative Law Library Unit. Report no. PE 6959.362. November 2020).

M Feeley, *The Process is the Punishment: Handling Cases in a Lower Criminal Court* (Sage, 1979).

J Fitzgerald, *Why are Indigenous Imprisonment Rates Rising*? (Report for NSW Bureau of Crime Statistics and Research. Report no. 41, August 2009).

R Florence, *100 Years, The Nowra Lockup 1901-2001* (Shoalhaven Historical Society, Nowra NSW, 2001).

S Forshaw and M Pilgerstorfer, 'Direct and Indirect Discrimination: Is There Something in between?' (2008) 37(4) *Industrial Law Journal* 347.

P Fossion, et al., 'Family approach with grandchildren of Holocaust survivors' (2003) 57(4) *American Journal of Psychotherapy* 519.

Chief Justice R French , 'The Common Law and the Protection of Human Rights' (Speech, Anglo Australasian Lawyers Society, Sydney, 4 September 2009).

F Gale, R Bailey-Harris, and J Wunderstiz, *Aboriginal Youth and the Criminal Justice System: the injustice of justice?* (Cambridge University Press, 1990).

P Garde, 'The Danish Jury' (2001) 71(1-2) *Dans Revue internationale de droit penal*.

O Gazal-Ayal and R Sulitzeanu-Kenan, 'Let My People Go: Ethnic in-group bias in Judicial decisions,' (2010) 7(3) *Journal of Empirical Legal Studies* 403.

Globalization and World Cities Research Network, (2018) 'The World According to GaWC 2018.'

Globalization and World Cities Research Network, (2020) 'The World According to GaWC 2020.'

C Gooley, 'Pat Dodson calls for Peter Dutton to convene police ministers meeting on deaths in custody,' *ABC News* (online, 16 March 2021) <https://www.abc.net.au/news/2021-03-16/pat-dodson-seek-government-action-indigenous-deaths-in-custody/13253920>.

Goulburn Herald (19th March 1887).

E Grant, E Rowden, and M Taitz, 'Evaluating the cultural responsiveness of the design of an Aboriginal Court Complex for Aboriginal Users: Post Occupancy Evaluation of the Port Augusta Court Complex,' (Conference Paper, Australian and New Zealand Society of Criminology Conference, Geelong, 28-30 September 2011).

P Gregorie and U Nedim, 'The Lack of Ethnic Diversity in the NSW Magistracy' *Sydney Criminal Lawyers* (online, 18 September 2019) <https://www.sydneycriminallawyers.com.au/blog/the-lack-of-ethnic-diversity-in-the-nsw-magistracy/>.

R Griffen, J Bell, and J Gavin, J 'Cleverman.' *Australian Broadcasting Corporation* (2016-17).

S Hagen, *The Rise and Rise of Judicial Bigotry* (University of Queensland Press, 2017).

C Hartney and L Vuong, *Created Equal: Racial and Ethnic Disparities in the US Criminal Justice System* (Report for (US) National Council on Crime and Delinquency, 2009.) <https://www.hivlawandpolicy.org/sites/default/files/CREATED%20EQUAL-racial%20dispar%20in%20crl%20justice%20system-2.pdf>.

Harvard Law Review Association, *The Bluebook: a uniform system of citation* (20th ed., 2015).

Heritage NSW, 'Heritage Listing' (Department of Environment (NSW) Database). <https://apps.environment.nsw.gov.au/dpcheritageapp>.

CB Hessick, 'The Myth of Common Law Crimes' (2019) 105(5) Virgi*nia Law Review* 965.

A Hoel, 'Compensation for wrongful conviction' (2008) 365 *Trends & issues in crime and criminal justice*.

D Hoitink and A Hopkins, 'Divergent Approaches to the Admissibility of Tendency Evidence in New South Wales and Victoria: the Risk of Adopting a More Permissive Approach' (2015) 39(6) *Criminal Law Journal* 303.

D Howard-Wagner, 'Success in Closing the Socio-Economic Gap, But Still a Long Way to Go: Urban Aboriginal Disadvantage, Trauma, and Racism in the Australian City of Newcastle' (2019) 10(1) *International Indigenous Policy Journal.*

Human Rights and Equal Opportunity Commission (Australia), *The Right to a Discrimination Free Workplace* (online, 2008) <https://humanrights.gov.au/our-work/right-discrimination-free-workplace>.

Human Rights Watch, '2018 Country Chapters: Australia.' (online, 2018) <https://www.hrw.org/world-report/2018/country-chapters/australia>.

F Hunt, 'Lehrmann trial discharged due to jury misconduct' *Law Society of NSW Journal* (online, 27 October 2022) <https://lsj.com.au/articles/lehrmann-trial-discharged-due-to-jury-misconduct/#:~:text=The%20jury%20in%20the%20Bruce,research%20paper%20on%20sexual%20assault>.

RW Hymes, M Leinart, S Rowe, and W Rogers, 'Acquaintance rape: The effect of race of defendant and race of victim on White juror decisions' (1993) 133 *Journal of Social Psychology* 627.

M Ierace, 'Early Guilty Pleas: A New Ball Game' (Working chapter for the Office of Public Defenders (NSW), 28 April 2018). <https://www.publicdefenders.nsw.gov.au/Documents/Early%20Guilty%20Pleas%20-%20A%20New%20Ball%20Game%20(3).pdf>.

Interview with Omarosa Manigault Newman (C Dodd, NBC News, Meet the Press, 12 August 2018). <https://www.nbcnews.com/meet-the-press/meet-press-august-12-2018-n899996>.

T Jeanson, 'Texas Courthouses, Jails and More' *Texas Escapes (*online, retrieved 8 July 2022) <http://www.texasescapes.com/TexasPhotography/Terry-Jeanson-Photography.htm>

M Joyce and J Wilson '10 County Courthouses That Show off the Beauty and History of Small-Town Texas' *Texas Highways* (September, 2018). < https://texashighways.com/culture/these-10-county-courthouses-show-off-the-beauty-and-history-of-small-town-texas/>.

JPA&D Architecture Interiors and Heritage, 'Author Archives Griffith Courthouse' (online, retrieved 8 July 2022) <https://www.jpad.com.au/web/author/jpad/>.

L Kaplan and W Owings, 'Countering the Furor Around Critical Race Theory' (2021) 3(105) *National (US) Association of Secondary School Principles*.

C Kerry, 'Sistergirls/Brotherboys: The Status of Indigenous Transgender Australians' (2014) 15(3-4) *The International Journal of Transgenderism* 173.

M Koziol, 'We have atoning to do but not for Indigenous incarceration: Abbott' *Sydney Morning Hearld* (14 June 2020).

B Kwan, 'New citizens welcomed as thousands rallied across Australia in solidarity with First Nations people' *SBS* (online, 26 January 2023) <https://www.sbs.com.au/news/article/new-citizens-welcomed-as-thousands-rallied-across-australia-in-solidarity-with-first-nations-people/jw2mh5kfc>.

JR Kyllingstad, 'The Absence of Race in Norway?' (2017) 95 *Journal of Anthropological Sciences* 319.

Law Society of NSW, *2018 National Profile of Solicitors Final* (Report for the Law Society of NSW. Report no. ESA12418, 17 July 2019).

Lawyers Rights Watch Canada 'Pre-Trial Release and the Right to Be Presumed Innocent' (Lawyers Rights Watch Canada, 2013).

M Lee, ‘Yes, U.S. locks people up at a higher rate than any other country’ *Washington Post* (7 July 2015).

M Legg and A Song, ‘The Courts, the Remote Hearing and the Pandemic: From Action to Reflection’ (2020) 44(1) *UNSW Law Journal* 126.

A Levade, ‘Positive Discrimination and the Principle of Equality in French Law’ (2020) 111(4) *Pouviors* 55.

L Levy, *Origins of the Fifth Amendment* (Macmillan, 1986).

S Lindstad, ‘Etnisitet lar seg ikke telle’ [Norwegian] ‘Ethnicity does not count’ (Report for committee for gender balance and diversity in research (Norway), 24 November 2008). <http://kifinfo.no/nb/2017/11/etnisitet-lar-seg-ikke-telle>.

T Loenen, ‘Indirect Discrimination as A Vehicle For Change" (2000) 6(2) *Australian Journal of Human Rights* 77.

JA Lozano, ‘Settlement reached in lawsuit over Houston area bail system’ *The Associated Press* (online, 17 July 2019) <https://apnews.com/0f6beffe78884a2d9130b74445fe8ecf>.

A Luuk, *Reducing Recidivism Not Rights: Rethinking Interior Architecture as a solution for New Zealand's failing prisons* (MS thesis, Victoria University of Wellington, 2018).

I MacKinnell, P Poletti, and J Holmes, *Crime and Justice Bulletin: Measuring Offence Seriousness.* (Report for the NSW Bureau of Crime Justice and Statistics. Report no. 142, 2010).

AS Malaspinas, M Westaway, C Muller, et al. ‘A genomic history of Aboriginal Australia’ (2016) 538 *Nature* 207–214. <https://doi.org/10.1038/nature18299>.

K Marx, *Das Kapital: Kritik der politischen Ökonomie* [High German] ‘Capital: A Critique of Political Economy’ (Verlag von Otto Meisner, 1867).

M McAlister and S Bricknell, *Deaths in custody in Australia 2021-22* (Report for the Australian Institute of Criminology, Statistical Report no. 41, 2022).

J McCullough, ‘Texas to shutter three more prisons as units face critical staffing shortages’ *Texas Tribune* (online, 1 December 2020) <https://www.texastribune.org/2020/12/01/texas-prisons-close-understaffing/>.

SE Merry, ‘The seductions of quantification: measuring human rights, gender violence, and sex trafficking’ (2020) 44(4) *Journal of Law and Society* 726.

M Mileski, ‘Courtroom Encounters: An Observation Study of a Lower Criminal Court’ (1971) 5(4) *Law & Society Review* 473.

M Miller, J Reichert, B Bornstein, and G Shulmand, ‘Judicial stress: the roles of gender and social support’ (2018) 25(4) *Journal of Psychiatry Psychology and Law* 602.

SF Moore, ‘Law as Process: An Anthropological Approach’ (1978) 6(1) *British Journal of Law and Society* 135.

Monitoring Pre-trial Reform in Harris County: First Sixth Month Report of the Court-Appointed Monitor. *O'Donnell v Harris County* [3 Sept, 2020] 4:16-cv-01414 US Fed. Ct. S. Dist. TX.

N Moreton, 'Bathurst Courthouse's major restoration project has begun' *Western Advocate* (online, 24 October 2016) <https://www.westernadvocate.com.au/story/4235282/courts-restoration-works-photos/>.

S Morris and R Lobsenz, 'Significance Tests and Confidence Intervals for the Adverse Impact Ratio' (2000) 53(1) *Personnel Psychology* 89.

National Aboriginal and Torres Strait Islander Legal Services, *2018-2019 Pre Budget Submission.* (Submission to Department of the Treasury (Australia), 2018). <https://treasury.gov.au/sites/default/files/2019-03/C2016-052_National-Aboriginal-and-Torres-Strait-Islander-Legal-Services.pdf>.

MS Nelson, A Wooditch, and SL Gabbidon, 'Is Criminology out of Date?' (2014) 25(1) *Journal of Criminal Justice Education* 16.

New England Constructions, 'Armidale and Inverell Courthouses' (online, retrieved 8 July 2022) <https://newenglandconstructions.com.au/projects/armidale-and-inverell-courthouses/>.

Newsroom, 'Old Armidale Courthouse heritage listing campaign continues' *Armidale Express* (online, 20 July 2020) <https://www.armidaleexpress.com.au/story/6840266/campaign-continues-to-have-old-courthouse-heritage-listed/>.

Northern Territory Government, *Ampe Akelyernemane Meke Mekarle: 'Little Children are Sacred'* (Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, 2007).

NSW Bar Association, 'About Us, Statistics' (online, retrieved 2023). <https://nswbar.asn.au/the-bar-association/statistics>.

NSW Bureau of Crime Statistics and Research, 'NSW Criminal Justice Aboriginal Over-representation Quarterly Report' (March 2022).

NSW Law Reform Commission, *Encouraging Early Appropriate Guilty Pleas* (Report no. 144, December 2014).

NSW Law Reform Commission, *Jury Selection* (Report no. 117, September 2007).

V Nugent, 'Armidale Courthouse is "Fawlty Towers"' *Armidale Express* (online, 11 July 2014) <https://www.armidaleexpress.com.au/story/2409408/armidale-courthouse-is-fawlty-towers/>.

OECD, 'The Price of Prejudice: Labour Market Discrimination on the Grounds of Gender and Ethnicity' in *OECD Employment Outlook 2008* (online, 2007) <http://www.oecd.org/employment/emp/40844081.pdf>.

Office of the Correctional Investigator (Canada), *BACKGROUNDER: Aboriginal Offenders –A critical Situation*. (Report for the Office of the Correctional Investigator (Canada), 2013). <://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20121022info-eng.aspx>.

Oriel Building, 'Courthouse Refurbishment Bega' (online, retrieved 8 July 2022) <https://www.orielbuilding.com.au/projects/heritage/courthouse-refurbishment-bega/>.

Ormsby, G 'NSW bar stats give insight into female barristers.' *Lawyers Weekly* (online, 31 March 2019) <https://www.lawyersweekly.com.au/wig-chamber/24214-nsw-bar-stats-give-insight-into-female-barristers>.

Osborne, et al., 'Beyond the black stump: rapid reviews of health research issues affecting regional, rural and remote Australia' (2020) 213(11) *Medical Journal of Australia* 3.

J Oscar, 'Grace Vaughn Memorial Lecture.' (Speech, Grace Vaughn Memorial Lecture, University of Western Australia 2 May 2018) <https://humanrights.gov.au/about/news/speeches/2018-grace-vaughan-memorial-lecture-university-western-australia?_ga=2.93806045.1310653198.1589433178-1084954384.1589433178>.

N Pearson, *Mission: Essays, Speaches and Ideas* (Black Inc, 2004).

N Pearson, *Our Right to Take Responsibility* (Black Inc, 2000).

T Perdue, 'The Legacy of Indian Removal,' (2012) Feb *J Southern History* 13.

J Perez, *Los judíos en España* [Spanish] 'The Jews of Spain' (Marcial Pons Ediciones de Historia, 2005).

L Phelan, M Sotiri, and M Scott, 'Profile of women in prison in NSW Part A: A Snapshot 2-5' (online, 2018) <https://www.sydneycommunityfoundation.org.au/wp-content/uploads/2020/04/KWOOP-Coalition-Profile-of-women-in-prison-in-NSW.-Part-A.-A-snapshot.-Final-9-March-2020.pdf>.

A Piperoglou, 'From Dago to Wog: Remembering stinging slurs' *Freilich Project for the Study of Bigotry* (Blog post, 18 October 2022) < https://freilich.anu.edu.au/news-events/blog/dago-wog-remembering-stinging-slurs>.

N Papakonstantinou and A Stevens, 'Raptus and Roman Law' (2020) 52 *CLIO Women, Gender, History* 21.

Project Coordination Pty Ltd, 'Nowra Courthouse Redevelopment' (online, retrieved 8 July 2022) <https://projectcoordination.com.au/project-portfolio/nowra-courthouse-redevelopment/>.

S Puszka, et al., 'Community-based social care models for indigenous people with disability: A scoping review of scholarly and policy literature' (2022) 30(6) *Health and Social Care in the Community* e3716.

PWC Consulting 'Indigenous incarceration: Unlock the facts.' (online, 17 May 2018) <https://www.pwc.com.au/indigenous-consulting/assets/indigenous-incarceration-may17.pdf>.

J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson 1901).

Justice S Rares, 'Australia's prison rates are up but crime is down. What's going on?' *The Conversation* (online, 22 October 2021) <https://theconversation.com/australias-prison-rates-are-up-but-crime-is-down-whats-going-on-170210>.

Justice S Rares, 'Why Magna Carter Still Matters' (Conference Paper, Judicial Conference of Australia Colloquium, Adelaide 9 October 2015).

N Rees, S Rice, and D Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 2014).

Royal Commission into the Protection and Detention of Children in the Northern Territory (Final Report, 2017).

C Robertson, S Baughman, and M Wright, 'Race and Class a Randomized experiment with prosecutors' (2019) 16(4) *Journal of Empirical Legal Studies* 807.

O Roeder, LB Eisen, and J Bowling, *What Caused the Crime Decline?* (Report for the Brennan Centre for Justice, 12 February 2015).

M Rombauer, *Legal Problem Solving* (West, 1991).

M Rossner and D Tait, 'Contested emotions: adversarial rituals in non-adversarial justice procedure' (2011) 37(1) *Monash Law Review.*

M Rossner, D Tait, B McKimmie, and R Sarre, 'The dock on trial: courtroom design and the presumption of innocence' (2017) 44 (3) *Journal of Law and Society* 317-344.

E Rowden and D Jones, 'Design Dignity and Due Process: The Construction of the Coffs Harbour Courthouse' (2015) 14(2) *Law, Culture and the Humanities*.

Royal Bank of Australia, 'Pre-Decimal Inflation Calculator' (online tool, retrieved 8 July 2022) <https://www.rba.gov.au/calculator/annualPreDecimal.html>.

Royal Commission into Aboriginal Deaths in Custody (Final Report, 15 April 1991).

Royal Commission into the NSW Police Service (Final Report, May 1997).

E Russel, et al., 'The Building' *High Court of Australia 40th Anniversary Building Oral History Project* (online article, retrieved 09 August 2022) <https://www.hcourt.gov.au/about/the-building#:~:text=The%20theme%20of%20the%20design,handles%20continue%20the%20emblematic%20design.>.

L Ryan, et al. 'Colonial Frontier Massacres in Australia 1788-1930' U*niversity of Newcastle, 2017-2022* (online, retrieved 01 March 2022) <http://hdl.handle.net/1959.13/1340762>.

'Safe room for vulnerable witnesses under construction at Port Macquarie courthouse' *Port News* (online, 3 August 2021) <https://www.portnews.com.au/story/7361476/safe-room-for-vulnerable-witnesses-under-construction-at-port-macquarie-courthouse/>.

B Schwartz, *A History of the Supreme Court* (Oxford University Press, 2016).

Schwartz, M and Cuneen, C 'Working Cheaper, Working Harder: Inequity in Funding for Aboriginal and Torres Strait Islander Legal Services' (2009) 7(10) *Indigenous Law Bulletin* 19

EW Shoben and RC Hunter, 'Disparate Impact Discrimination: American Oddity or Internationally Accepted Concept?' (1998) 19(1) *Berkeley Journal of Employment & Labor Law* 108.

S Shirodkar, 'Bias against Indigenous Australians: Implicit association test results for Australia', (2019) 22(3-4) *Journal of Australian Indigenous Issues* 3.

K Slack and A Hartnett, 'Case note: Reflections on the High Court decision in Love v Commonwealth of Australia [2020] HCA 3: The Constitution, Indigenous rights and immigration law' (2020) 159 *Precedent* 47.

S Sommers, 'On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations' (2006) 90(4) *Journal of Personality and Social Psychology* 597.

N Spaulding, 'The Enclosure of Justice: Courthouse Architecture, Due Process, and the Dead Metaphor of Trial,' (2012) *4 Yale Journal of Law & the Humanities* 311.

E Spillett, 'Wollongong Courthouse Gets a Facelift: photos' *Illawarra Mercury* (online, 5 July 2015) <https://www.illawarramercury.com.au/story/2396114/wollongong-courthouse-gets-a-facelift-photos/#slide=2>.

S Smith, R Askew, E Lang, and J Smith, 'Courthouse Size and Its Impact on Judicial Performance Insights from Weber's Theory of Rationality' (2019) 7(2) *Journal of Law and Courts* 215.

S Smith, J Smith, and Z Auyong, 'Evaluating Judges in State Courthouses: The Potential Effects of Organizational Size' (2022) *CrimRxiv* (online, 20 January 2022). <https://www.crimrxiv.com/pub/xz80iqwp/release/1>.

Snowy Hydro Legacy Fund 'NSW Regional Connectivity Program' (online, retrieved February 2023) <https://www.nsw.gov.au/snowy-hydro-legacy-fund/regional-digital-connectivity-program>.

H Spencer, *Principles of Biology* (1864).

J Stanley, A Tomson, and J Pocock, 'Child abuse and neglect in Indigenous Australian communities' (2003) 19(Spring) *Australian Institute of Family Studies Bulletin* 1.

C Stone, and M Davis, 'New evidence: Stark inequity of online access for rural and remote students' (Australian Association for Research in Education, online 15 June 2020) <https://www.aare.edu.au/blog/?p=5524>.

S Tarrant, 'Building Bridges in Australian Criminal Law: Codification and the Common Law' (2013) 39(3) *Monash University Law Review* 838.

Texas State Historical Commission, 'Courthouse Cornerstones: 2021 Texas Historic Courthouse Program Update,' (2021). <https://www.thc.texas.gov/public/upload/publications/CourthouseCornerstones_2021_web.pdf>.

L Titia, 'Indirect Discrimination as A Vehicle For Change' (2000) 6(2) *Australian Journal of Human Rights* 77.

Tobler, C *Indirect Discrimination: A case study into the development of the legal concept of indirect discrimination under EC law* (Intersentia, 2005).

K Toole, 'Only in America: why Australia is right not to have grand juries' *The Conversation Australia* (online 27 November 2014) < https://theconversation.com/only-in-america-why-australia-is-right-not-to-have-grand-juries-34695>.

The Museum of the City of San Francisco, 'Early History of the San Francisco Fire Department' (online, retrieved 11 August 2021) <http://www.sfmuseum.net/hist1/fire.html>.

Thomson Reuters, *The Laws of Australia* (at 15 April 2018).

M Travers, E Colvin, I Bartkowiak-Theron, R Sarre, A Day, A, and C Bond, *Rethinking Bail: Court Reform or Business as Usual?* (Palgrave Macmillan, 2020).

L Trimboli, *Crime and Justice Bulletin: Early Appropriate Guilty Plea reform program Process evaluation.* (Report for the NSW Bureau of Crime Statistics and Research. Report No. 238, August 2021).

H Tubex, 'Don Weatherburn, Arresting Incarceration: Pathways out of Indigenous Imprisonment' (2014) 47(3) *Australian & New Zealand Journal of Criminology* 449.

Chief Justice R v. Moschzisker, 'The Historic Origin of Trial by Jury' (1921) 70 *University of Pennsylvania Law Review* 1.

M Wade, and N Gladstone, 'Rapid Growth for Indigenous Population of Sydney' *Sydney Morning Herald* (online, 1 June 2019) <https://www.smh.com.au/politics/nsw/rapid-growth-for-indigenous-population-of-sydney-20190531-p51t7i.html>.

R Walmsley, *World Prison Population List (10th ed.)* (Report for the International Centre for Prison Studies, 2015)

C Walsh, *Falling on deaf ears? Listening to Indigenous voices regarding ear disease ('otitis media') and hearing loss* (PhD thesis, National Centre for Indigenous Studies, 2020)

J Walter and S Ostrander, 'An Observational Study of a Juvenile Court,' (1982) 3(3) *Juvenile and Family Court Journal* 53-69.

M Weber, *Politik als Beruf* [High German] 'Politics as a Vocation' (1919).

D Weatherburn, *Arresting Incarceration: Pathways out of Indigenous Imprisonment* (Aboriginal Studies Press, 2014).

D Weatherburn, and J Holmes, *Indigenous Imprisonment in NSW: A closer look at the trend.* (Report for the NSW Bureau of Crime Statistics and Research. Report no. 126, June 2017).

D Weatherburn and J Fitzgerald, 'Reducing aboriginal over-representation in prison: A rejoinder to Chris Cunneen' (2006) 18(2) *Current Issues in Criminal Justice* 366.

Weekender News Network, 'Courthouse to Close for Six Months' *Western Weekender* (online, 9 October 2013) <https://westernweekender.com.au/2013/10/courthouse-to-close-for-six-months/>.

West, *Black's Law Dictionary* (9th ed., West, 2009).

G Williams, 'Race and the Australian Constitution: From Federation to Reconciliation' (2000) 38(4) *Osgoode Hall Law Journal* 643

J Williams and J Bradsen, 'The Perils of Inclusion: The Constitution and the Race Power' (1997) 19(1) *Adelaide Law Review* 95.

M Wilson, J Jones, and T Butler, et al,. 'Violence in the Lives of Incarcerated Aboriginal Mothers in Western Australia' (2017) 7(1) *Criminology and Criminal Justice*.

Wilson, J Chihota, C, and Marks, G 'Teaching white privilege: an auto-ethnographic approach' (2021) *International Journal of Inclusive Education*. (Accepted for publication).

A Wood, 'Constitutional Recognition: A Case for Less is More' in *It's Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform*. (Melbourne University Press, 2016).

World Prison Brief, 'Sweden' (online, retrieved 2021) <https://www.prisonstudies.org/country/sweden>.

A Yacoub, A Amin and Briggs, 'Posttraumatic Stress Disorder ('PTSD') Effect on a Defendant's Action and State of Mind: The Future of Criminal Culpability' (23 December 2021). Available at SSRN: https://ssrn.com/abstract=4024522 or http://dx.doi.org/10.2139/ssrn.4024522

S Yeong and S Poynton, *Crime and Justice Bulletin: Did the 2013 Bail Act increase the risk of bail refusal? Evidence from a Quasi-Experiment in New South Wales.* (Report for the NSW Bureau of Crime Statistics and Research. Report no. 212, 2018).

A Yu, 'Direct Discrimination and Indirect Discrimination: A Distinction with a Difference' (2019) 9(2) *Western Journal of Legal Studies*.

A Zenz, 'Brainwashing, Police Guards and Coercive Internment: Evidence from Chinese Government Documents about the Nature and Extent of Xinjiang's "Vocational Training Internment Camps."' (2019) 7 *Journal of Political Risk* 7.

Online Public Datasets

Australian Bureau of Statistics, *Prisoners in Australia 2016* (online 2016) <https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2016~Main%20Features~New%20South%20Wales~18>.

Australian Bureau of Statistics, *New South Wales remains Australia's most populous state* (online, 2017) <https://www.abs.gov.au/AUSSTATS/abs@.nsf/mediareleasesbyReleaseDate/BBEDD77E8EA69ACACA2581BF001E65B2?OpenDocument>.

Australian Bureau of Statistics, *2016 Census QuickStats* (online, 2017) <https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/036>.

Australian Bureau of Statistics, Census of Population and Housing - Counts of Aboriginal and Torres Strait Islander Australians (Catalogue number 2075.0).

NSW Bureau of Criminal Statistics and Research, *NSW Criminal Courts Statistics 2016* (online, 2017) <https://www.bocsar.nsw.gov.au/Pages/bocsar_publication/Pub_Summary/CCS-Annual/NSW-Criminal-Courts-Statistics-2016.aspx>.

Guion-Miller Roll, United States National Archives ID: 300329 (33931-1911-053 Cherokee Nation).

Appendix i. Key to reading the impact ratio test equation (Testing For Inequity)

$$\frac{\ln\left(\frac{SR\ non}{SR\ Indig}\right)}{\sqrt{\frac{1-SR\ Total}{SR\ Total}\left(\frac{1}{N\ non}+\frac{1}{N\ Indig}\right)}}=\frac{\ln(SR\ non)-\ln\left(SR\ Indig\right)}{\sqrt{\frac{1-SR\ Total}{SR\ Total}\left(\frac{1}{N\ non}+\frac{1}{N\ Indig}\right)}}$$

z_{IR}: The statistic itself

$\ln$: Natural Logarithm

$SR\ non$: Selection rate for non-Indigenous persons in custody (A value between 0 and 1).

$SR\ Indig$: Selection rate for Indigenous persons in custody (A value between 0 and 1).

$SR\ Total$: Selection rate for entire population (Indigenous and non-Indigenous combined) in custody. (A value between 0 and 1).

$N\ non$: complete non-Indigenous population in raw numbers regardless of incarceration status

$N\ Indig$: complete Indigenous population in raw numbers regardless of incarceration status.

Appendix ii. Commonly used abbreviations for observational variables (Testing For Inequity)

AA	accused
AJ	adjourn
Age	Approximate age
ATTN X	attention scale 1-10
B.Stat	Bail Status of accused
BARD	beyond a reasonable doubt
CT	court
CR	courtroom
CO	courtroom officer
CA	Crown assistant
CB	Crown barrister
C.mis	Prosecutorial Misconduct Observed
CS	Crown solicitor
Dir	Direct Examination
DoO	Date of (alleged) Offence
DoTR	Date of TR
DA	defence assistant
DB	defence barrister
DS	defence solicitor
Diff	different matter
Evid	evidence
Ex	exhibit (pl. ex's)
GL	gallery
ID.Evid	Eyewitness ID Evidence
JJ	Judge
JJ.TR/JR.TR	Judge-Alone/Jury Trial
JA	judge associate
JR	Juror
pJR	Potential Juror on Panel
JR.FP	Jury Foreperson
LS.CT	List Court
LS.JJ	List Court Judge
nm	new matter
Obj	Objection (pl. Obj's)
OIC	Officer in charge
POL	police
POL.mis	Police Misconduct Observed
PPL	People
QQ	Question Count
Race	Race
Re	Re-Examination

RD	reasonable doubt
sm	same matter
sub	submission (pl. sub's)
TEND	Tendency Evidence
TS	timestamp
TL	trial
WT	witness
VV	Victim
XX	Cross Examination

Appendix iii. Semi-structured interview base question set (Testing for Inequity)

1. What is your name?
2. Please confirm on the record you have been given the research information sheet and have completed a written consent form for this interview.
3. How do you identify racially?
4. Where were you born?
    a. If not Australia, are you an Australian citizen?
    b. If you are a naturalized citizen, when did you become an Australian citizen?
5. Where and when did you attend university?
    a. Please give dates of completion and the names of universities from which you have a degree or qualification as well as your major.
6. What year did you gain your practice certificate?
    a. In which year were you called to the bar?
    b. Which year did you become Senior/Queens Counsel?
    c. In which year did you take the bench?
7. Whom is your employer?
    a. What year did you take that position?
    b. What were your previous criminal law positions?
8. What is your primary role in criminal trials?
    a. What were your previous primary roles?
9. Please estimate the total number of District Court trials you have been a legal practitioner in throughout your legal career.
    a. How many involved Indigenous male accused?
10. Do trials play out differently for Indigenous accused males compared to non-Indigenous males?
    a. Can you please explain what aspects are different?
    b. Which aspects are not different?
11. How do procedural and evidence law impact Indigenous male accused?
12. What impact does specialized training on Indigenous issues in the criminal law have on District Court trial procedure and trial outcomes?
    a. In your experience, does this training lead to judges giving directions regarding indigenous culture to juries?
        i. If so, how often?
        ii. What language do those instructions tend to contain?

iii. Should such instructions be given?

iv. In cases where no such instruction is given, would such an instruction help juries come to a more culturally informed decision regarding the guilt or innocence of Indigenous accused males?

13. How does counsel treat an Indigenous male accused person? Does it differ from other accused persons?

14. How do Indigenous males behave in the dock? Does that behaviour alter trial outcomes?

15. How frequent are perverse verdicts?

a. What kinds of accused are most likely to benefit from a perverse verdict and why?

16. How frequent are no case to answer submissions? Which kinds of accused are most likely to win such an application?

a. Does the race of the accused play any role?

17. How does racist (overt or implied) witness behaviour impact trial outcomes for Indigenous males?

18. ALS NSW/ACT currently wins more of its trials than the general population does, can you estimate as to why this is?

19. How are Indigenous males impacted by their prior criminal history at trial?

a. Are Indigenous males as a group impacted by tendency evidence compared to non-Indigenous males?

20. What differences exist regarding evidence introduced by the Crown against Indigenous male accused compared to non-Indigenous male accused?

a. Can you estimate as to why each of the differences exists?

b. Additionally, can you estimate as to the impact of the differences you have described?

21. How does cross-racial eyewitness ID evidence impact Indigenous male accused persons compared to non-Indigenous male accused persons?

a. Do judges exclude photo panels from identifications that do not have enough of the subjects for identification matching the description of the accused?

i. If yes, how often?

ii. And, on legal basis do judges exclude unfair photo boards?

22. What differences exist in frequency or kind of defence cases run by lawyers for non-Indigenous accused persons (i.e. 'you got the wrong guy' v 'burden of proof' v 'complainant is lying') compared to non-Indigenous accused males?

23. What impact do last minute plea deals have on Indigenous accused males?

a. If there are any differences, please explain what those differences are and estimate as to why such differences exist.

24. What impact do inchoate aggravating factors that escalate otherwise summary offences to indictable offences (such as the broad use of 'affray' or 'in company') adversely impact Indigenous accused persons?

a. Can you please describe what types of otherwise petty crimes that wind up in District Court?

b. Do these crimes you have named disproportionately impact Indigenous males?

25. What impact does prosecutorial practice have on the massive over-representation of Indigenous males in District Court trials?

a. Can you please estimate as to what the prosecutorial practices are that contribute to this over-representation?

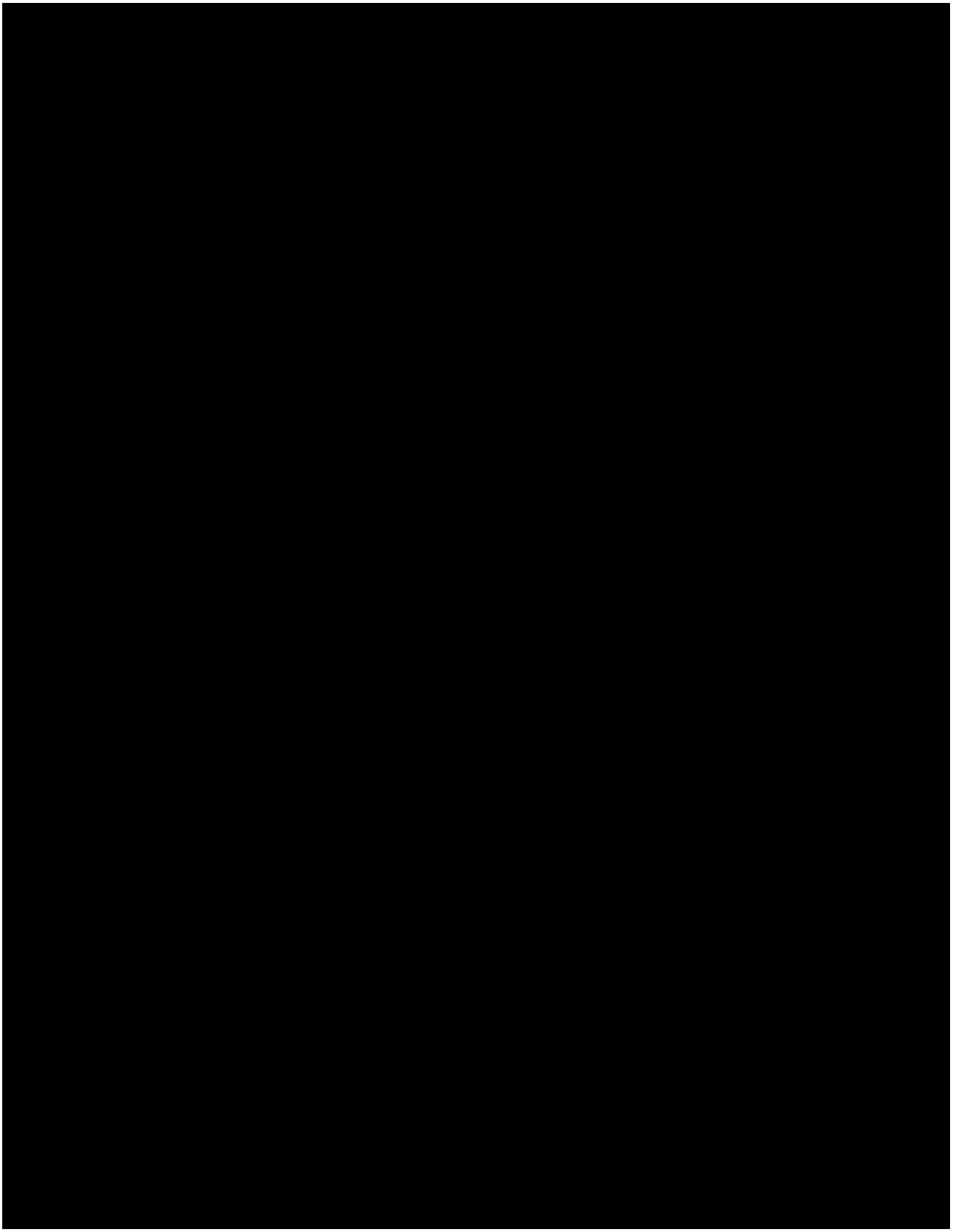
b. What can be done to correct any prosecutorial practices adversely impacting Indigenous males in District Court trials?

26. What impact will any of the recent changes in criminal procedure (such as EAGP) have on Indigenous males as a group?

27. If you could change one thing about District Court trials to make things more just for Indigenous males accused of an indictable offence, what would that change be?

Appendix iv. Data for Replication (The Racism of Remand)

This appendix is subject to delayed access restrictions



Appendix v. Data For Replication (The Oppression in Discretion)

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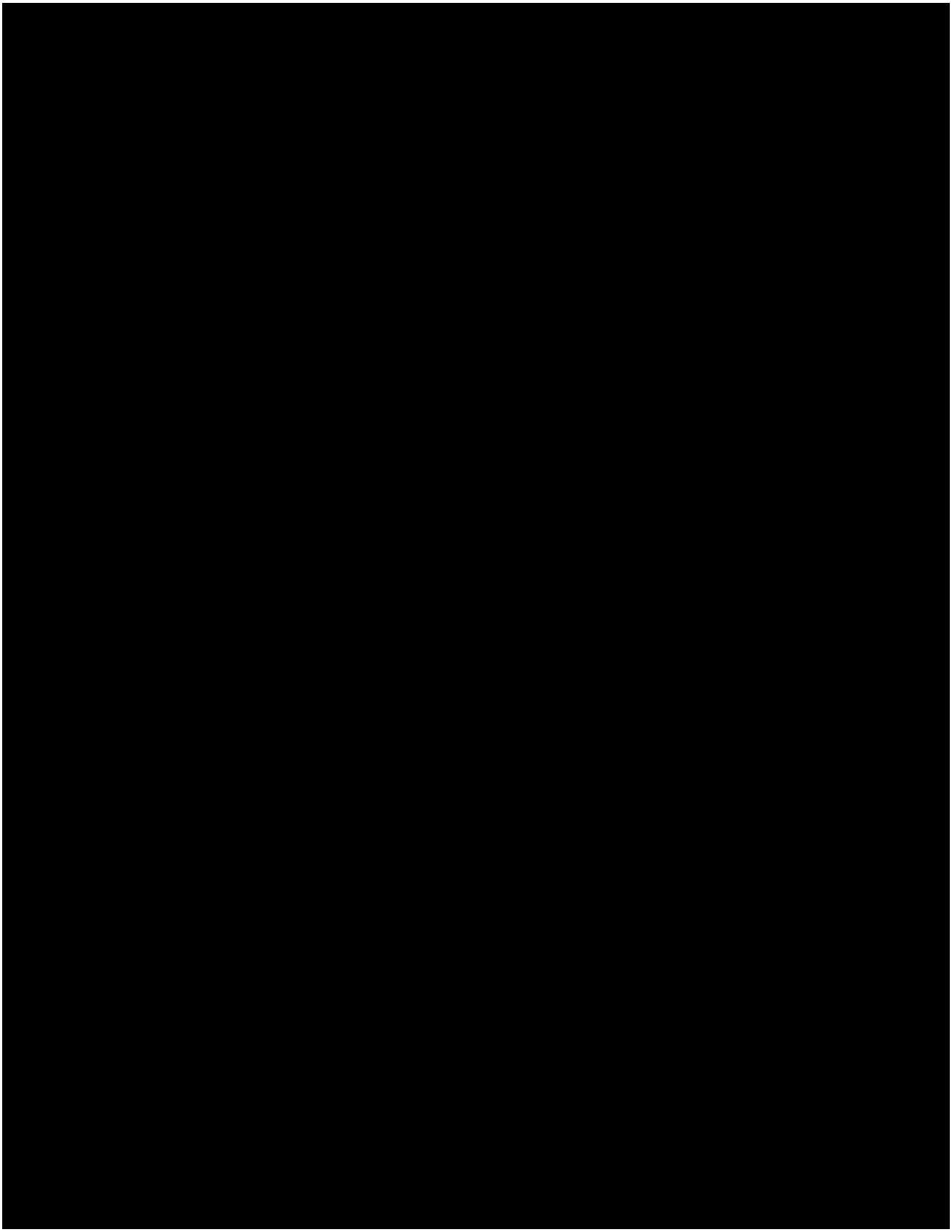


Appendix vi. Matter summaries (The Oppression in Discretion)

RACE	SUMMARY OF EVID	STRONG/WEAK EVID	CUSTODY STATUS	VERDICT	CAUSE OF VERDICT
Indig.	There was physical evidence of the accused being at the scene, eyewitnesses, a 000 call and extensive photographic evidence.	Strong.	In custody during trial.	Guilty plea to a lesser charge and acquitted on the main charge.	Victims were poor witnesses and admitted to racism against the accused's sister. It was a perverse acquittal according to the judge on the record.
Indig.	There was video footage of the accused committing a different crime he was not charged with but exonerated him of the crime of which he was accused.	Unreasonably weak.	On bail.	Application for a directed verdict denied, but accused was then acquitted.	The judge informed me that the directed verdict was refused because it was a judge alone trial, and they wanted a final verdict despite the unreasonably weak evidence.
Indig.	Eyewitness saw 'African Americans' entering the apartment. Victim had severe alcoholic brain damage and had relapsed so they could not ID anyone.	Unreasonably weak.	In custody during trial.	Acquittal.	Judge noted there is no way to confuse African Americans with Aboriginal Australians.
Indig.	The accused was in possession of stolen property but was physically unable to have committed the crime due to a physical disability	Unreasonably weak.	In custody during trial.	Acquittal.	Judge noted the police should have been able to tell the accused could not have committed the crime at issue.
non.	Drugs found at scene, but the wrapping was lost. Police making claims about where the drugs were that were physically impossible.	Weak.	On bail.	Acquittal.	Judge noted the serious police misconduct when presenting the verdict.

non.	Video footage near the scene but none of the crime itself and victim testimony.	Medium.	In custody during trial.	Acquittal.	Jury found reasonable doubt.
non.	Video footage near the scene but not of the crime itself and victim testimony.	Medium.	In custody during trial.	Acquittal.	Jury found reasonable doubt.
non.	Victim testimony.	Strong.	In custody indefinitely.	Accused found incompetent to stand trial in a special hearing.	Judge noted accused was unable to assist in his own defence and in this state, it would also put the victim through unnecessary trauma.

The King's Courts

Courthouse architecture in the state of New South Wales

Introductio

Having paradoxically 'concluded' the thesis, this appendix contains a gallery show of photographic captures, their captions, and the overall methodology of the related photographic research. This is done both for the sake of readability and because the captions contain a mixture of the artist's impressions of the buildings, architectural comments, and histories collected about the buildings whilst travelling. At the time of field research undertaken for the thesis, this gallery represents a complete sample of every New South Wales courthouse with criminal District Court sittings. The buildings are not described from the viewpoint of an architectural critic, but instead reflects the artist-researcher's lived experience coupled to their legal and artistic training. Such a structure makes intuitive sense because in the personal experience of this photographer, each picture paints a thousand words, but through captions art tells stories.

In addition to displaying the places and spaces where research took place, this gallery show serves another, almost more important purpose within the context of this thesis as a social scientific text. Through these photographs and captions, I am making an open and overt claim to my own ethnographic authority, demonstrating that I as a social scientist put in the time and effort to make the arguments contained throughout the entirety of this thesis. I have personally *driven* to every single NSW courthouse with District Court sitting dates (both criminal and civil) over the course of my PhD programme. I have *seen* and placed my feet on Mother Earth in the traditional lands of every mob in New South Wales. I have met the people I advocate for in this thesis, and I have seen their homelands. This may be unusual in a legal text, but it is *essential* in ethnographic research. Without having placed one's feet on the lands of those for whom an ethnographer writes, a work of ethnography is no better than the colonial armchair anthropologists such as Herbert Spencer, who espoused unilineal

evolutionism and coined the term 'survival of the fittest[1]' to justify British colonialism without having ever met the people he otherised.

Moving beyond this introduction, this appendix sets out the photographic methods used to produce the gallery show itself, including the social scientific uses thereof. After doing so, it displays all 30 courthouses in which the NSW District Court presently holds jury trials for indictable criminal matters. Finally, this appendix, this show, and this thesis comes to its actual end with a short conclusion regarding this photographic research and creative exegesis.

Methodology

This section deals with the methods used in this specific, photographic aspect of the research. The scientific methods are dealt with in the methodology. This appendix's methods section, therefore, is limited to the photographic research and is broken down into two subsections. The first is a brief description of the technical details of how the stills were captured, edited, printed for display, and digitally embedded within this photographic collection. The second contains the social scientific and artistic methods underpinning the photographic research.

Technical Details

The images in this chapter were captured in .RAW on a digital mirrorless camera (a Sony A6000) with manual focal lenses (also made by Sony with Zeiss optics). Images were edited in Adobe Lightroom Classic and in Adobe Photoshop. Test printing used a medium format pigment-type inkjet printer (a Cannon Pixma Pro 10s) on A4 matte Kodak 180GSM paper. A3+ proofing used the same printer and an sRGB colorimeter calibrated monitor, on Ilford Galerie Raster Silk paper. Final printing of gallery quality stills was outsourced to a professional photo printing studio in the ACT, and electronic .JPEG files are imbedded in the digitally stored version of this thesis.

The Art and the Science

This subsection addresses both the art and the science of the photographic research. Usually, one would separate a section such as this, but in this case, it would be inappropriate because the art and science are so heavily intertwined. Firstly, this section addresses the artist's inspiration for the

[1] Spencer, H *Principles of Biology* (1864).

collection, their positionality, and their artistic influences. The section then goes on to discuss the methods, methodology, and unique challenges one faces when photographing criminal courthouses.

Beginning with the inspiration for a photographic investigation requires a certain degree of inward thinking about the researcher's lifelong fascination with courthouse architectural design. This fascination is likely both familial and cultural. In Teyshas,[2] the historic county courthouses are more important to the current Texans' quasi-nationalist sense of regional locality than almost any other government institution.[3] Artists travel the state painting and photographing the courthouses,[4] and it is not uncommon to see a large coffee table book of courthouse photographs sitting in a law office waiting room. From a legal perspective, one of the more striking differences between Indian Country in the United States and Aboriginal Country in Australia is that on Indian Country, Tribal police and Tribal courts have significant criminal jurisdiction – whereas in Australia, no Indigenous peoples are not legally allowed to have a criminal court of their own to settle guilt or innocence.[5] This raised a question about whether these exclusionary legal structures were baked into the buildings themselves. That question, in turn, inspired an ethnographic inquiry taking place across nearly the entirety of NSW to discover if this hypothesis proved true and, if so, learn how courthouse architecture interfaced with racially discriminatory aspects of the NSW criminal process discussed in later chapters. As this gallery show and chapter illustrates, while there is a glimmer of hope found in Coffs Harbour, the overall architecture of the courts is largely as Anglo-centric as the NSW criminal law.

Artistically, the photographer who most influences the modality of photographic composition used in this appendix is Linnaeus Tripe, and there is some degree of irony in his influencing any minority-centric research. Linnaeus Tripe's most well-known works are his photographs in then Burma (now Myanmar) during a lull between the Anglo-Burmese wars. Tripe was sent to 'Burma' as a British Army captain on a 'friendly' expedition to convince the Burmese king to cede a province of Burma to

[2] Teyshas is the Caddoan word that would later become Texas. In Anglo Texas society it is translated as 'friend' though the real meaning is more linguistically nuanced. It is used here to demonstrate the importance of 'country' in the Indigenous Australian sense of the term.

[3] *See,* Texas State Historical Commmission 'Courthouse Cornerstones: 2021 Texas Historic Courthouse Program Update,' (online, 2021); Joyce, M and Wilson, J '10 County Courthouses That Show off the Beauty and History of Small-Town Texas' *Texas Highways* (September 2018).

[4] *See,* C Bennet, 'This Mesquite artist wants to paint every county courthouse in Texas' *Dallas Morning News* (online, 1 April 2021); Jeanson, T Texas Courthouses, Jails and More' *Texas Escapes* (online, retrieved 8 July 2022).

[5] H Blagg, *Crime Aboriginality, and the Decolonization of Justice* (2nd ed., Federation Press, 2016) 2-16.

the British colonial rulers of India.[6] It is entirely unavoidable that the largest single influence on the researcher's personal artistic style played an important part of the very colonial project this thesis critiques. In the academic literature of photography, Nicholas Dirks[7] strongly critiques Linnaeus Tripe's art for its 'colonial aesthetics' and the role Linnaeus Tripe's photography played in wider British colonial endeavours. However, despite being a coloniser who engaged in the same enterprise as the English colonisers of Australia, or the conquistadors who first invaded Texas, the way Linnaeus Tripe used angles, captured light, and otherwise literally created what eventually became the rules of photographic composition, has fundamentally shaped these photographic captures. Likewise, these photographs are a productive appropriation of colonial artistic techniques and are deployed to critique the colonial enterprise. Doing so, is itself, another (albeit more amusing) form of irony.

As a social scientific sample, these images collectively form a complete sample of New South Wales courthouses with NSW District Court criminal sittings between 2018 and 2021. Sydney Downing Centre, Wollongong District Court, Parramatta District Court, and Newcastle District Court were photographed during courtroom observational fieldwork. However, travelling to every courthouse in the state of NSW for observational data collection was entirely non-viable for the reasons set out in the thesis itself. Resultantly, numerous courts went unvisited during observational fieldwork thereby necessitating dedicated travel to document the remaining courthouses. Flying was avoided to properly experience the Aboriginal Country on which each of these courthouses resides – and to gain a more accurate emotional perspective of the sheer scale of distances between population centres in regional and remote NSW.

In travelling on a fairly limited budget, these photographs were primarily taken while camping out of a car on weekends, during a time of rolling COVID-19 lockdowns, which could require last minute alterations to the itinerary. Such circumstances precluded the luxury of staying in a place long enough to get perfect lighting, which is visible in some of the photographs. Likewise, due to time constraints, it was impossible to document all the courthouses in their full glory since several of them were undergoing significant renovations and restorations. Similarly, others were obscured by more recent construction or vegetative overgrowth. Modern technology enables image manipulation to remove

[6] A selection of Tripe's work is available online at the Victoria and Albert Museum's website. For access, *see,* <https://collections.vam.ac.uk/search/?q=Tripe,%20Linnaeus&images_exist=true&page=1&kw_object_type=Photograph&id_place=x30037&id_person=A6257&id_category=THES48910>.

[7] N Dirks, 'Colonial Amnesia and the Old Regime in the Photographs of Linnaeus Tripe' In *Traces of India: Photography, Architecture, and the Politics of Representation, 1870–1900* (Yale University Press, 2003) 198.

glare, and sometimes crop images to remove unsightly construction. Where images are altered, it is done in a manner that intentionally preserves the 'vibe' of the buildings. This is done for two reasons. The first is to preserve the artistic value of the buildings themselves. The second flows from a scientific desire to preserve the buildings as they existed in the shared reality at the moment of photographic capture, instead of an idealised depiction an artist created in their mind's eye.

It is worth noting that photographing courthouses in NSW presents other significant challenges, some of which require elaboration methodologically. New South Wales law expressly prohibits taking photographs of the courts on court property. A court officer explicitly stated such while the researcher was photographing Bega courthouse. The officer was not rude – quite the opposite in fact. He saw someone taking photographs of the courthouse (who was not on courthouse property,) and approached to inform them of the permissible limits. That encounter led to a pleasant conversation about this research project. The conversation itself gave way to a private tour and viewing of early twentieth century Bega courthouse photographs. Nevertheless, New South Wales law substantially limits the angles one can photograph courts from, which does impact the art. Likewise, there are no photographs from inside the courts, since taking those requires special permission from the Chief Justice of the NSW District Court. Because the courtroom observational research discussed in later chapters alreiady required special permission to use electronic devices in court, it seemed imprudent to bother Chief Justice Price further by seeking additional special privileges.

The final methodological challenge to discuss are the socio-political limits on how long it is realistically safe to loiter whilst photographing government buildings. On occasion, police approached the photographer to see what was occurring. There was nothing untoward about the police's actions, and all seemed legitimately curious as to why a relatively well-dressed professional would be standing just off court property photographing a courthouse. However, there are obvious, implied meanings when police approach anyone in a public place to have a chat. In the post-9/11 era, anyone spending too long photographing government buildings understandably makes police leery. Such police apprehension thereby places time constraints on how long one can spend with a camera in one's hand just outside a courthouse without looking as if they are up to no good. This wider research project is heavily reliant on the goodwill of the courts and police, so looking off- kilter to court officers by loitering with extended photo shoots was simply not an option.

The Courts Themselves

This section now displays the photographic captures along with their captions. Readers of this work now become viewers – joining the photographer on their series of journeys across thousands of kilometres seeking a deeper understanding of the NSW District Court's criminal processes.[8] When viewing these still images, it becomes apparent a supermajority of NSW courts were built in purely Western architectural styles, and viewers are encouraged to consider the racial and cultural significance of doing so within the context of First Nations Australians being the most incarcerated people group on earth.[9] When seen in this light, the courthouses in New South Wales become one of the more striking (albeit beautifully so) symbols of an ongoing legacy of terra nullius bleeding into Blak Australia's present, lived reality. Viewers will be unable to avoid the painful truth that almost all extant New South Wales courthouses were built in the same style of the law itself – in an absolute rejection of Indigenous sovereignty and multicultural legal pluralism.[10] However, in one, newly-built courthouse, there is a ray of hope for the future. In Coffs Harbour Justice Precinct resides a radically designed, new courthouse inspired by radical new ideas.[11] This beautiful, new building offers a gleaming ray of light at the end of a largely long and dreary tunnel.

[8] S Smith, et al. 'Courthouse Size and Its Impact on Judicial Performance: Insights from Weber's Theory of Rationality' (2019) 7(2) *Journal of Law and Courts* 215.

[9] Anthony, T 'FactCheck Q&A: are Indigenous Australians the most incarcerated people on Earth?' *The Conversation* (6 June 2017).

[10] T Anthony and E Grant, 'Courthouse Design Principles to Dignify Spaces for Indigenous Users: Preliminary Observations' (2016) 8(1) *International Journal for Court Administration* 43.

[11] E Rowden and D Jones, 'Design Dignity and Due Process: The Construction of the Coffs Harbour Courthouse' (2015) 14(2) *Law, Culture and the Humanities.*

Albury

The current Albury courthouse is dated 1987 under the seal of Australia and the words 'Court House' on its front façade. The structure is somewhat reminiscent of a 1980s or 1990s grocery store, although with distinct courthouse elements borrowed from earlier design eras. The building façade is entirely red brick with grey grouting and consists of false pillars 1-2 bricks deep on each side of the peaked central entry intended to mimic the grand entries of earlier courts in New South Wales.

The centre of the court building is a large glassed-in window that almost appears a doorway, however the doorways are actually perpendicular to the false entry and face to the sides. Polished stainless railings shine brightly between the false pillars aiding people to follow the queue to enter through a modern security entry in a way that adds to the grocery store vibe of the overall design. The design is not beautiful, but neither is it aesthetically unappealing. It is a piece of functionalist architecture designed on a budget with intentional artistic allusions to other, more traditional courthouses. The courthouse achieves its purpose fittingly. There are no overtly Indigenous aspects to the design.

Armidale

Armidale courthouse, renovated in 2010,[12] is a low budget replacement for smaller, more aesthetically appealing, colonial courthouse languishing abandoned around the corner. Locals tell of multiple attempts and planning projects trying to salvage the building. The historic building's windows exist in a state of disarray, having been boarded up years prior. A chandelier swings lazily in the wind in a central entryway littered with an inordinate amount of rubbish. Nevertheless, the colonial courthouse remains standing loudly and proudly in inner Armidale. The new courthouse is a square-ish deep red brick building with white rectangular archways and orange facings above the ground floor windows. The new courthouse, by contrast, looks more like a government office or the corporate headquarters of a mid-sized corporation than a fitting replacement for the beautiful colonial courthouse around the corner. Local activist attempts to place the historic building on the NSW state heritage registry as recently as 2020 have all failed.[13] Neither structure appears to take any design cues from local Indigenous people.

The new courthouse began experiencing quality issues shortly after opening when a plumbing failure forcing the courts to briefly close in 2014. In the aftermath, a local magistrate went on record saying, 'There's a major problem with the building, the Fawlty Towers we're in.'[14] Not long thereafter, the state of New South Wales increased its new courthouse construction budgets. As a point of comparison, consider the 17 million Australian dollars spent on the Armidale courthouse alongside the 94 million NSW spent on the architecturally marvellous courthouse in Newcastle. Unsurprisingly, the quality difference astounds.

[12] New England Constructions, 'Armidale and Inverell Courthouses' (online, retrieved 8 July 2022).
[13] Newsroom, 'Old Armidale Courthouse heritage listing campaign continues' *Armidale Express* (online, 20 July 2020).
[14] V Nugent, 'Armidale Courthouse is "Fawlty Towers"' *Armidale Express* (online, 11 July 2014).

Bathurst

The current Bathurst Courthouse is a Victorian Free Classical style building dating to 1880[15] currently undergoing extensive restoration. A clocktower above the grand entry houses a domed, spherical ornament oxidized in the pale green shade of clean, antique copper. Behind the clocktower is a brick and sandstone rotunda topped by an oxidized copper dome with eight semi-circular windows each capped by a turret. The two wings stretch from the grand entrance, each topped with two-story roofs of peaked copper. The grand entry and wings are all constructed from local brick, use sandstone-faced pillars, and is fronted with a sandstone façade.[16]

The building, being of the federation period has no Indigenous design aspects. Though, it remains to be seen whether a half-million Australian dollar restoration project[17] adds Indigenous cultural cues to the historic structure. This restoration is a worthy step in preserving one of New South Wales oldest surviving public buildings, and it would be lovely to see Indigenous design aspects added to place Indigenous Country into a beautiful space as a symbol of national reconciliation with Indigenous Australia.

[15] N Moreton, 'Bathurst Courthouse's major restoration project has begun' *Western Advocate* (online, 24 October 2016).
[16] Ibid.
[17] Ibid.

Bega

The current 1881 Bega Courthouse is a simple pioneer style structure built to replace a prior slab-style courthouse dating to 1865.[18] The 1881 courthouse was most recently refurbished in 2013 by Brookfield Multiplex.[19] The refurbished building is a simple, classical Australian, country town structure that still manages to look stately. The walls are off-white with a circular window on the second story's facing. Green coloured, peaked, corrugated-metal roofs sit atop pale-yellow pillars holding up the wrap around porch. Similar looking drainage pipes painted in the same pale yellow continue around the historic parts of the structure, and the original, dark hardwood entry doors are decorated by the seal of Australia. The words Court and House sit to either side of the original entryway with an 1881 date stamp resting near to the ground on a pale-yellow brick staircase.

A new entry, added during the expansion, stands around the corner from the original entryway on a side street. This new entry consists of an automatic glass door, the design of which demonstrates the great efforts taken to integrate a modern expansion into a simple, colonial design. There are no overtly Indigenous design aspects to either the original building of the expansion. Neither does it appear there are any major plans to include them despite a local focus on Indigenous heritage elsewhere in the Bega Valley.

[18] Bega Pioneer's Museum, 'Historic Tour of Bega' (online, retrieved 8 July 2022).
[19] Oriel Building, 'Courthouse Refurbishment Bega' (online, retrieved 8 July 2022).

Bourke

Construction of the current Bourke Courthouse finished in 1900.[20] The courthouse features prominently on the Bourke Heritage trail and several sources tout the initial construction cost of 9.5K British Colonial Pounds which according to the Reserve Bank of Australia is worth almost 1.5 million Australian Dollars in current monetary value[21] (though the current price of tradies would almost definitely increase the cost further). The Architect, WL Vernon, and designer, George Oakeshott, created a truly lovely building in the Federation free style.[22]

The building is a deep reddish-brown brick with aspects of white plaster. Green half-pillars hold up a tiered, brown shingled roof. A white plastered steeple erupts from the main entry, itself tucked away behind a courtyard serving to shelf the entry from a massive bowling club directly across the street. There are no visibly Indigenous aspects to this Vernon-Oakeshott masterpiece, in stark contrast to a proudly Indigenous bowling team playing lawn bowls while the artist took photographic captures.

[20] The Council of the Shire of Bourke, 'Bourke Local Strategic Planning Statement' (November 2019).
[21] Royal Bank of Australia, 'Pre-Decimal Inflation Calculator' (online tool).
[22] Heritage NSW, 'Heritage Listing' (Department of Environment (NSW) Database no. 504662).

Broken Hill

The Broken Hill Courthouse is a lovely example of Australian Outback architecture during the Victorian era. The 1889 building is a pale yellow with white mouldings and a red trimmed metallic roof. A central, round, louvered window sits in the middle of the peaked central entryway. That window is fronted by red pillars holding up the veranda's lower tiered roof. Just underneath shines a multicoloured seal of the British empire replete with a unicorn, lion, and a slightly reflective, silver background.

Just to the side of the central, peaked roof, two pale-yellow chimneys erupt from the beginning of each wing. At the end of each wing is shorter, square structure themselves capped by a peaked roof. Sitting in both shorter, square structures are two large, red-trimmed windows. Fittingly, the grounds are immaculately maintained. Withing the grounds reside a series of benches, brick footpaths, garden trees and a lovely sculpture of a bearded, Indigenous man on the righthand side. However, despite the almost tokenistic inclusion, the courthouse itself is rather imperial and non-Indigenous.

Campbelltown

The 1991 date-engraved Campbelltown District Courthouse is almost prototypically 1990s. To the right is a two-story glass entry with a one-story security entrance faced by a squarish concrete false veranda on which an aged bronze seal of Australia sits above the door. A pyramid tiled grey roof rises from the same. The date stamp and the words courthouse are emblazoned on a squared off false portico that tilts at a stark angle in front of the main entryway.

To the left of the main entrance, the building extends down the street. The street view begins with a red, brick tower topped by an angular, grey-tiled roof sliding towards the entryway. A yellow brick building trimmed with blue and red bricks follows the tower. Another, shorter, red brick tower with a flat, red roof interrupts the structure before another continuation of yellow brick trimmed in blue and red. There does not appear to be anything Indigenous about this building, despite its youth or existence in Sydney, the Australian city more Indigenous people call home than any other in the country.[23]

[23] ABS, 'Australia, Aboriginal and Torres Strait Islander population summary' (online, 1 July 2022).

Coffs Harbour

It must be stated that the Coffs Harbour courthouse is absolutely unique in New South Wales. It is such a strikingly Indigenous space that even when camping at the caravan park across the street, the artist did not realise the structure was a courthouse prior to looking up the courthouse's location online. A main glass tower is adorned with a striking piece of Indigenous art, and the Koori court underneath is a unique indoor-outdoor space where all people sit at the same level out of respect for Aboriginal culture and custom.

The building is bright despite the dark metallic cladding and flows with the land in a rather Indigenous manner. Furthermore, the landscape architecture is just as Indigenous-centric as the building design. Native flora surrounds the building in lieu of a gated fence, and the area near the Koori court receives shade from two giant, gardenesque gums that have likely protected the site for over a century. Coffs Harbour courthouse is exciting. It is beautiful. It is functional. It is uniquely and unashamedly Australian. But, more importantly, it is also a place of societal healing and radical reconciliation. Using court design like this is special and impressive.

Coonamble

The Coonamble Courthouse feels strangely similar to the local court in Batemans Bay NSW. It is a simple, yellowish brick affair with a leftward-sloping roof when viewed from the street. It shares walls with the police station, another half-building topped by a rightward sloping roof. A chimney rises from the rear of the courthouse and a red sculpture of a policeman sits in front of the police station. A simple seal of Australia sits near the words 'Court House' affixed to the courthouse side, and a large red and white communications tower rises from behind the police station. A large tree for that part of NSW and a few benches round out a rather plain building with an almost unsettlingly diminutive statute. Both the police station and courthouse are absolutely dwarfed by the local water towers and drinking establishments.

The town, itself, displays a nontrivial amount of public Indigenous art (including on the aforementioned water towers becoming typical in Outback New South Wales). Nevertheless, one cannot observe anything Indigenous about either half-building, even though they reside in a community boasting a high per-capita Indigenous population.

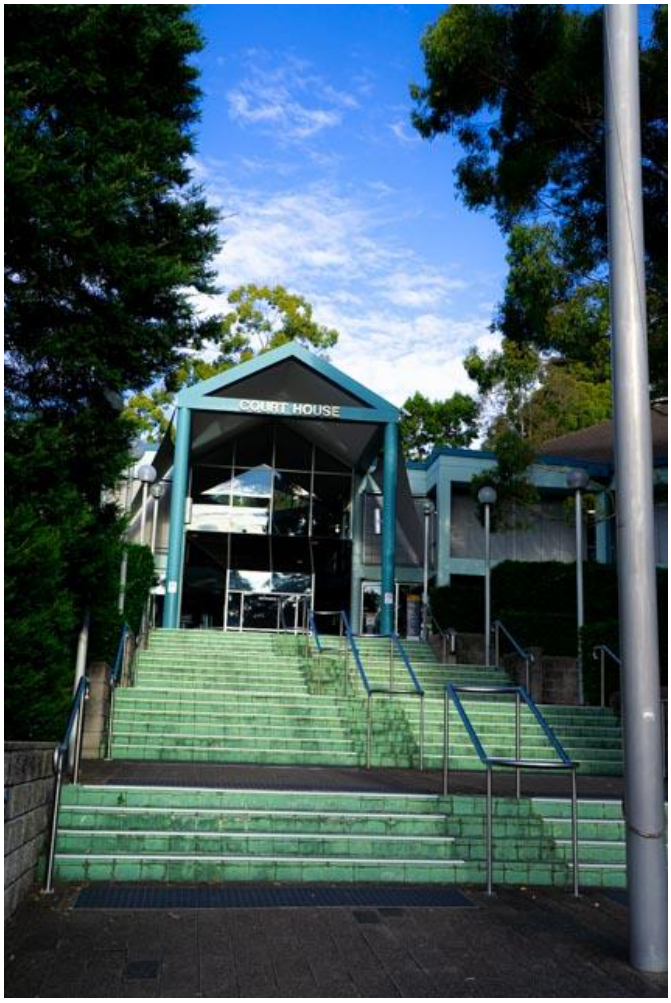
Dubbo

Dubbo Courthouse is an 1890 Victorian Free Classical style building created by James Barnett. It was substantially enlarged in 1981, and then retrofitted with modern Audio Video Link technology now required by recent changes to NSW evidence law in 2018.[24] At the time of photographic capture, Dubbo Courthouse was undergoing additional refurbishment.

A grand, three arched, portico style entry sits at the centre of the building. The pale-yellow painted entryway is held up by two brown pillars supporting a peaked roof underneath which stands a bright red main doorway with arched windows. A deep set, Roman Numeral date stamp resides emblazoned below a three-dimensional, vibrantly coloured, sculpted national seal providing an interesting contrast from the more common flat seals on NSW courthouses. From that entry stretch two wings, each with arched windows, terminating symmetrically. The building is stunning, but clearly colonial. Neither James Barnett, nor those who updated the courthouse made any attempt at meaningful Indigenous representation in a highly Indigenous town.

[24] Heritage NSW, 'Heritage Listing' (Department of Environment (NSW) Database no. 3080051).

Gosford



Gosford Courthouse is a rather interesting building in a quaint Central Coast town. A concrete staircase with green faced steps and galvanized railings leads to a green and grey concrete and steel building made of angular geometry reminiscent of a small 1980s shopping centre. Such mall-like imagery is completed by an oversized chandelier in the foyer. The building is absolutely full of natural light, although, it is beginning to show its age. Recent changes to evidence law and procedure necessitate overdue updates to the building. At the time of photographing the courthouse, it was being retrofitted with secure rooms for domestic, family and sexual violence matters in addition to fire safety facilities and other necessary upgrades.[25]

While there is nothing particularly Indigenous to the Gosford courthouse, the building feels delightfully and quintessentially Central Coast NSW. Yes, the building is dated, but in a coastal, aesthetically appealing way. Adding to that appeal is an excellent use of light that makes Gosford Courthouse one of the more architecturally interesting courthouses in the state. One would hope NSW Justice adds Indigenous inclusivity plans into the ongoing retrofits, although no Indigenous designs have appeared in local reporting.[26]

[25] A Crouch, 'Courthouses to Be Upgraded' (Media Release, Parliamentary Secretary for the Central Coast (NSW), 13 August 2021).
[26] Ibid.

Goulburn

Goulburn Courthouse is a striking example of the Colonial Victorian Free Classical style. The building primarily consists of sandstone and brick with a massive copper dome atop a turreted spire. Underneath this spire sits a central grand entrance, and from that entrance two wings stretch in either direction. The entry itself is a true archway, and oversized chimineas rise from the peaked-roofed wings.

The builder was David Jones of Bathurst.[27] Out at the front of the grounds, a historical monument plaque dates the opening of the court to 1887, and credits the design to the office of the Colony of NSW architect James Barnet. The plaque itself, dated 1987, was placed by then state Attorney-General 'The Honourable Terry Sheahan.' On the whole, the building is a beautiful colonial imperial palace dedicated to Justicia, but one devoid of any Indigenous cultural representation.

[27] *Goulburn Herald,* (19th March 1887).

Grafton

Grafton Courthouse was one of the most difficult courts in NSW to photograph. Doing so required a second, long distance return trip due to the difficult lighting condition. The building itself is almost always half shaded by foliage surrounding the front of the courthouse, which, while beautiful, presents technical difficulties. Date Stamped 1880, the courthouse is a colonial style construction of with a tile roof. A centre two-story peaked roof building with rectangular windows is abutted by two wings of the same red brick. The entire building is surrounded by a wraparound porch with a metal roof held up by white columns.

The garden of mostly native plants is hemmed in by a white wrought iron fence. Neither the garden nor the courthouse appears to represent a significant attempt having been made at Indigenous inclusion.

Griffith

The Griffith Courthouse recently received a $1.5 million AUD large-scale expansion and renovation under harrowing circumstances. [28] After an accused smuggled a sharp objected into the courtroom and attempted suicide in open court by slitting their wrists and throat, several local legal pracitioners vocally and openly called for a public review of the facility.[29] In response, the NSW government to commissioned an architectural firm, JPA&D, to make the building safer and more usable by both expanding and renovating the structure.[30] According to JPA&D, those upgrades were completed in 2021.[31]

The courthouse is a bit of an architectural oddball. The original 1926 red brick courthouse remains fairly untouched with its peaked roof, white pillars, white windows and white doors all remaining intact. Sitting next to this original structure is the first expansion. It is another red brick structure with white trimmings and the word courthouse that largely keeps with the style of the original 1926 building. However, after the attempted suicide in open court, the first expansion was then itself expanded. That third building is constructed from darker red bricks in the modernist style with zinc cladding and a glass entry. On the newest expansion's façade rests the seal of Australia rests above the words Griffith Courthouse. The design is all over the place, but somehow, JPA&D made it work. The entire courthouse complex it is a well-executed example of preservationist and modernist architecture that added much-needed security to a poorly secured building. Nevertheless, there is nothing particularly Indigenous about any of it.

[28] J Coates, 'Sex offender slits wrists and throat in Griffith courtroom' *Beaudesert Times* (online, 22 February 2018).
[29] J Dickins, 'Griffith Court House undergoes $1.5 million upgrade' *Area News* (online, 5 March 2020).
[30] JPA&D Architecture Interiors and Heritage, 'Author Archives Griffith Courthouse' (online, retrieved 8 July 2022).
[31] Ibid.

Katoomba

Katoomba Courthouse is currently undergoing a $855,000 upgrade and renovation aimed at modernising the facilities, adding compliance with modern NSW evidence law including victims' services and keeping the historic character of the 1897 WL Vernon designed facilities.[32] Previously, in 2021, audio-visual link systems were installed at the time they were most necessary – the COVID-19 pandemic. This allowed the District Court of NSW to return to the dated building for the first time in two decades.[33]

The building itself is a yellow sandstone brick structure that fits into the cold mountainous climate perfectly, with the typically Australian, white grated accents below the peaked shingled roof. The building feels almost like two houses linked by a covered porch overhanging a tunnel-style hallway. The main entry is a rugged sandstone archway with a mission style top and the words 'Court House' carved in relief above. A staircase leads to a yellow door at a facility devoid of Indigenous cultural influences. However, the building overall has a pleasant mountain town feel, as was the trademark of WL Vernon: localising designs for the local environment.

[32] 'Conservation Work at Katoomba Courthouse' *Blue Mountains Gazette* (online, 29 June 2021).
[33] Ibid.

Lismore

Lismore Courthouse is two entirely unrelated and yet complementary buildings built in a distinctly coastal Australian style. The larger main building is built in the British Imperial style with a triple faux-sandstone false arch façade for the grand entrance. Each of these false arches is in turn supported by rectangular prismatic columns painted a bright pumpkin colour. The stairs are unfinished concrete capped in steel and the tube steel handrails are painted an eggshell-finished, cherry red. To the left of the grand entrance is a legally compliant access ramp in pumpkin orange rising from the ground in a two-level approach with cherry red, tube steel railing. The main doorway is an ocean green, as are the shutters to each side of the main arched entryway. A covered porch stands in front of the main doors, under a red-trimmed roof tented triangularly over the main building. Above the main courtroom there is a circular window reminiscent of an old German cuckoo-clock. Just atop that archway the court's date stamp, 1883, is placard for the entire town to see. In front of the main building a series of palm trees grows in shallow raised beds making the coastal style even more appropriate.

The smaller secondary courthouse sits to the right side when looking from the street. That courthouse announces its existence to the world with its striking colour, a reddish purple nearing the shade of a passionfruit. Behind this yellow trimmed passionfruit coloured façade exists an older appearing red and tallow brick courthouse entered through a red brick staircase trimmed by faded red railings. The two disparate but complementary buildings were connected years ago by a small, glass hallway between the two. The design is beautifully playful and fun – it is suited perfectly to the style and appearance of the wider Lismore CBD. However, as much enjoyment as the buildings give a fan of unique courthouses in places as lovely as Lismore, the courthouse lacks any connections to country. The courts are distinctly for, by and of the empire.

Moree

The Moree courthouse is a beautiful colonial style building tucked behind a black steel fence. Two evergreens guard the main gate to the law where several benches sit among two large native deciduous trees and top-hat lamps. The building itself is built of red brick with green grating along the base. The external windows are trimmed in a pale sandstone with a roof held aloft by white iron flying buttresses. The roof consists of shingles the colour of an Australian shiraz, and from this sea of wine-coloured shingles erupt two chimneys: one from each of the two roof apexes. The main roof is in the centre, above the grand main entry, and in the centre stands belltower reminiscent of a colonial era Anglican church or a one room schoolhouse. A centre crest marks the date of construction as 1903.

There is absolutely no visible homage to the first nations people of Australia or the traditional custodians of Moree despite the prevalence of Indigenous artists across the street at the BAAM museum. The local police station next door to the courts has a tokenistic display of Indigenous art, but there is a strong feeling of ‘settlement’ to the entire town centre in Moree. There are numerous Blakfellas everywhere in town, but it is clear who has the power.

Nowra

Nowra's newest courthouse actually sits immediately next door to the old historic courthouse and new police station. The most recent expansions including the new entryway were completed in 2008 by Project Coordination (Australia)[34] for $4.5 million Australian dollars. The new entryway sits to the left of the second courthouse and to the right of the detached 1901 lockup-turned-courthouse.[35]

The new entryway consists of glass metal and concrete, whereas the older court it abuts is red brick courthouse with a sandstone archway and two circular windows that look a bit like a cartoon character yawning. The old entry is a white door, and the two-story courthouse behind the entry arch is topped with a peaked roof from which red chimneys erupt. There is no visible Indigenous aspect to the courthouse, though there is an Aboriginal Legal Service office across the street.

[34] Project Coordination Pty Ltd, 'Nowra Courthouse Redevelopment' (online, retrieved 8 July 2022)
[35] R Florence, *100 Years, The Nowra Lockup 1901-2001* (Shoalhaven Historical Society, Nowra NSW, 2001)

Newcastle

The Newcastle Courthouse is one of the more architecturally exciting courthouses in New South Wales – and from a cultural perspective it is almost an allegory for Newcastle itself. The design is literally award winning. The architectural firm behind the design (Cox Architecture) received a commendation for the 94 million Australian dollar project from the Australian Institute of Architects. Overall, the design reflects the impact the Danish mid-century modernists and *Det Kongelige Danske Kunstakadem* [Danish] 'The Royal Danish Art Academy' continues to have on current Australian architecture. However, according to the architect, the courthouse does have intentional integration of certain local, Indigenous motifs. The building is beautiful, functional, and importantly, it was part of a massive, much needed urban renewal project in a city struggling to rebuild its economy after years of decline.

The courthouse sits on a street corner and is distinctly triangular to maximise the amount of space. To the left where the point reaches the street corner, the materials on the upper floors are glass, concrete and metal. On one side, the façade is zinc and timber. To the other side, the façade is mostly zinc with glass cut outs in rectangularised spirals running to near the ground level. Closer to the ground level the glass windows are covered by a series of white concrete screens that pay homage to the paper bark trees that previously grew at the site. A grand concrete stairway leads past a small garden, under a massive concrete awning, into the foyer where an abstract art piece welcomes everyone to the site. The sculpture is an abstraction of the local Awabakal and Worimi shell middens, though both the paper bark screens nor the shell midden sculpture are so heavily abstracted as to require a bit of research before knowing what the artwork represents. The courthouse is stunning, and on some levels does pay respect to both country and the traditional owners thereof. Furthermore, the courthouse could as easily sit in Amsterdam as it could in Australia. It is an architectural marvel.

Orange

The Orange courthouse is a Victorian-era, pale yellow building date stamped below the sculpted seal with 1883 in Roman numerals. It is currently being repaired and upgraded, but the structure is a large central peaked grand entry supported by rectangular columns with two wings stretching to each side of the main entry. A counter-relief of Justicia's sword bearing the scales of justice graces the outer column on each side. A smaller peaked roof, false entry sits at the end of both wings. Then, the entire building is protected by a gated entry with the two main brick entry gateposts supporting classical streetlamps.

The Orange courthouse is plainly a statement of the power of the British Empire at the time it was built. There was unlikely concern for the Indigenous inhabitants of Australia in such a design, and it appears much the same way today. The court is beautiful and amazing but lacks any Indigenous design aspects.

Parkes

Parkes Courthouse is a red brick, bicoloured tile roofed, sandstone accented courthouse featuring a three arched entry central a central tiered, multi-story structure at the centre with a smaller wing to each side. The windows in each wing replicate the archways sandstone trim and feature well-chosen colour matched bracings that blend nearly perfectly with the grout. The central window in the main court tower as well as the turret windows all feature the same off-white bracings. The railings on the stone staircase are the standard green of many Australian street signs, though the metal drainage pipes repeat the off white from the grout.

The courthouse would be aesthetically pleasing on its own, but what makes Parkes courthouse stand out is the quality of the relief work. The seal of Australia, the 1895 date stamp, the words court and house and the royal RVI (Regina Victoria I) are executed with a precision not usually seen on public buildings in NSW. It is a stately announcement of the power of the Queen of the Empire, so unsurprisingly there do not appear to be any Indigenous design aspects to the Parkes courthouse.

Parramatta

Both the larger courthouses in Paramatta are built like fortresses – and for good reason. In 1984, Leonard John Warwick bombed the old Family Court of Australia courthouse in Paramatta, though he was not arrested until 2015 when advances in forensic technology allowed investigators to place Warwick at the scene of another crime.[36] To prevent future attacks both the Federal Law Courts building and the Paramatta District Court look almost as much like forts as they do courthouses. The fortress design is more apparent with the Federal Court building, but the NSW District Court across the street is still significantly higher security than its counterpart across town in the CBD.

The District Court is a slim, tall tower of metal and glass with a large seal painted on a concrete screen on the lower right of the main façade just above the secure main entry. The left of the façade is a warm copper tone, and the right is a bright silver with large windows on every floor. The building is obviously secured, and the metal detectors in use are more sensitive than many of the other courts in Coastal NSW. The building is large, bright, spacious – and imposing. Although, it is obvious the money in this courthouse was spent more on security than on Indigenous inclusion.

[36] A Dale, 'Shaken to its Foundations: The Family Court Bombings' *Law Society (of NSW) Journal* (online, 06 October 2020).

Penrith

The 1963 Penrith Courthouse underwent a major renovation and expansion in 2013.[37] The building itself consists of glass and steel in a mid-century modernist design following along the trends of most of the 'Free West' at the time. The building is recessed into the ground with concrete staircases and dark stone backless benches sitting at the top with a large zinc fixture sitting to the righthand side. To the right of the zinc structure a white abutment juts, emblazoned with the seal of Australia and the words 'Penrith Courthouse' in silver.

The same words in the same silver sit above the main overhang at the secure entrance. Stainless railings guide users of the court to the secure entry, which is entirely glassed-in behind I-beam style steel pillars. The building is striking and well-modernised but lacking anything notably Indigenous to the design language. This lack of Indigeneity is somewhat interesting for its age, because the Indigenous rights movement was gaining so much momentum at that time. However, this lack of inclusivity demonstrates legal referendums come at a faster pace than culturally inclusive design in NSW.

[37] Weekender News Network, 'Courthouse to Close for Six Months' *Western Weekender* (online, 9 October 2013).

Port Macquarie

The 'new' 1986[38] Port Macquarie courthouse underwent substantial renovations to add secure witness rooms in 2021.[39] Nevertheless, the exterior of the building suffers from peeling paint and fading surfaces. The building looks similar to an Australian public college that has been upgraded for various legal reasons over the last few decades. There is a staircase entryway with a stepped awning featuring red screens to either side. A brightly coloured, royal blue accessibility ramp climbs to the left of the main staircase. The staircase appears somewhat more recent. It simply does not fit into the design scheme of the pale-yellow, brick building with large bay windows and blue posts holding up a faded, red roof.

The grounds, like the courthouse, are not so much unaesthetically designed as they are under-maintained. Such an abject lack of adequate maintenance is striking, even during the COVID-19 pandemic. This was not a problem that crept up overnight or even over a year. The poor state of the Port Macquarie courthouse and grounds represent a long-term, systemic problem. There are plenty of unattractive courthouses in NSW, but only Port Macquarie presented as unkempt. The courthouse felt unfit for purpose. It is neither a proud government courthouse nor a place where Indigenous people can feel like equal citizens.

[38] Australian Heritage Restorations, 'Port Macquarie Courthouse' (online, retrieved 8 July 2022).
[39] 'Safe room for vulnerable witnesses under construction at Port Macquarie courthouse' *Port News* (online, 3 August 2021).

Queanbeyan

Driving from southern Canberra to almost anywhere requires passing the brutalist design of the Queanbeyan Courthouse. The building like the High Court of Australia or the National Gallery is a concrete on concrete on concrete on concrete on concrete affair trimmed with glass windows. However, where the High Court of Australia is a testament to the grandeur and power of the nation-state, standing surrounded by galleries and museums, Queanbeyan Courthouse is a smaller, more suburban design allegorical to Queanbeyan's journey from country town to Canberra suburb.

The building is not entirely square despite appearing so from the main street in town. Concrete stairs rise at roughly 30-degree angle contrasting with a 45-degree angular entryway faced in glass. A smaller, secure entry is cut into an otherwise oversized glass entry, and white-railed walkways surround the building. At night, brown, downfacing lamps mounted to the court's exterior light the outer walls. This design could fit into an American or Russian suburb as easily as it does the small city in NSW. As such, there is nothing particularly Indigenous about the exterior of the structure despite being home to a large portion of the greater-ACT region's Indigenous population.

Sydney Downing Centre

The Sydney Downing Centre is a converted space. It began life in 1909 as the luxury department store Mark Foy's, which died a slow an agonising death over decades. Over time, the courts gradually began taking over floors in the building, and by 1991 the entire building was a courthouse.[40] The external structure remains largely the same as it was as a department store, and the grand entry maintains the Gilded Age staircase. The building has no real Indigenous design aspects, though at times the front window galleries display Indigenous artists.

The building is difficult to describe in some ways, but in others it is straightforward. It is a massive turn of the prior century, luxury department store. The exterior is a pale yellow and the two peaked roof towers are a yellow-green tile with a brassy yellow trim. Two other floors are trimmed in the same brassy yellow, and the ground floor is trimmed in green. The window shopping displays so commonplace to metropolitan flagship stores have been converted into a small art gallery – save for the basement existing the train station where the displays have only been covered over to facilitate using the basement for records storage. The building is overall a well-executed converted space that protects the heritage of downtown Sydney, but it only protects the white-centric history of the city with the largest Indigenous population in the nation.

[40] Heritage NSW, 'Heritage Listing' (Department of Environment (NSW) Database no. 5045095).

Tamworth

Tamworth Courthouse looks more like a small corporate office block or strip mall than the images of courthouses one conjures in their mind. The small red brick building is only two-stories tall, and the majority of the second story is an atrium of green metal mixed with glass rising up in a way that looks more reminiscent of an office building than a courthouse. A number of reverse-parked cars out front adds to the corporate ambiance of a space directly across from Tamworth's main shopping centre.

The courthouse's architectural vibe feels strikingly at odds with the place in which the building exists. Tamworth is a city with a respected arts scene and a proud Indigenous culture that both go unrecognised in the courthouse's bland architecture. Confusingly, more respect gets paid to Indigenous Australian musicians at the relatively Anglo-centric Australian country music hall of fame on the other side of Tamworth's central business district than in the courthouse's design. This results in a spatial disconnection further accentuating an awkward juxtaposition between a boring building and the uniquely Australian place where it resides.

Taree

Taree courthouse is another of the expanded colonial courts in NSW that would be better referred to in the plural. The colonial building is a pale yellow, three arched, red tile-roofed building with a mixture of darker yellow and crimson-red trim. A multicoloured seal of Australia and the words 'Court House' proudly announce to the world the power of the Anglo empire that built it. Likewise, a grassy garden out front remains immaculately maintained.

To the left of the classic colonial structure sits a black granite, tinted glass building equally as grand and imposing as its colonial counterpart it shares grounds with. The newer building is a simple, boxy design, but the execution is striking. The sheer quality of the stone façade speaks for itself. Sadly, neither structure shows a significant attempt to incorporating Indigenous culture.

Wagga Wagga

The 1900 Edwardian Federation Free Style[41] courthouse in Wagga Wagga is probably better described as a court complex than a courthouse. The red brick clocktower fittingly dominates the Wagga central business district skyline, and the smaller red bricked, off white stuccoed, metal roofed buildings around the courthouse courtyard only add to the sheer grandeur of the clocktower. Entering through a brick and sandstone archway, the main court building is at the rear of the complex and exudes a stately presence with its peaked roof and stucco façade. The courtyard is hemmed in with a red brick fence.

When viewing the Wagga Wagga courthouse, one cannot avoid being impressed by the skill and artistry of WL Vernon – this is a statement of beauty and empire. As with most of the pre-Federation and early Federation period buildings in NSW, there is nothing particularly Indigenous about the building – though it would seem there must be a way to merge the beauty of buildings like this and the beauty of the local Indigenous culture. This courthouse in particular is such an outstanding example of Anglo-Australian achievement that it seems finding ways to integrate places and spaces such as this would help the nation heal from the bloodshed of its founding.

[41] Heritage NSW, 'Heritage Listing' (Department of Environment (NSW) Database no. 3080123).

Wollongong

The 1886 Victorian style Wollongong Courthouse seemingly erupts from a small stand of palms, pines and gums. On the street itself is the historic half of the building that still houses the Magistrates' Court. The building is mostly local sandstone, with a portico grand entry, rectangular pillars, a copper seal of Australia, and its true, defining feature, the belltower and two-meter diameter clock sitting just under the green oxidized copper dome at its peak.

The more modern expansion was rebuilt in 2014 for both aesthetic and functional reasons.[42] Without being in the same style whatsoever, the modernist expansion blends colours and strategically uses sandstone accents in such a way that it feels like a natural, albeit younger, outgrowth of the historic Victorian building. Even the concrete staircase and floating façade just *work* with the historic structure. While I have personally met and even played pool with the excellent Indigenous courtroom officer at the Wollongong Courthouse, there is no visibly Indigenous aspect to the overall design.

[42] E Spillett, 'Wollongong Courthouse Gets a Facelift: photos' *Illawarra Mercury* (online, 5 July 2015).

Finale

Fundamentally, this gallery show serves to ground readers in the places and spaces where NSW District Court trials are conducted as well as to establish some of the cultural context of the courts themselves. By seeing the courthouses in which these matters appear, it allows readers all over the globe to understand where this research takes place. However, this gallery show also seeks to do more – it is quite literally filled with captions to these 30 photographs and lays out what I discovered about NSW District Court criminal litigation through courthouse architecture.[43] The overarching theme of the images and this commentary is that the design choices made by the government in building the courts serves not to include but to exclude. The structures serve not to reconcile but to colonise. The buildings make it very clear whose courts they are: these are the King's courts, where prosecutions are carried out in Rex's name. And yet, two newer courthouses provide a ray of hope with a new vision for a new future. These courts are the Courts on Country – representing the people of the land on which they sit. This show is their combined story in still images in hopes that story can grow into decolonised future.

As a final closing note, to this final concluding section, I once again wish to thank the Indigenous mobs on whose lands I travel, work, and intend to remain a grateful guest for as long as they grant me welcome. I pray my efforts over these last several years prove worthy of their trust.

Shalom and donadagohvi. May we all meet again on a beautiful mañana.

[43] Smith et al. (2019).