BLACK LIVES, WHITE LAW

LOCKED UP AND LOCKED OUT IN AUSTRALIA

RUSSELL MARKS

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You were always to blame
And they put you through hell
Then they locked you away in a dark lonely cell
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Now they'll hound you no more, oh my beautiful child

—'Beautiful Child', Archie Roach

I hit the road when I was fifteen
When my mother died and my dad got mean
I've been locked up since twenty-one
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Forgotten most from early days
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Little boy you're my pride and joy
The only good thing about Old Fitzroy

—'Old Fitzroy', Dan Sultan

INTRODUCTION

The mass incarceration crisis

'Aaron'

The wire mesh between us makes it difficult for me to see the man sitting opposite – and for him to see me. We're in a small cubicle at the back of the Katherine courthouse in the Northern Territory, and I'm taking instructions from a man who's just signed a retainer to become a client of the North Australian Aboriginal Justice Agency (NAAJA). It's mid-2017, and it's my first day duty lawyering in Katherine, where I'll be based for the next couple of years, but the man opposite me doesn't know that. I'd done a couple of days' duty in the Darwin Local Court, and did plenty in Melbourne, Dandenong and Morwell when I worked for the Victorian Aboriginal Legal Service a few years ago. But the Territory has a fearsome reputation for its use of prison, and I don't really know what to expect.

I glance down at the brief of evidence, collected earlier from the police prosecutor. There's a system in Katherine. Each morning, prosecutors bundle together the briefs for all the Aboriginal people who've been arrested overnight and give them to NAAJA's duty lawyers. Sometimes they're existing clients. Sometimes they're conflicted out – perhaps we're already representing the alleged victim, for instance – in which case they'll go to the Legal Aid Commission, at least at first.

Aaron,* the young man opposite me whose features flash briefly into view through the mesh whenever either of us shifts slightly in our seat, isn't new to the criminal justice system. He'd first been sent to Darwin's prison

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* Not his real name, and I've changed many of the details of his offending and his history.

the previous year, before being 'released' to Venndale, an open-air alcohol rehabilitation facility twenty minutes' drive outside Katherine. Venndale is run by the Aboriginal community-controlled Kalano Community Association, but its staff are mostly non-Indigenous and its programs are delivered in English, which is not most of its clients' first language. The remainder of Aaron's prison sentence had been 'suspended', but only if he stayed at Venndale for three months and followed its (very strict) rules, and then stayed entirely alcohol-free for a further nine months. The research says it often takes multiple false starts before addicts are ready to change, and that people living in disadvantaged circumstances tend to have more false starts than others.[1] Aaron did a few weeks at Venndale. But then he hitched a ride back into town and spent the next little while in his community – one of the town camps dotted around Katherine's perimeter – before he was picked up again by police for breaching his suspended sentence (by leaving Venndale). He was re-sentenced to the remaining months of the original sentence he'd received.

Again, the court order released him from prison after a few days. The remaining time on Aaron's original sentence – now just under three months – was suspended once more. He had to stay sober for a year. It's a condition with which very few people who are alcohol-dependent, and whose extended family are also alcohol-dependent, can comply. Add frequent episodes of grief as family members pass away, mix in some childhood trauma and let it all percolate in deep wells of intergenerational trauma, and a year of sobriety for Aaron was about as likely as becoming prime minister; more than once over the subsequent two years I wondered whether many of the judges who ordered a year of sobriety for my clients would be able to do it themselves.

One of the most vicious stereotypes Settler Australia has created is the drunken Aborigine, which functions as way to blame dispossessed people for the decades – centuries – of trauma heaped upon them. With the year-long sobriety conditions they impose on people like Aaron, courts perpetuate this stereotype by setting them up to fail. Judges see a sad parade of people being forced to court for breaching some order by drinking. They form prejudices, and have them confirmed again and again.

By the time I met him, Aaron was on two suspended prison sentences, with a long list of rules he had to obey. Many judges, prosecutors and members of the public believe this is leniency, and consistent with the deaths in custody royal commission's recommendations, but many clients tell me they actually prefer prison to the year-long surveillance of suspended sentences and other community-based orders. The surveillance is both inconstant – which creates confusion – and oppressive. Aaron has now been in the community surveillance hamster wheel for a year and a half.

As well as the assault charge, police had also named Aaron on an alcohol protection order (APO) banning him from drinking, buying or even possessing any alcohol for three months. Any breach of the APO's conditions would also be a crime, itself punishable by up to three months' prison. It was an entirely superfluous order. Both suspended sentences already included conditions banning him from drinking. Controversially introduced by the single-term Country Liberal Party government four years earlier, APOs were modelled on domestic violence orders (DVO): once they were made, breaching their conditions became a crime. But unlike DVOs, which can be made on an interim basis by police but must be confirmed by courts, APOs could be written up by police alone. Experts decried the absurdity of criminalising alcohol dependency. NAAJA predicted – correctly – that APOs would be used primarily against Aboriginal people. The NT Court of Appeal – constituted by three white judges – disagreed that APOs were racist.[2]

Aaron is sitting in the cells today because he'd been arrested overnight. It was now two weeks before his new spot at Venndale was due to open up. A close family member died, so Aaron drank. Why? Asking a person dependent on or addicted to alcohol *why did you drink?* is always a nonsensical question. There will always be reasons. Perhaps it's about numbing the grief, or peer pressure, or habit. None will ever be good enough to satisfy the judge who asks.

While drunk, Aaron was walking along one of Katherine's main streets. He stumbled into a group of white teenagers, who were also drunk. They swore at him. He swore back at them, pushed one of them, yelled loudly, suggested they fight, wobbled onto the road so that a passing car had to stop, and kept walking. So did they. He was breaking the law by being intoxicated, and perhaps also by being 'disorderly'. On another night, in another place, he might have continued home and slept it off. But this was Katherine. One of the first things visitors notice about the town – indeed, anywhere in the Territory – is the sheer number of police patrols. Across the Northern Territory, there are 2.6 times as many police officers per head of population

than the national average.[3] Inside the car that stopped in front of Aaron were two (white) police constables. They arrested him, locked him in the cage on the tray of their police utility, and took him to the police station, where he spent the rest of the night in a cell – to 'sober up', in accordance with nineteenth-century practice – before being taken to court the next morning. That's when we meet in the cells.

It takes me a few minutes to do the maths, but eventually I work out that Aaron has just under three months left to serve on the first suspended sentence and just under four months left to serve on the second. The law in the Northern Territory demands that anyone who breaches a suspended prison sentence *must* serve the rest of the sentence in a prison unless a judge believes that 'it would be unjust to do so in view of all the circumstances'.[4] I look again at the new charges. Breach APO; behave disorderly. Minor, in anyone's language. No violence. No property damage. Aaron is young. He obviously has a problem with alcohol. He has a spot at Venndale coming up in a fortnight. Surely, 'in view of all the circumstances', any judge would think it unjust to restore nearly seven months' prison because a young man got drunk and a bit disorderly after his uncle died?

Had I been in Victoria, maybe. But in the Northern Territory, I'm not so sure. Colleagues have warned me that the judge sitting in Katherine today is a harsh sentencer. I explain to Aaron the risks of pleading guilty today. I want time to talk to prosecutors, maybe get them to drop one of the new charges, change some of the more unsavoury parts of the facts they were alleging. I want to find out whether I can get anyone to come to court to say nice things about Aaron. I want to do some research, to make sure I'm able to use existing caselaw to Aaron's best advantage. In a 2013 case, *Bugmy v The Queen*, the High Court confirmed that Aboriginal offenders who grew up in conditions of disadvantage and deprivation were entitled to some mitigation of their sentence, no matter how many times they'd broken the law. I want time to re-read that case. I also want to get Aaron away from this judge. It's a Friday, so I suggest we ask the judge for a short adjournment, perhaps just over the weekend.

Aaron becomes animated for the first time during our interaction. *No adjournment*, he insists. I've told him bail is very unlikely, so to him, an adjournment means a four-hour drive in a prison van to Darwin, a weekend on remand, and a pre-dawn four-hour drive back to Katherine on Monday. *No remand*. He tells me he wants to plead guilty today and 'get it over with'. I spend some time trying to convince him otherwise. He's hungover, but his instructions are clear. I'm bound by them. I leave the cells and check with colleagues who've been in the Territory longer than I have. 'Not ideal, but [the judge] should send him to Venndale,' one tells me as she's rushing back into the cells carrying a stack of files. I try reassuring myself that nobody wants to lock up young Aboriginal people unnecessarily three decades after the royal commission. I skim *Bugmy* on the web, re-enter the courtroom and take a deep breath.

I'm a lamb to the slaughter. The (white) judge bats away my *Bugmy* submissions. He dismisses my observation that Aaron had no previous disorderly or breach APO offences on his record. He shrugs off my submissions about Aaron's difficult childhood and his young age. He says I don't have any evidence that Aaron is addicted to or dependent on alcohol. (Apparently the pages of alcohol-related offending isn't evidence of anything other than a penchant for breaking the law.) He's not impressed by Aaron's early guilty plea – which should attract a 'sentencing discount' by law – or by his recent efforts to engage with an Aboriginal men's program in Katherine while he waited for the Venndale bed.

But it's when I link Aaron's drinking the previous day to his grief and his participation in Sorry Business – a set of cultural practices, including ceremonies, which involve whole communities following a person's death – that the judge takes particular issue with what I'm saying. He wants to know whether I'm suggesting that alcohol is part of traditional Sorry Business. In that moment, I'm not sure. I'm also white, I was raised in a southern capital, and I'm far too ignorant of the cultures I'm now interacting with to be able to competently answer his question. I'm only trying to make the point that Aaron was drinking in the context of his grief, which I naively think is a relatively common experience among many people in Australia, and that he was simultaneously participating in Sorry Business. But I get drawn into a debate on terms that aren't mine. I try to redirect the judge's attention to Aaron's prospects for rehabilitation, which must still be strong because of his youth. The judge points to the multiple pages of priors. Most of them are breaches caused by drinking alcohol when he was prohibited from doing so. To me, the rest look mainly like typical teenage criminality of the kind that generally settles down after the age of twenty-five or so.[5] The judge sees them differently. Aaron's prospects of rehabilitation are practically nil, he declares. He's 'obviously' not interested in Venndale, the judge says, so his spot may as well go to someone else.

His Honour fully restores the suspended prison sentences, and makes them cumulative rather than concurrent – which means Aaron has to serve one *and then* the other, rather than at the same time. For the new charges, he orders three months' prison, equivalent to the maximum penalty for APO breach offences: proportionally, it's the equivalent of getting ten years' prison for stealing a soft drink from a supermarket. All but one month of the new sentence is cumulative on top of the two restored suspensions.

All up, Aaron is going to prison for about eight months and two weeks, because he got noticed by a passing police patrol while he was drunk. In Victoria, where appeals to the County Court were *de novo* until 2021,[6] I would have stood up immediately, applied for appeal bail, and filled out the appeal paperwork almost on the spot. Instead, I stare disbelievingly at the judge, ask to leave the courtroom, and visit Aaron in the cells. He's done prison stretches before, so the result doesn't seem to faze him. But he does instruct me to appeal, mainly on my advice – or more accurately, my urging. I can't believe anyone on the Supreme Court bench could look at these circumstances and agree that eight and a half months' prison is an appropriate sentence for a young Aboriginal man whose main problems are trauma and grog.

I'm wrong again. Our appeal is dismissed four months later. The original sentence stands.

By the time Aaron's appeal is heard, I'm deep in other tragedies. Aaron's isn't the last case that feels like injustice. But I'm finding myself becoming used to the system here, and each injustice feels less unexpected, a little less outrageous.

Numbers

Why does it matter if Aaron goes to prison for a few months? While I've been writing this book, at least thirty-seven Aboriginal people have died in Australia's criminal justice system. Seven relatively young adults were found 'unresponsive in their cells' in the language of prison authorities, as if it's a genuine mystery. Two women and four men – including one young man who had been self-harming for weeks after being frequently locked down because of Covid-19 restrictions – apparently suicided in prisons. Thirty-seven-year-old Veronica Nelson Walker died in January 2020 in the Melbourne's women's prison, the Dame Phyllis Frost Centre, three days after being locked up for shoplifting. Reports suggest that she'd been crying out for help during the night before she was found dead. Less than a year later, another thirty-year-old woman died in hospital after being transferred there from Dame Phyllis. Thirty-seven-year-old Barkindji man Anzac Sullivan was killed during a police pursuit in March 2021. One twenty-seven-year-old man died after being tasered and pepper-sprayed in Gunnedah, and another twenty-seven-year-old man died after what police called a 'violent struggle' in Toowoomba (though police were left only with 'minor injuries'). A sixteen-year-old boy somehow collided with an unmarked police vehicle driving in the opposite direction. (Police now routinely use their vehicles as weapons to 'force' suspects to stop running: the likelihood is that the unmarked car did the colliding.) One twenty-year-old man somehow fell 10 metres to his death as he was being escorted by correctional officers from hospital to prison in Gosford. Three people – a twenty-nine-year-old woman in Geraldton, Stanley Russell in western Sydney and nineteen-year-old Kumanjayi Walker in Yuendumu – were shot dead by police.[7]

Thirty years ago, one of Australia's longest and highest-profile royal commissions – that into Aboriginal deaths in custody – told us that the reason so many Aboriginal and Torres Strait Islander people were dying in prisons, police cells and police vehicles was that they were in those places so often. The five commissioners urged governments to do everything in their power to prevent First Nations people from being locked up. There was a lot of low-hanging fruit. Laws that criminalised public drunkenness in Queensland, Tasmania, Western Australia and Victoria – which authorised police to lock very drunk people in cells instead of ensuring they were properly monitored – had no place in modern Australia. Each state's *Summary Offences Act* – anachronistic laws that mostly protect the virtues of a century-old white middle class – had to go. Imprisonment was to be used only as a last resort.

But it took all of those thirty years for Victoria to decriminalise public drunkenness, which happened when amendments were introduced in December 2020, due in large part to the urging of the family of Aunty Tanya Day (see chapter 12).[8] And during that time, our use of prison has skyrocketed. In 1990, 112 of every 100,000 people in Australia were locked up. As the nation celebrated at the Sydney Olympics and commemorated a centenary of Federation, 148 in every 100,000 were incarcerated.[9] Five years later

that figure rose to 163. By 2010 it was 170, and by 2015 we were locking up *nearly 200* people in every 100,000. We reached our carceral peak in 2018, when 221 in every 100,000 were in some form of lawful custody. So much for imprisonment as a last resort. Since the royal commission, Australia's governments, police and courts had worked together to *double* the rate at which we lock people up. Meanwhile, the recommendations made by no fewer than thirteen national inquiries between 2009 and 2020 have been mostly ignored.[10]

The brunt of Australia's carceral thrust has been felt by Aboriginal and Torres Strait Islander men, women, children, families and communities. In 1990, Indigenous people made up just over 14 per cent of Australia's prisoners. That was a very high proportion, given that they constituted just 3 per cent of Australia's general population. The rates of First Nations men being locked up were stratospheric: for every group of 100,000 Indigenous men, 3221 of them were incarcerated. Indigenous people were being locked up at more than *17.5 times* the rate that other people were.[11]

By the end of the century, the proportion of people in Australian prisons who were Indigenous had risen to 19 per cent, or nearly *one in every five* prisoners. The rate of Indigenous incarceration had increased by 13.8 per cent in the decade since the royal commission. And while there had been a steady increase in the rate at which Aboriginal men were being locked up, the bigger story was the sudden and dramatic growth of the Indigenous population in *women's* prisons. During the 1990s, the rate at which Australia was locking up Aboriginal and Torres Strait Islander women shot up by *more than half*.[12]

The disparity continued into the new century. Between 2000 and 2010, almost the entire increase in Australia's rate of imprisonment was among Indigenous people.[13] Between 2011 and 2018, the number of Indigenous people in Australian prisons zoomed up from 7655 to 11,849 – a 55 per cent increase in just seven years. (Over the same period, the number of non-Indigenous prisoners rose by 'only' 45 per cent.) By 2019, an incredible 28 per cent of Australia's prisoners were Aboriginal or Torres Strait Islander, or both.[14]

Then, during the year ending June 2020, for the first time in a decade the number of people in Australian prisons actually decreased. (We'll go into some of the reasons why in chapter 8.) But even though at the end of June 2020 there were nearly 2000 fewer prisoners across Australia, there were also *226 more* Aboriginal and Torres Strait Islander people in prison. The proportion of Australia's prison population who were Indigenous was now over 29.4 per cent.[15] The over-representation of First Nations people in Australia's prisons had doubled since the royal commission.

If you're an Indigenous man, you are now more than fifteen times more likely to be locked up than a man who isn't Indigenous. If you're an Indigenous woman, you're more than *twenty-one times* more likely to be locked up than non-Indigenous women. Even more glaring are the disparities among children. In Western Australia, for instance, an Indigenous child is *more than fifty times* more likely to be locked up than a non-Indigenous kid. In the Northern Territory, it's now often the case that *every single child* in the Don Dale or Alice Springs Youth Detention Centres is Indigenous. Some of these kids are ten years old.

The over-representation of African American people in United States prisons is widely known in Australia. Well before the #BlackLivesMatter movement surged across the internet and social media, Hollywood and the news had introduced us to many of the ways the American criminal justice system treats, mistreats and ultimately fails black men, women, children and their families. African American people are locked up at five times the rate of white Americans; in some states, that disparity rises to ten times the rate of white incarceration. In eleven states, *one in every twenty* black men is in prison. *One in every three* African American boys born in 2001 can expect to spend at least some time in a prison during his lifetime. In May 2020, #BlackLivesMatter injected a new impetus into an ongoing civil rights struggle following George Floyd's slow death under the knee of police officer Derek Chauvin, who arrested him on suspicion of using a fake $20 note at a nearby convenience store.

But the discrepancies between black and white incarceration in the United States pale against those in Australia. Black Americans are imprisoned at five times the rate of white Americans, but Indigenous people are over *twelve times* more likely to go to prison than non-Indigenous people in Australia. About three years ago, the rate at which Indigenous people are being locked up in Australia *surpassed and overtook* the rate at which African American people are locked up in the United States.[16]

These numbers are extraordinary and, frankly, absurd. But numbers can never tell the human story. 'As an Aboriginal person in this country,' writer and actor Nakkiah Lui told Miranda Tapsell on the *Pretty for an Aboriginal* podcast in 2017, 'I'd been to, like, every jail in New South Wales

before the age of eight years old, because every male in my family aside from my dad has been incarcerated.' Among most white people in Australia, that kind of experience is entirely foreign. Most white people in Australia have never even been inside a prison. But it's a common experience in many Aboriginal families. When I visit clients in prison, I watch Aboriginal toddlers already much more familiar, even comfortable, with their securitised routines than I'll ever be. The idea that prison is a normal place to visit Dad or Uncle or, increasingly, Mum is one that's been established through regular weekend visits well before many children even set foot in a school.

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On 7 November 1968, the anthropologist Bill Stanner told his ABC radio audience that Settler Australia had over the course of the first seven decades of the twentieth century wilfully forgotten Aboriginal and Torres Strait Islander peoples and, pointedly, what it had done to them. 'What may well have begun as a simple forgetting of other possible views', Stanner said in a now-famous Boyer Lecture, 'turned under habit and over time into something like a cult of forgetfulness practised on a national scale.' Anthropology had been the one discipline of the social sciences in Australia which had not simply gone on as if Indigenous people had ceased to exist, and Stanner was keen for other disciplines – history, sociology – to catch up. He observed that there had emerged a 'great Australian silence' about Indigenous experiences and about Australia's colonial history.[17]

But even as Stanner was delivering his lecture, he knew the silence was about to end. A new Indigenous politics, which built on existing activism and which was modelled in part on the radicalism of the American civil rights and global anti-colonial movements, had emerged in the wake of the 'protection' era. Indigenous-run organisations and institutions were being set up by firebrand activists like Gary Foley, Paul Coe and Sam Watson, who found new ways to speak to urban Settler Australia. Settler historians like Henry Reynolds were beginning to re-write Indigenous experiences into the whitewashed record. And as more and more First Nations people forged paths into Australian universities, a newer, middle-class activism has emerged. This book is in large part based on, and indebted to, the groundbreaking work of Marcia Langton, Jackie Huggins, Larissa Behrendt, Aileen Moreton-Robinson, Megan Davis, Maggie Walter, Chelsea Watego and many other activist-intellectuals who are now challenging and changing Settler Australia from *within* its institutions. The Great Australian Silence, as Arrernte/Kalkadoon filmmaker Rachel Perkins declared in her own Boyer Lectures in 2019, has well and truly ended.

What remains, however, is a 'Great Australian Incarceration'.

This is a book about Australia's extraordinary record of locking up First Nations people. But it's not primarily a book *about* Indigenous peoples and communities. My subject is Australia's system of criminal justice: the system of laws and courts and police and prisons that we use to control behaviour we proscribe as 'criminal'. I'm interested in the ways in which that system interacts with First Nations people and communities. How and why does it lock up so many? Has it always been this way? Why have incarceration rates increased since the Royal Commission into Aboriginal Deaths in Custody? Can – and should – anything be done about it?

We like to imagine Australia as the place of the 'fair go', a classless land of egalitarian virtue. The criminal justice system also presents itself as fair, often to a fault. Defendants are entitled to a fair trial, and judges sometimes need to move mountains to make sure it happens. Witnesses must be treated fairly. Sentences must be fair and proportionate to the crime.

To test these claims of fairness that the system makes for itself, this book looks at how the system responds to Aboriginal and Torres Strait Islander people and communities. Why? Because Aboriginal and Torres Strait Islander people account for *nearly 30 per cent* of all adults locked away in Australian jails, 36 per cent of all adult *women* in prisons, and, astoundingly, *half* of all teenagers in detention centres.[18] Outside prison, Indigenous people are only about 3.3 per cent of the general Australian population. I focus mostly on the situation in the Northern Territory, for two reasons – that's where I've been practising law for the last few years, and that's where the problems I'm describing are among the starkest.

Is this situation fair? Almost everyone agrees that it's not. And yet it keeps getting worse. Nobody, at least since criminologists and sociologists began noticing First Nations people and Aboriginal prisoners in the late 1960s, can say they couldn't see it coming.

Telling stories

There are different stories settler Australians tell themselves to explain why so many Aboriginal and Torres Strait Islander people are in Australia's prisons.

The simplest and most prevalent is one that we can call the carceral three-act narrative. We like the three-act structure in stories. Set-up, confrontation, resolution. In *Star Wars*, the three-act structure of the first film – Luke Skywalker on Tatooine, his quest with Han Solo and Chewbacca, and finally their destruction of the Death Star – is repeated in a trilogy of trilogies. Beginning, middle, end. In the carceral narrative, the three acts are always the same: crime; arrest and court; punishment and prison.

This carceral story is one that looks no further than the person who commits the crime and does the time. The criminal law applies to everyone equally. Each of us has a responsibility to know the law, and to obey it. Offences and their penalties are clearly outlined in codified statutes, most of which reflect prohibitions as old as civilisation. Nobody is allowed to murder or assault anyone else, or steal or damage anyone else's property. A person who intentionally or recklessly breaks the law deserves to be punished. Imprisonment is how the most serious or recidivist offenders are punished. People can avoid going to prison simply by not committing crimes.

This is the story you'll hear over and over again if you sit in magistrates' courts, or read the opinion pages in tabloid newspapers, or scroll through online comments feeds, or even just strike up a chat with a friend or a family member or a complete stranger. I heard this story over and over even during Aaron's plea hearing: the judge repeatedly emphasised that it was Aaron's 'choices' that had led to his presence in that Katherine courtroom, and to his prison sentence. It's the most prevalent story in criminal justice, in part because it's true. Disregarding for a moment issues of wrongful arrest and conviction, the best way of ensuring that you'll never go to prison is to ensure that you don't break the law.

So, the simplest explanation for the over-representation of Aboriginal and Torres Strait Islander people in Australian police and prison cells is that Aboriginal and Torres Strait Islander people commit more serious crimes, more often. Nearly 34 per cent of Indigenous prisoners are in prison because they've been charged with 'an act intended to cause injury'. Another 14 per cent are there because of burglary, 9 per cent because of robbery, another 9 per cent because of sexual assault, and just over 5 per cent because of homicide.[19] More than seven in every ten Aboriginal prisoners, then, are in prison because of some act of serious violence or home invasion. If they'd never done the crime, they wouldn't be doing the time. That maxim applies equally to other offences, from drug crimes to breaches of bail.

To stop the inquiry at this point is to accept two propositions: first, that there is no better, or more effective, or more humane way of responding to the criminal behaviour of individuals than to lock them up; and second, that the devastation wrought by prison on those individuals' families and communities is a kind of sad but inevitable by-product of imprisonment – a form of excusable collateral damage. But does it really make sense to respond to individuals' violence by, for instance, locking people in cages stained with blood and vomit? Depriving people not only of their liberty but also adequate healthcare, sanitation and education? Perpetuating practices which are known to hasten and even cause early death? Most people who accept these propositions have never been confronted by the life-and-death realities of imprisonment and over-policing, and with the opaque promises of Australia's justice and coronial systems.

What's also true is that social scientists can predict, with an astonishing degree of accuracy, how likely it is that people will break the law. These predictions don't work at the level of the individual, so nobody can predict for sure whether a *particular* person will commit a crime. *Minority Report* is still fiction. But at what statisticians call a 'population-wide' or merely 'population' level, it becomes apparent that certain characteristics and experiences either increase or decrease the risk that a person will break the law in a serious way. Not completing high school, using drugs, suffering abuse or neglect by parents and being unemployed – these are the four main factors that make it more likely that people will commit crime. There are many other factors, too, but pretty much all of them – including having spent time in prison, or being involved (as a perpetrator *or* a victim, or both) in family violence – can ultimately be explained by the four 'main' factors. Plus being male makes it more likely – *much* more likely – that a person will commit a crime of serious violence. This knowledge doesn't square well with the simple story we tell about crime. If offending or not was purely a matter of choice, we would expect statistics to confirm that offending patterns are consistent across the entire population regardless of background and circumstance. In other words, we'd expect to see the daughters of Vaucluse offending just as much as the sons of Darwin's town camps. Obviously they don't, so something else is going on.

As to just what that 'something else' is, and how it explains the extraordinary rates of Indigenous incarceration in particular, is the subject of ongoing debate among researchers and policymakers. Part of this debate

is set out in a report of the most recent large-scale national investigation into 'Aboriginal incarceration': that undertaken by Matthew Myers – the Federal Court's first Aboriginal judge – and the Australian Law Reform Commission (ALRC) beginning in October 2016. When Myers reported at the end of 2017, he found what similar inquiries had found going back to the Royal Commission into Aboriginal Deaths in Custody in 1991. Between 1910 and 1972, Aboriginal families were shattered by child removal policies, which at their nadir were aimed at 'breeding out the colour', compounding the continuing harm wrought by invasion, colonisation and dispossession. Formal discrimination against Aboriginal people ended in 1972, but only after nearly two centuries of terror that left many First Nations people, families and communities dealing with the legacies of what Jiman/Bundjalung woman and trauma researcher Judy Atkinson calls 'transgenerational' trauma.[20] As a result, Aboriginal people were and remain massively over-represented among the various statistical 'markers of disadvantage' – school dropouts, unemployment, substandard housing, overcrowding, homelessness, poor health, mental illness, cognitive impairment, alcohol and other drug dependency, child abuse and neglect, and children being removed from their parents by child protection authorities[21] – which are also heavily correlated with criminal offending, becoming a victim of crime and going to jail. So, goes this story, it's no surprise that Aboriginal people are spending so much time in prison.

Some researchers stop their analysis here, and claim that if governments and Aboriginal communities alike work hard to address these various deprivations, eventually, fewer Aboriginal people will be locked up. This is the 'deprivation' or 'deficit' story about Aboriginal imprisonment, and it's a true story too. It sees incarceration as an inevitable by-product of disadvantage. The deficits in Aboriginal people and communities are the cause of their higher offending rates, and therefore their higher rates of imprisonment. Provide better support to Aboriginal parents, teach them better parenting skills, keep Aboriginal children at school for as long as other kids, fix their housing problems, improve their diets and lifestyles, stop them drinking alcohol when they're pregnant, make sure they stay healthy, support them to better participate and compete in the labour and capital markets, and the incarceration rate will take care of itself. With this view, the criminal justice system and its institutions – governments, police, courts, prisons – can remain basically neutral: they receive disadvantaged people, including many Aboriginal people, and process them as best they can. The justice system can no more stop an Aboriginal person – or anyone – from being locked up than an oncologist can prevent a person from growing a cancer. But to stop here is to accept that imprisonment – and all that goes with it – will remain a reality for a high proportion of First Nations people, families and communities until they can be dragged into the middle class. It's a grimly utilitarian position – and a deeply illiberal one – which ignores people's lived experience in the meantime. 'In the long run', wrote the economist John Maynard Keynes famously, 'we are all dead'.[22]

Myers and the ALRC also acknowledged another body of research that goes back at least to the deaths in custody commission, which crisscrossed the country from 1987 until it reported in 1991. The royal commissioners came to several conclusions about Australia's criminal justice system itself. While many Aboriginal people were committing serious crimes, *most* Aboriginal people were being locked up for very minor offences, such as public drunkenness, offensive behaviour and the non-payment of fines. Police were regularly using their discretion *against* Aboriginal people, and were arresting them and locking them up in situations where they would have simply issued a summons – or even a warning – had the offender been white. Bail laws that required financial sureties effectively discriminated against Aboriginal people, many of whom didn't have the money to pay. As a result, many Aboriginal people remained on remand in situations where they could have been released pending trial. Corrections departments had often failed to create community-based alternatives to imprisonment, especially in regional and remote areas; so many Aboriginal offenders were being sent to prison when they could have stayed in the community on a supervised order had one been available. And Aboriginal legal services weren't adequately funded to deal with the high numbers of people needing in-court representation, which meant that many Aboriginal defendants were still going to court unrepresented.

These observations pointed to what appeared to be a widespread bias against Aboriginal people that permeated the institutions of the criminal justice system. The story of *institutional bias* isn't inconsistent with the *deprivation* story, though subscribers to the bias thesis obviously don't see the system as neutral. Rather, bias works to augment the already high rate at which Aboriginal people are being locked up because of their multiple disadvantages. After the royal commission reported, a dispute arose

between those who saw institutional bias as a major contributing factor in Aboriginal people's incarceration, and those who saw it as a kind of red herring. In practical terms, this is a debate about where governments should direct their efforts. To what extent should governments spend scarce resources on retraining police, establishing community-based offender programs in regional areas, reforming bail laws and funding Aboriginal Legal Services (ALS), when doing so would divert resources from addressing Aboriginal disadvantage?

There is also a fourth story, one that maintains that *none* of the existing stories – neither the three-act narrative, the one about deprivation, nor the one about institutional bias – goes anywhere near far enough to explain the sheer extent of the problem. The story with the most truth, some say, is that Aboriginal and Torres Strait Islander people and their communities are locked in a one-sided and ongoing relationship with Settler Australia and its government that commenced in 1788, and has continued substantially on the same terms. The whole system of crime and punishment, this critique suggests, is *designed* to continue to punish Indigenous people unless and until they adopt the cultural norms of the settler middle class.

Does history matter?

Arguments in favour of change now run headlong into one gigantic stumbling block. That block is Indigenous men's violence, especially against Indigenous women. As I was completing this book, *The Australian* published a three-part report detailing the extreme violence inflicted on one twenty-one-year-old woman, 'Ruby', by men, including her father, in Yuendumu. The journalist, Kristin Shorten, had met Ruby while she was there covering the police shooting of Kumanjayi Walker by Constable Zachary Rolfe (see chapter 12). In *The Australian*'s coverage of that shooting, the violence police officers routinely contend with in Aboriginal communities was presented as context for its readers to understand – and to excuse – Rolfe's own actions.[23] In her report, Shorten gave her readers graphic detail of Ruby's repeated rapes at the hands of her biological father, and the horrific punishments she received from other family members when she testified against him in court.[24]

Settler Australia has told this kind of story to itself for four decades. It fulfils a particular function: to shock readers into staying the colonial course. Questions of history and sovereignty are overwhelmed by the violence. As if on cue, *The Australian* then featured an exclusive interview with Judith Kelly, a sitting Supreme Court judge who told journalist Amos Aikman: 'I just want people to know what's happening to Aboriginal women.' 'She praised the Black Lives Matter movement's focus on allegations of excessive force by authorities,' Aikman wrote after interviewing her, 'but questioned whether those ought to be the top priority.' Kelly pointed out to Aikman that while police have shot two Aboriginal men in the Territory since 2000, fifty-two Aboriginal women have been killed during the same period, 'mostly by their partners'. Kelly – who is white – told Aikman that claims of racism in the justice system were 'very unhelpful'. 'The problems to be solved are unemployment, passive welfare dependency, substance abuse and intergenerational trauma. The 'epidemic' of domestic violence in the Territory isn't caused by racism, she said. 'It's the violence of the men against the women.'[25]

Following Kelly's intervention, Professor Marcia Langton told *The Australian*: 'The safety of women and children must be the overriding and first concern; not fear of increasing incarceration rates for Aboriginal men.'[26] Some reformers and activists do tend to downplay the prevalence and extent of this violence, and to focus almost exclusively on the violence and surveillance deployed by police and prison officers, and the myriad ways courts excuse and endorse them. But this book argues that prison doesn't protect women either.

Like all criminal defence lawyers, I'm regularly asked: *How do you represent men who bash women? How do you defend rapists?* My job, in the end, in this adversarial system inherited from England, is to defend and assert people's right to be assumed innocent until proven guilty. But I do see a lot of horrific violence, or at least its aftermath: photos, videos, terrified victims. For many, that's enough to demand a lifetime of prison and hard labour: *do the crime, do the time.* The big problem is that prison doesn't work. Violent men come out more violent. Children come out hardened. Everyone comes out broken – when they come out at all. One of this book's big asks is a preparedness to distinguish the *criminal act*, committed by the individual, from the *criminal justice system* which responds to it by way of policing and punishment. Whether we accept it or not, each – the act and the system – has a history. Knowing some of that history, I think, lets us ask questions about what's happening now: questions that aren't asked

when we're blinded by horror and moral outrage, which are understandable responses following a vicious crime.

I'm not an Aboriginal or Torres Strait Islander person. My ancestors are all from Europe. They arrived from Ireland, London and Germany between the 1830s and 1947 to 'settle' on Kaurna land, by then called Adelaide by settlers. I was raised in a red-brick home in that city's western suburb of Fulham Gardens, its name recalling both the Bulgarian and Chinese market gardens it had been and John White's earlier estate of Fulham, originally purchased from the South Australian Company in 1836. My parents purchased their land from developers in the late 1970s. But the Kaurna people, who had lived on, managed and cultivated – in other words, owned – that same land for tens of thousands of years, have never once agreed to these transactions. They were driven off their land during South Australia's speedy settlement, and for that theft they've never been compensated, despite the requirement to do so in British law. Later I worked for Aboriginal Legal Services, firstly in Melbourne and then in Katherine, in the Northern Territory, representing Aboriginal people charged with criminal offences. Nothing in my own middle-class experience as a 'white' guy – nothing in my childhood, my education, my law degree, the things I'd been taught to believe about our system of criminal justice – had prepared me for what I learned about it when I saw, from close up, how it treated Indigenous people.[27]

I regularly use the term 'Settler Australia' or 'settlers' in this book, especially to refer to Australians who don't identify as Aboriginal or Torres Strait Islander: 'those who've come across the seas', and the institutions and ideas and practices and cultures they brought with them. 'Australia', by itself, seems too vague, too reconciled. 'Non-Indigenous Australians' is too clunky. But if the history of what happened here is taken seriously, then it must be recognised that there are two main groups: the beneficiaries of settlement and the dispossessed. I'm a beneficiary. The more than 12,000 Aboriginal and Torres Strait Islander people presently locked up in Australia's prisons and police cells are not. I'm not talking about 'race' or ethnicity here: people have complicated ethnic histories, and 'race' is literally a social construct: a 'technology of power instituted in precise historical contexts, most significantly colonialism and slavery', as researcher and former public servant Debbie Bargallie, descendant of the Kamilaroi and Wonnarua peoples, explains.[28] I'm talking in part about the worlds we've been raised into, and the structures of power that govern us. White settlers rarely think in these terms, and react with bewilderment and even anger when they're asked to, because settlers are beneficiaries of the colonisation which occurred here. In my experience, the Indigenous people I've represented in courts think in these terms constantly.

Does history matter to the growing problem of the over-incarcerated First Nations? Plenty – they tend to be settlers – claim that it ultimately does not. Those who perform the carceral three-act play – magistrates, judges, police, politicians, tabloid editors – look barely any further than the criminal act itself and the immediate damage or loss it causes. And those who see the problem of Aboriginal incarceration as one that can be explained by Aboriginal deficits – of education, of parenting, of community – may acknowledge the history that has left those deficits as its legacy, but argue that the solution must lie in moving Aboriginal people beyond the bounds history has created.

The secret history of the criminal law

This is not another book about Aboriginal deficits, perceived or otherwise. There are plenty of those. The crimes Aboriginal people commit are only part of the story. To focus on them exclusively is to ignore the possibility that we're *compounding* existing problems with the way we insist on dealing with offenders.

This is a book that turns the gaze back onto Settler Australia's system of criminal justice. It examines the history of how that system came to be in this land, and how it grew from non-existence – before 1788 – into the system as we know it today. Above all, that system is *universalist*. It jealously claims that *its* law is the one true law, and that all others are given by false prophets. Just as they were in the nineteenth century, Aboriginal communities are still prohibited from practising significant aspects of their own distinct cultures, namely, their methods of dispute resolution, which aim to resolve tensions and restore balance in ways that are meaningful to the people involved.

Much of this still has an oddly 'secret history' feel to it. For a very long time, Australian textbooks – drawn from serious histories – repeated the claim that the settlement of the Australian continent was uniquely peaceful, that there were no wars here. Now we know that at least 60,000 Aboriginal men, women and children were deliberately killed in an

unrelenting, undeclared and illegal frontier war *in Queensland alone*. The vast majority of the perpetrators – police officers, pastoralists, squatters, settlers – were never charged, let alone convicted and imprisoned, even though what they were doing was clearly prohibited by the law they brought with them from Britain.

Aboriginal communities and nations had distinct cultures and laws before 1788. Many of those cultures and laws continue today in updated form, just as the culture and laws British people arrived with have also changed. So then the claim that settler criminal law makes – that it is the one true law – seems a long way from neutral. If we also acknowledge that the criminal law did nothing to protect the victims of some of the greatest land-thefts in human experience, and some of its bloodiest massacres, then how can it claim fairness and legitimacy? Both the 'deprivation' and even the 'institutional bias' theses downplay or ignore the extent to which the ongoing one-sided relationship between Settler and Indigenous Australia – a relationship whose terms are continually imposed by the one on the other – governs Aboriginal lives and dictates their opportunities, including their opportunities to recover from generations of trauma perpetrated by the settler state, to heal and to thrive.

I must also state at the outset what this book is not: it isn't an argument in favour of reversing the tides of history so that Aboriginal and Torres Strait Islander people can finally be afforded the separate and uncolonised existence they should have had from the beginning. Nor is this a history of the two centuries of First Nations activism aimed at reforming or replacing the settler justice system. This book makes an argument specifically against the enduring practice of *imposing laws and solutions* onto colonised nations and communities, especially where there is ample evidence that those 'solutions' – especially where they involve imprisonment – barely work in settler culture, let alone for colonised First Nations.

This book is about the stories that Settler Australia has told *itself* about Indigenous crime and how to control it. Many of those stories serve settler-colonial interests. They emphasise violence perpetrated by individual Indigenous people, and routinely ignore, downplay or excuse both the historical and social context within which that violence takes place, and the violence perpetrated by the settler state and its agents and institutions, most notably police and prisons. Because this book draws from the historical record *created by* settler courts and governments, many contemporary readers will observe that my focus is often very one-sided. *Where is the truth about the frontier violence?* the reader is entitled to ask. *Where are the contemporary accounts of police violence?* The most straightforward answer – and the most shocking one – is that the court records are overwhelmingly silent about these acts of state-sanctioned (or wilfully blind) violence. That in itself creates, at the very least, a legitimacy problem for the settler system of justice. Police get away with what they do because of courts' complicity. More recent court records do show occasional prosecutions of police officers for killing Indigenous people, but all of them – *all* of them – are stamped with acquittals.

Other readers, meanwhile, are likely to reject the entire premise of this book. *How can there be anything but a single justice system?* these readers may ask. *Do the crime, do the time.* This points to one of the reasons this book exists. The conversations occurring about crime, justice and sovereignty at exclusive academic conferences and in pricey academic texts are taking place in a moral universe which seems entirely remote from that within which, say, the *Daily Telegraph* or a typical commercial TV news bulletin exists. The approach this book takes is to attempt to bridge this gap: to draw from the best of the contemporary research and, guided by interpretations and perspectives provided by an expanding group of Indigenous and settler researchers and writers, talk to a general Australian audience. Many of this book's readers are likely to be white: ultimately I'm talking to Settler Australia about *its* need to change.

Some caveats and explainers. I recount some of the cases I've been involved in as a lawyer. As a way of protecting my clients' identities, and those of any victims, I've used pseudonyms and altered some of the facts of the offending. I've also given pseudonyms to most of the people likely to still be alive whose real names appear in published court documents. Court records contain findings of 'fact', and often include facts to which defendants have agreed to plead guilty. This doesn't mean they're accurate. As a practising lawyer, I've been privy to enough of the distorting processes of the criminal law to know that at least sometimes, and probably often, the 'facts' courts hear – even on guilty pleas – bear little relationship to what actually happened. Readers should be aware of this as they're reading the 'facts' in the cases discussed in this book, some of which record brutal violence. Sometimes the truth is even worse than what the court hears. And sometimes the court hears a version that's much more serious than the real-life

incident. In most cases I write about in this book, the identities of individual people caught up within the settler justice system don't need to be known in order to talk about that system. So I mostly conceal individuals' identities. In all cases the system creates its *own* stories.

If we can see how these stories have changed over nearly 235 years, we may be able to see more clearly how the way Settler Australia talks and thinks about Indigenous crime might change again. It may then be possible to see that Settler Australia can't 'reform' its own system – its police forces, its criminal courts, its correctional agencies – without first dropping its jealously guarded universality and sheen of neutrality, and entering into, at long last, a relationship of genuine respect and mutuality with Aboriginal and Torres Strait Islander communities and nations. Indigenous people have been asking for that kind of relationship for more than two centuries. Now, as prisons continue to fill with more and more Indigenous men, women and children, it's well past the time Settler Australia began to properly listen.

SETTLERS

How the criminal law came to Australia

When they arrived on the Australian continent in January of 1788, Arthur Phillip and the 1500 mostly pale-faced convicts and officers of the First Fleet brought guns, chains, shackles and lashes. And they brought their own law, perhaps the most powerful weapon of all in what would become, eventually and inevitably, a decades-long undeclared war for control of the continent whose frontline would inch ever inland and northward. It was a war that many of its beneficiaries never even knew was being waged.

The people experiencing the invasion, however, knew they were at war. It was difficult not to know. They were being murdered, and massacred, and driven off their lands so that the invaders could begin using it for their own, foreign purposes. Many groups fought back. Direct confrontation mostly didn't work. Wooden spears were no match for muskets. So the Australian nations chose indirect methods, which might today be called guerrilla tactics. They raided farms, killed animals, stole weapons and, occasionally, attacked individual settlers and small groups in retaliation for earlier 'dispersals' committed on them by the invaders.

And when they did perpetrate these acts of resistance, they would often be punished, 'summarily' or by being 'dispersed': both were euphemisms for murder. Sometimes, when settlers didn't know for sure which particular Aboriginal person committed the 'crime', they'd kill a person who looked like the offender. Or they'd kill the first person they found. Or they'd go looking for a handful of Aboriginal people, or a dozen, or more, and massacre them as a vengeful 'example' to their countrymen and women: *This land is now ours. Stay away.* There was nothing in the law the settlers brought with them from Britain that allowed anything like this.