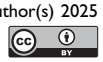
Article

Alternative Law Journal
2025, Vol. 50(4) 268–274


Article reuse guidelines:
sagepub.com/journals-permissions
DOI: 10.1177/1037969X251385771
journals.sagepub.com/home/alj
Sage

When reform kills: The implications of bail reform for First Nations women in Victoria, Australia

Megan Beatrice
Deakin Law School, Deakin University, Australia

Abstract
In March 2025 Victoria's Allan Labor government introduced sweeping reforms to the *Bail Act 1977* (Vic), which pose a disproportionate risk to both the lives and liberties of First Nations women. This article adapts Kimberlé Crenshaw's intersectional lens to consider the effect of the bail reform on First Nations women through the intersecting points of disadvantage of race, gender, and colonialism. This analysis concludes that considerations of First Nations women as a vulnerable population were absent from the reforms, and so have reduced this population to biological beings with no legal worth. This may ultimately prove to be lethal.

Keywords
First Nations women, bail, remand, death in custody, intersectionality

On Wednesday 12 March 2025, the Allan Labor government in Victoria, Australia, introduced bail reforms that heralded the next step in a tough-on-crime approach to criminal justice.[1] The tests contained in the government's proposed reforms have been labelled, in a somewhat heavy-handed gesture by the government, as the '*Tough Bail Bill*', being 'extremely hard to pass', and will 'jolt the system' as we currently know it.[2] Victoria has, at least in recent history, embraced a 'tough on crime' approach to bail which has typically had a disproportionate effect on vulnerable populations.[3] For example, in August 2024, the Victorian government introduced laws targeting 'thuggery and bad behaviour', providing Victoria Police with 'more power' to limit criminal association.[4] In the wake of James Gargasoulas' Bourke Street mass murder,[5] the previous Victorian regime (the Andrews Labor government) was similarly committed to 'strengthened legislation, [and] a presumption against bail and parole for certain offenders'.[6] Regardless, or perhaps in a conscious continuation of this trend, the Allan government has declared, with a

[1]Premier of Victoria, 'Tough Bail Laws to Keep Victorians Safe' (Press Release, 12 March 2025) https://www.premier.vic.gov.au/tough-bail-laws-keep-victorians-safe.
[2]Ibid; Bail Amendment (Tough Bail) Bill 2025 (Vic).
[3]See, eg, Richard Willingham and Jane Lee, 'Third Strike leaves Daniel Andrews' Tough on Crime Policy Looking a Bit "Botched"', *The Age* (online, 11 May 2017) https://www.theage.com.au/national/victoria/supreme-court-rules-again-that-children-should-not-be-held-in-adult-prison-20170511-gw2ddm.html; Victorian Equal Opportunity and Human Rights Commission, *2020 Report on the Operation of the Charter of Human Rights and Responsibilities* (Report, 2020) 92; Human Rights Law Centre, 'Andrews Government's Proposed Bail Changes Fall Short of Recommendations' (Media Release, 15 August 2023) https://www.hrlc.org.au/news/bail-changes-fall-short/.
[4]Premier of Victoria, 'Tougher Laws to Combat Organised and Serious Crime' (Press Release, 28 August 2024) https://www.premier.vic.gov.au/tougher-laws-combat-organised-and-serious-crime.
[5]See: *DPP v Gargasoulas* [2019] VSC 87, in which the defendant was sentenced to life imprisonment after being convicted of murdering six people and reckless conduct endangering the lives of 27 others when he drove at high speed down a heavily trafficked footpath in Melbourne's Central Business District, in the context of evading police, methamphetamine use, and drug induced psychosis.
[6]Premier of Victoria, 'Stronger, Safer, Fairer: Investing in Victoria's Justice System' (Press Release, 1 May 2018) https://www.premier.vic.gov.au/stronger-safer-fairer-investing-victorias-justice-system.

Corresponding author:
Dr Megan Beatrice, Deakin Law School, Deakin University, 221 Burwood Highway, Burwood, VIC 3125, Australia.
Email: m.beatrice@deakin.edu.au

confounding sense of grandeur, that the 'Tough Bail Laws … will make Victoria's bail laws the toughest in Australia'.[7]

These reforms pose a threat to a range of disadvantaged populations, but the risk they pose to the lives and deaths of First Nations women in the context of over-incarceration is extraordinary. The over-representation of First Nations women incarcerated on remand, *before* they are even convicted, is overwhelming. First Nations women are almost 16 times more likely than non-Indigenous women to be held on remand, a number also disproportionately higher than First Nations men.[8] Significantly, and in light of the Allan government's emphasis on youth offenders, First Nations children and young people are incarcerated at a rate 26 times greater than non-Indigenous young people; the gender breakdown of this data is not clear, but it is worth noting in the context of the focus of the 2025 bail reform.[9]

While this article acknowledges multiple populations exist to whom these bail laws pose a threat, the focus here is on First Nations women as a population who represent a specific, and unique, intersectionality in the context of the Victorian criminal justice system (CJS). Further, the population of First Nations women in the CJS has typically been affected disproportionately by the development of bail laws in Victoria and so these new reforms warrant serious consideration.

This article builds on Kimberlé Crenshaw's two-point intersectional lens, first introduced, at least formally, in 1989,[10] in which Crenshaw identified the 'collision', or compounding, of race and gender as points of disadvantage. This compounding of two apparently distinct points does not describe a circumstance by which two categories of disadvantage are experienced *simultaneously*. Rather, this compounding represents the amalgamation of two points of disadvantage which collide to form a *new*, *distinct*, and *unique* form of disadvantage or discrimination.[11] This article therefore adds 'colonialism' as a third collision point, with the aim of establishing a 'three-point' lens specific to First Nations women.[12] This is not to suggest that First Nations women experience *only* three points of compounded disadvantage. However, as Hilde Tubex and Dorinda Cox argue, the ongoing phenomenon of over-incarceration of First Nations women should not, and cannot truly, be understood within Western frameworks which render invisible the 'considerable role of colonialism' in the crisis.[13] In considering how legal theory might challenge legal and political developments like bail reform, First Nations women's location and experiences within a colonial CJS is both 'contextually and practically important'.[14]

The compounding intersection of race and gender is well established in the work of scholars like Crenshaw,[15] Sumi Cho,[16] Elena Marchetti[17] and, arguably, scholars such as Goenpul academic Aileen Moreton-Robinson.[18] These are but a very few of the scholars undertaking important intersectional work at the nexus of race and gender. In the context of the Australian CJS, the intersection of race and gender has informed a range of practical interventions, including the work of abolitionist organisations[19] and social media campaigns.[20] Theoretically, intersectionality has provided some deeper understanding of legal developments around 'provocation, self-defence, and the purpose and effects of punishment'.[21] However, the absence of 'colonialism' from this intersectional equation is marked, and has significant consequences in its potential to '*theoretically* erase' the carceral experience of a population, many of whom cannot be accounted for even at the intersection of race and gender.[22] The very use of race and its 'fixity' as a colonial tool of power and control in settler-colonial jurisdictions like Australia means that colonialism must be accounted for in any intersectional lens seeking to reimagine a crisis like that facing incarcerated First Nations women in Australia.[23]

[7]'Tough Bail Laws to Keep Victorians Safe' (n 1).
[8]Australian Human Rights Commission, *Statistics about Aboriginal and Torres Strait Islander Women and Girls* (Report, 9 October 2024).
[9]Ibid.
[10]Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1 *University of Chicago Legal Forum* 139.
[11]Ibid 149, see 'traffic accident' analogy.
[12]See, for the development of the 'three-point intersectional lens': Megan Beatrice, 'Incarcerating First Nations Women: An Intersectional Analysis' (PhD Thesis, RMIT University, 2025) 200.
[13]Hilde Tubex and Dorinda Cox, 'Aboriginal and Torres Strait Islander Women in Australian Prisons' in Lily George et al (eds), *Neo-Colonial Injustice and the Mass Imprisonment of Indigenous Women* (Palgrave Macmillan, 2020) 140. See also: Beatrice, 'Incarcerating First Nations Women' (n 12) 200.
[14]Beatrice, 'Incarcerating First Nations Women' (n 12) 200.
[15]See, eg, Crenshaw, 'Demarginalizing' (n 10); Kimberlé Crenshaw, 'Race, Gender, and Sexual Harassment' (1992) 65 *Southern California Law Review* 1467; Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality Identity Politics, and Violence Against Women of Color' (1991) 43(6) *Stanford Law Review* 1241.
[16]See, eg, Sumi Cho, Kimberlé Crenshaw and Leslie McCall, 'Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis' (2013) 38(4) *Signs: Journal of Women in Culture and Society* 785; Sumi Cho, 'Post-Intersectionality: The Curious Reception of Intersectionality in Legal Scholarship' (2013) 10(2) *Du Bois Review* 385.
[17]See, eg, Elena Marchetti, 'Intersectional Race and Gender Analyses: Why Legal Processes Just Don't Get It' (2008) 17(2) *Social and Legal Studies* 155.
[18]Note that while Moreton-Robinson does not call herself an intersectional scholar, or label her work as intersectional, it is consistent with scholarship located at the intersection of race and gender and has undoubtedly informed the work of self-labelled intersectional scholars. See as an example of such work: Aileen Moreton-Robinson, *Talkin' Up to the White Woman* (University of Queensland Press, 2000).
[19]See, eg, 'About Sisters Inside', *Sisters Inside* (Web Page, 2025) https://sistersinside.com.au/about-sisters-inside/; 'Flat Out', *Flat Out* (Web Page, 2025) https://www.flatout.org.au/.
[20]See, eg, Sister's Inside's #FreeHer campaign: '#FreeHer Campaign', *Sisters Inside* (Web Page, 2020) https://sistersinside.com.au/freeher-campaign/.
[21]Beatrice, 'Incarcerating First Nations Women' (n 12) 188.
[22]Deborah Bird Rose, 'Land Rights and Deep Colonising: The Erasure of Women' (1996) 3(85) *Aboriginal Law Bulletin* 6 (emphasis added). See also Megan Beatrice, 'Incarcerating First Nations Women in Australia: A Case for Intersectional Analysis' (2024) 50(2) *Monash University Law Review* 1, 10.
[23]Megan Beatrice, 'Critical Race Theory in the Australian Carceral Context: Thinking Differently About Over-Incarceration' (2025) 46(1) *Adelaide Law Review* (forthcoming).

This three-point intersectionality,[24] discussed in more detail later in the article, provides an opportunity to conduct analysis on the likely effects of the Allan government's bail reform on First Nations women involved in the Victorian CJS, ultimately showing that not only are the reforms a dangerous, 'knee-jerk' legislative reaction, but that they are, or will be, deadly.

Veronica Nelson and bail reform

Veronica Marie Nelson was a 37-year-old Gunditjmara, Dja Dja Wurrung, Wiradjuri and Yorta Yorta woman living in Victoria when she died on remand at the Dame Phyllis Frost Centre (DPFC) on 2 January 2020. She had been remanded in custody after being denied bail for minor, non-violent shoplifting offences, breach of bail offences, and a Community Corrections Order breach.[25] An autopsy found that she weighed approximately 33 kg at the time of her death, and that her height was approximately 160 cm, placing her in the 'grossly underweight' and malnourished body mass index category; the autopsy report also indicated that Nelson had 'the appearance of skin being just over bone'.[26] She also had a history of opioid dependence and was in a state of withdrawal when she arrived at the DPFC medical centre.[27]

While the *cause* of Nelson's death was ultimately found to be 'complications of withdrawal from chronic opiate use and Wilkie Syndrome in the setting of malnutrition',[28] Coroner Simon McGregor also found that her death 'was preventable'.[29] Indeed, for the purpose of this article, the death was preventable because Nelson was incarcerated at the time of her death, and she arguably should not have been. For this reason, Nelson's case is utilised as a regrettably brief case study of how important bail laws are to the lives, and deaths, of First Nations women and how any reform to bail must be considered at the intersection of race, gender, and colonialism.[30] Nelson's story, and the continuing fight for legislative change by her family and her community provides space and opportunity to interrogate what might be termed 'patriarchal colonial whiteness' in a legal setting of deep colonialism.[31] This reframing of the setting of Nelson's death highlights the 'invisible unnamed organizing principle that surreptitiously shapes social relations',[32] including the specific social contract in which we engage when we participate in law and order, or in our reliance on systems and structures of criminal justice.[33] In the wake of Nelson's death, in response to the calls for change from both her family and the broader community, but perhaps most pertinently in light of Coroner McGregor's damning coronial inquiry, the Andrews government made a concessional backflip from the 'tough on crime' policies that dominated criminal justice, making promises in the Victorian media of bail reform.[34] However, it is what came next – the current iteration of bail reform reflecting Allan's legislative acrobatics – which is of concern to the remainder of this article.

Lethal reforms

For First Nations women in the carceral system, like Veronica Nelson but also like Tanya Day in Victoria, and women in other Australian jurisdictions like Ms Dhu,[35] or Nita Blankett,[36] both of whom died in custody in Western Australia, themes of domination are informed by racial, gendered, and colonial oppressions that are hidden in a 'deep colonial' system, a system which *looks* decolonial, but is in fact so deeply colonial as to be undetectable.[37] Yawuru scholar Mick Dodson points to the 'sterile symbolism' of acts of law which, on the surface, promote equality and advance First Nations rights.[38] Other First Nations scholars, like Tanganekald, and Meintangk academic Irene Watson, argue in the context of the *Mabo (No 2)* decision of the High Court of Australia,[39] that these apparently progressive developments are illusory, and come not from a place of *law*, but rather of *power* of the muldarbi.[40] The confluence of this 'sterile symbolism', and the illusory

[24]See Beatrice, 'Incarcerating First Nations Women' (n 12) for detailed analysis and development of the 'three-point' lens.
[25]Coroner's Court of Victoria, *Inquest Into the Passing of Veronica Nelson* (Report, 30 January 2023) 73; Mark Davison and Patrick Keyzer, 'The Death of Veronica Nelson: Reconsidering the Criminalisation of Opiate Use' (2024) 49(1) *Alternative Law Journal* 7, 7.
[26]Coroner's Court of Victoria, *Inquest* (n 25) 66.
[27]Ibid 6.
[28]Ibid Appendix A 24.
[29]Ibid Appendix B 7.
[30]Beatrice, Incarcerating First Nations Women' (n 12) ch 9.
[31]Nicole Watson, *Aboriginal Women, Law and Critical Race Theory: Storytelling from the Margins* (Palgrave Macmillan, 2022) 3; Rose (n 22).
[32]Aileen Moreton-Robinson, *The White Possessive: Property, Power, and Indigenous Sovereignty* (University of Minnesota Press, 2015) 66.
[33]See also for 'social contract theory': Jean-Jacques Rousseau, *The Social Contract* (Penguin Classics 1998); Caitlin J Taylor and Kathleen Auerhahn, 'Community Justice and Public Safety: Assessing Criminal Justice Policy Through the Lens of the Social Contract' (2014) 15(3) *Criminology & Criminal Justice* 300.
[34]See, eg, Adeshola Ore, 'Daniel Andrews Promises Victorian Bail Law Reform After Inquest Into Veronica Nelson's Death', *The Guardian* (online, 31 January 2023) https://www.theguardian.com/australia-news/2023/jan/31/daniel-andrews-promises-victorian-bail-law-reform-after-inquest-into-veronica-nelsons-death; 'Victorian Premier Daniel Andrews Flags Justice System Reform After Coroner's Findings Into Veronica Nelson's Death', *ABC News* (online, 31 January 2023) https://www.abc.net.au/news/2023-01-31/daniel-andrews-flags-reform-after-veronica-nelson-coroner/101909278; Alannah Sciberras, 'Victorian Government Vows Bail Law Changes After Damning Inquest Findings Into Indigenous Woman's Death in Custody', *Nine News* (online, 31 January 2023) https://www.9news.com.au/national/veronica-nelson-victorian-government-vows-bail-law-changes-after-damning-inquest-into-death-in-custody/a0be447d-e1da-4b9e-9756-be0d2649ebac.
[35]Coroner's Court of Western Australia, *Inquest Into the Death of Ms Dhu* (Report, 16 December 2016).
[36]Coroner's Court of Western Australia, *Report of the Inquiry into the Death of Nita Blankett* (Report, 1990).
[37]Rose (n 22).
[38]Professor Michael Dodson, quoted in Nicole Watson (n 31) 25–6.
[39]*Mabo v Queensland (No 2)* (1992) 175 CLR 1 ('*Mabo (No 2)*').
[40]Irene Watson, 'Buried Alive' (2022) 13 *Law and Critique* 253. Watson uses the term 'muldarbi', a bad spirit, to denote the coloniser. See also Beatrice, 'Critical Race Theory in the Australian Carceral Context (n 23) 24.

nature of progression, paint a dire, yet undeniable, picture of the intersectional impact of race, gender and colonialism. In particular, for the purpose of this article, it is the sterility of the political messaging of reform, the illusion of change for First Nations women in the carceral system and, even more specifically, First Nations women's experience of *pre-trial incarceration*, that is of concern here for its reflection of the argument that the carceral system is operating in exactly the way it was intended, while presenting a very different face to the public.[41]

The report of the Inquest into Nelson's death was published in January 2023 and, in a departure from the generally politically neutral positions of previous coronial inquests,[42] Coroner McGregor 'centres' Nelson as a First Nations woman, and makes it clear that her race, and her death 'in a prison built on the lands of the Wurundjeri and Bunurong people',[43] was central to his inquiry. Further, McGregor's findings against the DPFC staff and, indeed, the government itself, 'are unequivocal, and they are damning'.[44] It is baffling, then, that the Allan government's reforms are inconsistent with Coroner McGregor's findings. Indeed, the reforms are inconsistent with recommendations from both Coroner McGregor and the *Royal Commission into Aboriginal Deaths In Custody* – that incarceration be used only as a 'last resort'. Coroner McGregor states that the bail laws as they were at the time of Nelson's death 'discriminate[d] against Aboriginal people, [and] are incompatible with the Victorian Human Rights Charter'.[45]

The Andrews Labor government had taken some steps in the years following Nelson's death to 'abolish the "'double uplift" provision', including the reverse-onus test that Nelson was unable to satisfy. These reverse onus provisions of the *Bail Act 1977* (Vic),[46] also referred to as the 'compelling reasons' test, rested on a presumption *against* bail unless the bail applicant could 'show compelling reasons' as to why their remand was inappropriate or unjust. This does, of course, reverse the usual presumption, and can be a difficult test to satisfy, particularly for vulnerable populations like women, victims of family violence, young people, unhoused people, or First Nations people. The Andrews government also committed to vary the strength of the test for bail depending on the offence.[47]

However, the Allan government's reform commits to 'target repeat offenders of the worst crimes, [under which] *bail can't be granted to someone who is accused of committing a serious offence if they are already on bail for a similarly serious offence*'.[48] While the Allan government indicates that '*serious* offences' will include 'serious … weapon offences' and 'non-aggravated home invasion',[49] the practical effect of these examples and the scope and boundaries around what constitutes a 'seriousness' in determining the parameters of a 'serious crime' are troubling, particularly in the context of a racialised, gendered, colonial CJS which actively operates to 'Other' a specific population of people as 'convenient criminals'.[50]

In his assessment of Nelson's unique discrimination, Coroner McGregor made the following statement:

> 'Discrimination' is defined in s3 of the Charter … and the attributes in s6 of the [*Equal Opportunity Act 2010*)]. Veronica possessed several attributes protected by the EO Act and the Charter; direct and indirect discrimination because of protected attributes is prohibited. *The most relevant attributes to this inquest are 'sex', given Veronica was a woman, 'race', given that she was Aboriginal,* and 'disability', because opioid addiction falls within the EO Act definition of disability.[51]

Coroner McGregor's articulation of race and Aboriginality is compelling. It seems that the Coroner is attempting to account for colonialism in Nelson's intersectionality, but this potential conflation is, at least theoretically and likely in practice, dangerous. The three-point intersectional lens applied here, and proposed previously, identifies race, gender, and colonialism as distinct points of intersection. When defined, for example, in the context of Crenshaw's intersectionality, 'race' appears more as a point of identity. However, 'colonialism' refers to a contextual location in which the systems and structures of justice are situated.[52] Where Coroner McGregor states '… "race", given that she was Aboriginal', he is not *quite* conflating race and colonialism, but it does appear he is attempting to frame colonialism as the context for Nelson's discrimination. Coroner McGregor has, interestingly, added 'disability' almost as a point of intersection of its own; it is certainly not the intention of this article to exclude such a point. Indeed, despite her focus on race and gender, Crenshaw left the 'theoretical door' open to 'the connections between all the "isms"';[53] it is only that this article focuses on the three-

[41] See, eg, Vickie Roach, 'The System is Not Failing, It is Working to Harm First Nations People' (2022) 30(2) *Journal of Prisoners on Prisons* 35. Roach's article is reflective of Slavoj Žižek's position in his book, *Violence* (Profile Books, 2009), but the reflections of Roach as a First Nations woman with involvement in the CJS are preferred for this article.

[42] Bruce Chen and Anita Mackay, 'The Nelson Inquest: Relevance of the *Victorian Charter* to the Coronial Function of Preventing Deaths in Custody' (2023) 48(4) *Alternative Law Journal* 245, 247.

[43] Coroner's Court of Victoria, *Inquest* (n 25) 10.

[44] Megan Beatrice, 'Death in the Deep Colony: Intersectionality, Human Rights, and Bail Reform', *Power to Persuade* (Blog Post, 22 February 2023) https://www.powertopersuade.org.au/blog/death-in-the-deep-colony.

[45] *Charter of Human Rights and Responsibilities Act 2006* (Vic).

[46] *Bail Act 1977* (Vic) s 4C.

[47] Premier of Victoria, 'New Reforms to Make Victoria's Bail Laws Fairer' (Press Release, 14 August 2023).

[48] 'Tough Bail Laws to Keep Victorians Safe' (n 1) (emphasis added).

[49] Ibid.

[50] See, eg, Jeffrey B Snipes, Thomas J Bernard, and Alexander L Gerould, *Vold's Theoretical Criminology* (Oxford University Press, 8th ed, 2019).

[51] *Inquest* (n 25) 29 (emphasis added).

[52] Beatrice, 'Incarcerating First Nations Women' (n 12) 200.

[53] Ibid 127; Crenshaw (n 15) 1468.

point intersection of race, gender and colonialism as has recently been proposed.[54]

Coroner McGregor deals with the intersectional effects of Nelson's location within colonial systems and structures separately. In previous work, I have identified that these include references to the 'continuing consequences of colonisation of Australia and its Indigenous peoples, which was underscored by assumptions about the innate superiority of non-Aboriginal people over Aboriginal people',[55] and highlighting a statement given in evidence that the CJS 'is one of the most significant sites of ongoing … colonialism in Australia'.[56]

The addition of 'colonialism' to Crenshaw's two-point lens,[57] which brings into existence a *three-point* intersectionality unique to First Nations women in the CJS, is supported by what Coroner McGregor identifies as the 'unbalanced power dynamics [which] replicates the long history of dispossession and colonisation experienced by First Nations people [where] [i]n short, the situation is likely to be experienced by an Aboriginal and/or Torres Strait Islander person as culturally unsafe'.[58] This supports a three-point intersectional lens because, while First Nations women in the CJS are undoubtedly disadvantaged or discriminated against by points of race and gender, their situation in a colonial power structure means that they experience a triple intersection that is unique to them.

Three-point intersectionality

In his report into the death of Veronica Nelson, specifically in his considerations of the 'circumstances' of her death, the Coroner called for a legislative response to bail reform in an effort to address what he perceived as a 'complete and unmitigated disaster',[59] which 'disproportionately affected' First Nations women.[60] This raises a crucial question: *Why* do tough bail laws disproportionately affect First Nations women? I propose to answer this question with reference to a three-point intersectional lens.[61]

'Intersectionality' as a theoretical lens was introduced by Kimberlé Crenshaw in the late 1980s to describe the experience of women whose discrimination is compounded at the *intersection* of two distinct points of disadvantage. As stated at the outset of this article, for Crenshaw these are generally 'race' and 'gender'. This section will consider race, gender, and colonialism in turn,[62] although with an awareness of space constraints. First, I will consider how 'watershed' legal moments, such as *Mabo (No 2)*, might racially impact First Nations *people* more broadly. I will then turn to the first intersection, to consider how First Nations *women* are impacted. Finally, I will consider *colonialism* as a third compounding factor,[63] to determine how the addition of an element which has typically been treated as contextual, rather than causal, changes the way we look at First Nations women's experiences of a racialised, gendered, colonially-informed instrument of law.

Race

There are many examples in the Australian common law of supposedly 'watershed' cases dealing with race as a discriminatory factor for First Nations *people*. For example, in 1992, the High Court of Australia decided the case of *Mabo (No 2)*,[64] in which Meriam man Eddie Mabo was successful in his claim of native title and in which the Court described the subversion of the foundation of proprietary rights.[65] The case is credited with overturning the doctrine of *terra nullius*, the principle upon which Australia's settlement/invasion in 1788 was founded. However, many scholars, including Irene Watson and Birri-Gubba and Yugambeh academic Nicole Watson, are critical of the decision.

In her article, *Buried Alive*, which includes the famous parable of the frog, Irene Watson describes her community 'digging itself from the rubble of the aftermath and the impact of *Mabo (No 2)*, and the Native Title legislation'.[66] For Irene Watson, the Australian High Court was given the opportunity to consider the power of the colonial structures in their decision on Mabo, and yet instead this 'watershed' moment perpetuated control of one race by another. Similarly, Nicole Watson argues that *Mabo* is Australia's *Brown v Board of Education,* an apparently revolutionary case from the United States which declared racial segregation was unconstitutional. There is some argument from Nicole Watson, taking a critical race theory position, that both cases are little more than 'sterile symbolism',[67] having no true effect on the impact of race on First Nations people in the legal system.

It is not suggested here that the Allan government's 2025 bail reform is in any way promising benefit, or even symbolic concession to First Nations women. However, I argue that it is the very promise of community safety that takes the form of 'sterile symbolism' as the newly reformed bail laws, by the breadth of its net, capture people from First Nations communities. The 'illusory' promise of 'community safety' is confounding.[68] How can the community be

[54]Beatrice, 'Incarcerating First Nations Women' (n 12).
[55]Ibid 13.
[56]Ibid 60.
[57]Ibid.
[58]*Inquest* (n 25) 82.
[59]Ibid 132.
[60]Ibid 20.
[61]Beatrice, 'Incarcerating First Nations Women' (n 12).
[62]Ibid.
[63]Ibid.
[64]*Mabo v Queensland (No 2)* (1992) 175 CLR 1.
[65]Ibid [54].
[66]Irene Watson (n 40) 258.
[67]Dodson (n 38).
[68]Irene Watson (n 40).

considered safe when an entire population of that community is at risk of over-incarceration, excessive pre-trial incarceration, and possibly death in a space that has been described as 'necropolitical' – that is, concerned with the governance of death?[69] This raises the issue of Achille Mbembe's theory of homo sacer, 'bare life', in which a person is stripped of all legal good, and reduced to a biological existence beyond being.[70] In Coroner McGregor's report, he describes a situation lacking in cultural competency, or 'culturally-specific care or support'.[71] Because arguably, as a First Nations woman Nelson, and all First Nations women in a custodial setting, are stripped to an unmanageable biological being,[72] managed by the state apparatus of the necropolitical carceral space.[73]

Gender

Introducing 'gender' as the first point of disadvantage of this intersection with race, it becomes apparent that, where feminist legal theory is applied, First Nations women are in a unique position. This population, at the intersection of race and gender, are disproportionately affected by bail reform. It is no secret that racialised people are at higher risk of misidentification in assaults,[74] and indeed misidentification of perpetrators in family violence orders disproportionately affects First Nations women in Australia.[75] So if, for example, a First Nations woman is misidentified as perpetrating an assault for the purposes of a family violence order, and she is subsequently charged with a similar offence, is she likely to be denied bail under the new reforms? If she is prohibited from entering the family home, where her children reside, under the conditions of a family violence order, and she has the intention of 'stealing' items which may belong to her, is she likely to be charged with non-aggravated home invasion and, therefore, denied bail?[76] If she is denied bail, are her children more likely to be removed from her care permanently – another issue that is highly racially charged?[77]

In the context of the criminalising effects of child removal,[78] for example, this consequence is dangerous and, potentially, lethal. Similarly, First Nations women who may be mothers raise the concept of 'motherwork',[79] which 'encompasses the social context of caregiving … in the community',[80] outside of traditional notions of the Western role of motherhood. The incarceration of First Nations women interrupts these patterns of motherwork and cause 'gaps in the structures of communities' which can exacerbate the criminalisation of the woman herself and those in her care and community and increase the occurrence of incarceration, including pre-trial incarceration.[81] These are but two examples of how the two-point intersectionality of First Nations women in the CJS are disproportionately or, at least, differently affected by a CJS which includes pre-trial detention.

Colonialism

Having established the intersection of race and gender for First Nations women in the context of the CJS, I now adopt my own previous work in introducing 'colonialism' to complete a three-point intersectional lens.[82] The notion of 'deep coloniality', which I have touched on briefly throughout this article, reflects the colonially enforced 'erasure' of First Nations women.[83] A deep colonial system is one in which the colonial attitudes and practices of its

[69]Olga Marques and Lisa Monchalin, 'The Mass Incarceration of Indigenous Women in Canada: A Colonial Tactic of Control and Assimilation' in Lily George et al (eds), *Neo-Colonial Injustice and the Mass Imprisonment of Indigenous Women* (Palgrave Macmillan, 2020) 79, 92. See also: Beatrice, 'Incarcerating First Nations Women' (n 12) 239; Achille Mbembe, *Necropolitics* (Duke University Press, 2019).
[70]Beatrice, 'Incarcerating First Nations Women' (n 12) 239; Mbembe (n 69).
[71]*Inquest* (n 25) 125.
[72]See for context, Foucault's theory of 'biopolitics': Michel Foucault, *History of Sexuality Volume 1: The Will to Knowledge* (Penguin Classics, 2020).
[73]Beatrice, 'Incarcerating First Nations Women' (n 12) 239.
[74]See, eg, Leslie R Knuycky, Heather M Kleider and Sarah E Cavrak, 'Line-Up Misidentifications: When Being "Prototypically Black" is Perceived as Criminal' (2014) 28(1) *Applied Cognitive Psychology* 39.
[75]Djirra, Submission No 8 to The Legislative Assembly Legal and Social Issues Committee, *Inquiry Into Capturing Data on Family Violence Perpetrators in Victoria* (27 May 2024).
[76]For the elements of home invasion see *Crimes Act 1958* (Vic) s 77A.
[77]See, eg, BJ Newton, 'Aboriginal Parents' Experiences of Having Their Children Removed by Statutory Child Protection Services' (2020) 25(4) *Child & Family Social Work* 814; Raven Sinclair, 'The Indigenous Child Removal System in Canada: An Examination of Legal Decision-Making and Racial Bias' (2017) 11(2) *First Peoples Child & Family Review* 8.
[78]See, eg, Beatrice, 'Incarcerating First Nations Women' (n 12) 16; Cassandra Lewis et al, 'Stigmatising Gang Narratives, Housing, and the Social Policing of Māori Women' in Lily George et al (eds), *Neo-Colonial Injustice and the Mass Imprisonment of Indigenous Women* (Palgrave Macmillan, 2020) 13; National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, *Bringing Them Home* (Report, 1997).
[79]See, eg, Lisa J Udel, 'Revision and Resistance: The Politics of Native Women's Motherwork' (2001) 22(2) *Frontiers: A Journal of Women' Studies* 43; Beatrice, 'Incarcerating First Nations Women' (n 12) 28.
[80]Menna Gower et al, 'The Criminogenic Profile of Violent Female Offenders Incarcerated in Western Australian Prisons as per the Level of Service/Risk, Need, Responsivity (LS/RNR) and Violence Risk Scale (VRS)' (2023) 30(2) *Psychiatry, Psychology and Law* 192, 192.
[81]Beatrice, 'Incarcerating First Nations Women' (n 12).
[82]Ibid.
[83]Rose (n 22).

structures are so entrenched that they are effectively invisible.[84] In bringing colonialism into the three-point lens, it is possible to situate the racialised, gendered individual within a criminal justice structure of colonialism.[85] The carceral system *is fundamentally colonial*.[86] The concepts of surveillance of the Other,[87] and the notion of policing and of bail decision-making, are each active elements of the CJS as a colonial structure. A First Nations woman is excluded from the identity of 'woman' because she is racialised; she is excluded from categories of 'race' because she is a woman. This is consistent with Crenshaw's iteration of intersectionality. However, the First Nations woman is *also* excluded from 'colonial social infrastructure', including the CJS and legal structures, as an operation of colonialism.[88]

For post-colonial theorist Edward Said, the colonised population is the 'subject race, *dominated by a race that knows them* and what is good for them better than they could possibly know themselves'.[89] Here, the Allan government is presuming to 'know' about a series of minority populations as either 'criminals' or, perhaps even worse, as being so low in significance they have no 'legal good' to speak of, and, therefore, need not be considered in law reform by nature of their reduction to bare, biological, life.[90] This idea of bare life, or *homo sacer*, introduced by Giorgio Agamben in his theory of necropolitics, is regrettably outside the scope of this article; however, the reduction of First Nations women to *homo sacer* in the formulation of legislative reform does warrant future research.

Conclusion

This article has applied a three-point intersectional lens comprised of race, gender and colonialism to shed light on the potentially deadly consequences of bail reform in Victoria.[91] Ultimately, First Nations women were not considered in the formulation of the Allan government's reforms, likely a result of their situation at the intersection of race, gender, and colonialism, stripping them of legal good while simultaneously catching them up in this net of carcerality. It is therefore imperative that, in formulating bail laws, the Victorian government pay close attention to the unique, and specific, three-point intersectional experiences of First Nations women whose societies, and communities, are under attack by the Western definition of 'progress'. It is not insignificant that the state government is itself a colonial structure. However, the positionality of a body as colonial, whether an individual or a structural body, does not exclude work in support of de- or anti-coloniality. I am not a First Nations woman. I was born and raised and have had the profound privilege of living most of my life on the beautiful lands of the Bunurong people. But I am motivated by injustice, and am motivated by Tony Birch's sentiment that carrying the burden of the memory of colonial violence cannot fall at the feet of Australia's First Nations communities.[92] It is possible for the Victorian government, regardless of which political party forms that government, to work within a three-point intersectional framework. In failing to do so, this population of First Nations women are facing the active 'destruction' of their lives *quite literally*, by the reformulation of bail laws.

Declaration of conflicting interests

The author declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author received no financial support for the research, authorship, and/or publication of this article.

ORCID iD

Megan Beatrice https://orcid.org/0000-0001-5382-1927

Megan Beatrice is a Lecturer at Deakin Law School, Deakin University.

[84]Ibid.
[85]See, eg, Beatrice, 'Incarcerating First Nations Women' (n 12); Beatrice, 'Incarcerating First Nations Women in Australia: A Case for Intersectional Analysis' (n 22); Beatrice, 'Death in the Deep Colony (n 44).
[86]For examples of scholarship on the coloniality of incarceration, see Lily George et al (eds), *Neo-Colonial Injustice and the Mass Imprisonment of Indigenous Women* (Palgrave Macmillan, 2020); Chris Cunneen, 'Indigenous Incarceration: The Violence of Colonial Law and Justice' in Phil Scraton and Jude McCulloch, (eds) *The Violence of Incarceration* (Routledge, 2009) 209; Thalia Anthony and Carly Stanley, 'Carceral Logics of Colonialism' in Jioji Ravulo et al (eds), *Handbook of Critical Whiteness* (Springer, 2023) 1; Vicki Chartrand, 'Unsettled Times: Indigenous Incarceration and the Links between Colonialism and the Penitentiary in Canada' (2019) 61(3) *Canadian Journal or Criminology and Criminal Justice* 67.
[87]Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Penguin Classics, 2020); Jeremy Bentham, *Panopticon* (1791).
[88]Megan Beatrice, 'Death in the Deep Colony' (n 44).
[89]Edward W Said, *Orientalism* (Penguin Classics, 2021) 35 (emphasis added).
[90]Harry Blagg and Thalia Anthony, '"Stone Walls Do Not a Prison Make': Bare Life and the Carceral Archipelago in Colonial and Postcolonial Societies' in Elizabeth Stanley (ed), *Human Rights and Incarceration: Critical Explorations* (Palgrave Macmillan, 2018) 257; Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, tr Daniel Heller-Roazen (Stanford University Press, 1998) 138.
[91]Beatrice, 'Incarcerating First Nations Women' (n 12).
[92]Tony Birch, '"I Could Feel it in My Body": War on a History War' (2006) 1(1) *Transforming Cultures eJournal* 19, 23.