Social Justice

DISABILITY, CRIMINAL JUSTICE AND LAW

RECONSIDERING COURT DIVERSION

Linda Steele

Disability, Criminal Justice and Law

Through theoretical and empirical examination of legal frameworks for court diversion, this book interrogates law's complicity in the debilitation of disabled people.

In a post-deinstitutionalisation era, diverting disabled people from criminal justice systems and into mental health and disability services is considered therapeutic, humane and socially just. Yet, by drawing on Foucauldian theory of biopolitics, critical legal and political theory and critical disability theory, Steele argues that court diversion continues disability oppression. It can facilitate criminalisation, control and punishment of disabled people who are not sentenced and might not even be convicted of any criminal offences. On a broader level, court diversion contributes to the longstanding phenomenon of disability-specific coercive intervention, legitimates prison incarceration and shores up the boundaries of foundational legal concepts at the core of jurisdiction, legal personhood and sovereignty. Steele shows that the United Nations Convention on the Rights of Persons with Disabilities cannot respond to the complexities of court diversion, suggesting the CRPD is of limited use in contesting carceral control and legal and settler colonial violence. The book not only offers new ways to understand relationships between disability, criminal justice and law; it also proposes theoretical and practical strategies that contribute to the development of a wider re-imagining of a more progressive and just socio-legal order.

The book will be of interest to scholars and students of disability law, criminal law, medical law, socio-legal studies, disability studies, social work and criminology. It will also be of interest to disability, prisoner and social justice activists.

Linda Steele is based at the University of Technology Sydney.

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Reconsidering Court Diversion

Linda Steele

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For Evan, Audrey and Jemima

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Preface

In 2006–2009 I worked as a solicitor at a community legal centre for people with intellectual disability. During my time there I represented clients in court diversion matters. This book is my attempt to grapple with many of the complexities and contradictions both with court diversion itself and lawyers' role in court diversion, which I observed during my time as a solicitor. This book, however, reflects only my personal opinions and not those of my former workplace or colleagues.

Introduction

Reconsidering court diversion

This book critically reassesses court diversion. Its central contention is that we need to reject the view that court diversion is a humane use of law specifically for disabled people who are in the criminal justice system. Instead, we must approach court diversion as part of a much bigger, systemic problem with law that we need to resist—the inclusion in legal doctrine and legal process of disability as a lawful and legitimate basis on which to circumvent equality for disabled people in the criminal justice system and to drastically shift the thresholds of permissible control, violence and injustice.

I argue that through the exercise of court diversion, legal doctrine and legal process are complicit in debilitating disabled people in the criminal justice system. Court diversion enables disabled people in the criminal justice system who might otherwise not be sentenced, or even convicted, to be subjected to coercive intervention through disability and mental health services. In so doing, court diversion provides legal pathways between otherwise disparate legal domains, spaces and modes of control and both sustains and serves to legitimise lifelong violence and precarity experienced by disabled people in the criminal justice system. Yet the language and logic of 'diversion' simultaneously serves to mask complicity of law in debilitation, portraying law instead as facilitating therapeutic and supportive interventions that are necessary, non-violent, non-colonial and just. Disentangling and laying bare law's (and relatedly legal actors') complicity in debilitation through disability is the primary purpose of this book.

The argument I have just set out might be unexpected and even unsettling and confronting for some readers, notably because court diversion's inclusion in criminal justice systems has at times been the result of the work of disability rights advocates and others committed to supporting and empowering disabled people. Certainly in proposing here that we reconsider court diversion I am not suggesting that instead we should retain the status quo of incarceration of disabled people. Rather, I am proposing that court diversion is part of what sustains that status quo through enabling the control of disabled people beyond the court house and prison which are often positioned as the conventional targets of disability criminal justice advocacy.

This chapter introduces the conventional approach to court diversion based in the overrepresentation of disabled people in the criminal justice system, and then moves to situate court diversion in broader issues of injustice associated with criminal justice and disability and mental health systems. The chapter then elaborates on the book's argument by reference to key aspects of an interdisciplinary analytical frame grounded in biopolitics which is used to critically reassess court diversion, drawing on theoretical ideas pertaining to disability, carcerality and legality.

The conventional approach: court diversion as therapeutic solution

This book defines 'court diversion' as a legal process whereby a judge is able to make an order that moves a disabled person appearing before them on criminal charges into treatment and support provided by disability and mental health services, in lieu of a sentence (and sometimes even a conviction). In light of the geographic development of court diversion (and my particular concerns with settler colonialism discussed below) this book is focused on court diversion in Anglo jurisdictions (England, Scotland, Northern Ireland, Wales, Canada, Republic of Ireland, United States of America, Australia and Aotearoa/New Zealand). Court diversion has its origins in England with the introduction in mental health legislation of hospital orders, as part of broader reform of mental health laws. Many Anglo jurisdictions with mental health laws modelled on England and Wales soon followed suit. A second wave of court diversion occurred in the late 1990s with the introduction of mental health courts in many jurisdictions in North America. Chapter 1 provides a more detailed overview of court diversion.

This book is focused specifically on court diversion of disabled people. 'Disability' is an umbrella term encompassing a broad array of diagnosed sensory, physical, neurological, mental and cognitive conditions. In contrast, when this book refers to disabled people in the criminal justice system it is referring specifically to people identified as having psychosocial disability or cognitive impairment. Psychosocial disability (also referred to as mental illness) includes a broad range of conditions, including depression, anxiety, schizophrenia and personality disorders. Cognitive impairment includes conditions such as intellectual disability and acquired brain injury. In criminal law, psychosocial disability and cognitive impairment are typically grouped together on the basis that these disabilities signal that an individual lacks mental capacity and rationality. This lack necessitates alternative doctrine and process because it would be unjust or ineffective to deal with these disabled individuals through conventional criminal legal doctrine and process, by reason of their incapacity and irrationality impacting on their ability to participate in trial, be found criminally responsible, or be deterred and rehabilitated through sentenced criminal legal interventions. Specific legal doctrine and legal process for people with these particular disabilities is, therefore, bound up with foundational aspects of criminal law (and, indeed, law more broadly) pertaining to mental capacity and rationality that traditionally have justified state

coercive interventions in relation to individuals through criminal law. While people with other disabilities (such as physical disabilities or hearing impairments) might also be in the criminal justice system, they are not similarly subject to disability-specific legal doctrine and legal process in terms of the disposition of their charges and the basis on which they might be entitled to access treatment and support.

My analysis of court diversion focuses on diversion of individuals at court prior to conviction or prior to sentence. It does not include forms of diversion that *sentence* individuals to specific mental health treatment or move them into treatment from prison once they are serving a sentence. Similarly, I do not include diversion during trial to treatment where there is no possibility this treatment can be in lieu of sentencing. Nor do I include the application of laws ordering treatment or support after finding of unfitness to plead or be tried or not guilty by reason of mental illness (also referred to as 'NGMI' and the insanity defence)—these are not court diversion. This is because unfitness and NGMI follow a conventional criminal justice trajectory whereas the court diversion schemes I discuss relate to completely different considerations with no direct relation to criminal legal criteria for trial, conviction and sentence. Indeed, O'Mahony (2013: p. 91) notes the peculiarity of court diversion insofar as it relates to people who are 'considered neither wholly culpable offenders nor "wholly incapacitious" [sic] offenders'. This rather anomalous nature of court diversion vis-à-vis criminal law more broadly is what makes it such a significant site of analysis from a sociolegal perspective, something I return to in Chapter 2. It should also be noted that my analysis of court diversion focuses on adult criminal jurisdictions.

My argument about court diversion might seem counter-intuitive to some readers. At least prima facie, court diversion might be understood as law doing good in the lives of disabled people by facilitating access to beneficial and necessary treatment and support and creating an option that avoids the ultimate coercive intervention of imprisonment. This view is grounded in the conventional association of court diversion with the problem of overrepresentation of disabled people in the criminal justice system.

Concern with disabled people in the criminal justice system—their contact with police, criminal courts, prisons and community corrections—is frequently articulated in terms of *overrepresentation*—the overall number of disabled people in the criminal justice system is not proportional to their prevalence in the general population. Conventionally, this overrepresentation is attributed to disabled people not having access to disability and mental health services in the community. This is said to coincide with the failure of governments to ensure appropriate treatment and support in the community in the aftermath of the gradual downsizing and closure of large-scale asylums and disability institutions associated with deinstitutionalisation. Solutions to overrepresentation thus become focused on providing access to disability and mental health services for individuals when they are in the criminal justice system, on the assumption that this will reduce the likelihood of these individuals re-offending and, in the long term, reduce the overall number of disabled people in the criminal justice system.

Conventionally, as discussed in Chapter 1, court diversion is viewed by many scholars, disability advocates and policy-makers as a way in which law (legal doctrine and legal process) and legal actors (lawyers and judges) can play a positive role in addressing overrepresentation. Court diversion is conventionally considered beneficial because it provides judges a legal alternative to conviction and sentence and, therefore, can facilitate freedom from prison and access to disability and mental health services. As such, court diversion does not merely remedy individuals' untreated disability but, through embedding within the legal system pathways to services, also addresses systemic problems associated with the post-deinstitutionalisation failure of governments to ensure appropriate treatment and support in the community. In this conventional approach, there is an underlying assumption that disabled people's criminal offending is associated with a lack of access to services; that access to disability and mental health services can, and should, be facilitated by criminal courts; and that, in order to empower courts to do so, disability should be singled out as a separate category in legal doctrine and legal process.

The ascendancy of court diversion as a key disability criminal justice strategy can easily lead one to assume that court diversion is a self-evident good, resonating with the observation made by Richards (2014: p. 125) in the context of youth diversion that 'the taken-for granted nature of the concept of "diversion" is striking; it is a constant feature of criminal justice … discourse, but is rarely critically examined'. Yet, there is a body of scholarship that questions court diversion. As will be discussed in Chapter 1, this scholarship has drawn attention to coercive and 'net widening' aspects, its failure to address structural issues and its procedural limitations vis-à-vis criminal law. Taking note of the concerns raised in that scholarship, I propose that as court diversion becomes further embedded and normalised as part of how disabled people in the criminal justice system are to be treated by criminal law and criminal justice systems, it is timely to pause and subject court diversion to sustained critical scrutiny of its broader political implications and effects.

The need to reconsider: court diversion and disability injustice

Disability, Criminal Justice and Law's reconsideration of court diversion begins by focusing on problems associated with its coercive character and complex relationships to disability injustices associated with criminal justice and disability and mental health systems. These problems, which are set out in detail in Chapter 2, are generally overlooked or given insufficient weight in the conventional approach to court diversion.

Acute problems with court diversion

The fundamental problem is that court diversion still involves coercive (in the sense of involuntary) intervention, even though individuals avoid criminal legal intervention through sentencing laws. This intervention is facilitated by law

through including disability (rather than criminal offending) as a basis for coercive intervention and occurs through disability and mental health services. Court diversion involves coercive intervention of disabled people in the criminal justice system who have not yet been convicted or sentenced and situates these people outside of the typical liberal legal limits on coercive intervention applying to non-disabled people in the criminal justice system. Therefore, court diversion demonstrates inequalities in the scope for legal coercion among people in the criminal justice system along lines of disability, because disabled people are subject to coercive intervention at a point in the criminal justice process when this is otherwise legally impossible. Court diversion also provides additional opportunities for perpetration of unlawful violence *and* legal violence against disabled people through disability and mental health services.

It is also problematic that access to disability and mental health services through court diversion is dependent on coercion, rather than being premised on choice, voluntariness and self-determination. This is indicative of inequalities in access to disability and mental health services among disabled people along the lines of criminality, because those who are diverted do not have choice in their access to services. Moreover, even though many disabled people in the criminal justice system are also poor, Indigenous or First Nations, or racialised minorities, court diversion's application to people on the basis of diagnosed disability can depoliticise people's circumstances and fail to acknowledge or seek to address the impact on disabled people of interlocking dynamics and forces of oppression.

Finally, court diversion applies only to a minority of disabled people in the criminal justice system; it does not address incarceration for the majority of disabled people in the criminal justice system, who continue to be incarcerated or subject to community corrections. Incarceration of disabled people, and the prison itself, continue. Beyond access to disability and mental health services, important structural issues—related to interlocking dynamics and forces of oppression shaping the experiences and lives of whole populations of disabled people in the criminal justice system—are not being addressed.

The problems I have identified here disrupt the conventional view of court diversion as beneficial and humane. These problems suggest that, through court diversion, the law is actually enabling injustice (in the sense of control, violence, precarity, discrimination, inequality) specifically of disabled people in the criminal justice system.

These problems lead to a series of novel questions about court diversion that drive this book. How is court diversion accommodated in law and politically tolerated? What is the significance of disability to control and violence through court diversion? To what extent does challenging oppression of disabled people in the criminal justice system require disruption of conventional understandings of disability political identity? How should court diversion be repositioned in our quest to end oppression of disabled people in the criminal justice system, and how can social justice be achieved for this group if not through court diversion? Can human rights provide the tools to challenge oppression of disabled people in the criminal justice system?

Court diversion through a prism of disability injustices

Appreciating the relevance and complexity of the new questions this book asks of court diversion requires viewing court diversion through a prism of disability injustices at the nexus of criminal justice and disability and mental health systems. These injustices are explored in further detail in Chapter 2. Viewing court diversion in this way connects the injustices arising from court diversion to broader dynamics and forces of oppression, including ableism, imperialism, colonialism, capitalism, patriarchal heteronormativity and white supremacy. While civil and criminal laws related to disability are a regular focus of law reform and government inquiries, the injustices of criminal justice and disability and mental health systems continue to be perpetrated, in part because institutionalisation and coercive intervention as well as the carving out of disability as a separate category endure in law. Indeed, the persistent orientation towards disability history in terms of the 'dark past' prevents us from seeing new or continuing forms of oppression.

Turning first to the criminal justice system, disabled people experience considerable discrimination, violence and other harms in prison (see Peters, 2003). This is exemplified by high-profile deaths in custody across a number of jurisdictions. These include the death of Ashley Smith, a young disabled Canadian woman, in her prison cell from self-strangulation while prison officers watched and videotaped her (Hannah-Moffat & Klassen, 2015). A further example is the death of Sarah Reed, a 35-year-old Black woman with mental illness in England; Reed died in her prison cell from self-strangulation while she awaited a fitness assessment (Coles, Roberts & Cavcav, 2018: pp. 5–10). The jury at the inquest into her death found 'unacceptable delays in psychiatric assessment, inadequate treatment for her high levels of distress, and the failure of prison psychiatrists to manage Sarah's medication contributed to her death' (ibid.: p. 10). Recently, international NGO Human Rights Watch documented first-hand accounts of disabled prisoners' experiences of verbal, physical and sexual violence, bullying, harassment and discrimination in Australian prisons (Sharma, 2018). Criminalised trans disabled people are particularly vulnerable to harm in prison, including through systemic transphobia and lack of provision of trans-specific physical and mental health care (Bassichis, 2007: p. 9). While court diversion does enable select individuals to avoid the violence of prison, it has no bearing on structural ableism and violence in the prison system to which those who are not diverted will continue to be exposed.

The violence of prison is particularly pronounced in relation to Indigenous and First Nations disabled people. This book's focus on Anglo jurisdictions captures numerous jurisdictions—Australia, Aotearoa/New Zealand, Canada, United States, Republic of Ireland, Northern Ireland—that were colonised (primarily by the British Empire). This book refers to these jurisdictions as 'settler colonial' nations (Veracini, 2010; Wolfe, 2006). At a very general level, and noting the considerable differences in experiences between jurisdictions, settler colonialism is an ongoing social structure involving occupation and exploitation of Indigenous

and First Nations people's land and the dispossession, displacement and elimination of Indigenous and First Nation's people. Settler colonialism manifests in a variety of practices perpetrated on Indigenous and First Nations people including child removal, sexual violence, incarceration, massacre and enslavement, and these practices are facilitated and legitimated through imposition of settler legal and political systems. Wolfe identifies a 'logic of elimination' driven by 'access to territory' as the driving feature of settler colonialism:

> the primary motive for elimination is not race (or religion, ethnicity, grade of civilization, etc.) but access to territory. Territoriality is settler colonialism's specific, irreducible element.
>
> The logic of elimination not only refers to the summary liquidation of Indigenous people, though it includes that. … settler colonialism has both negative and positive dimensions. Negatively, it strives for the dissolution of native societies. Positively, it erects a new colonial society on the expropriated land base—as I put it, settler colonizers come to stay: invasion is a structure not an event. In its positive aspect, elimination is an organizing principal of settler-colonial society rather than a one-off (and superseded) occurrence. The positive outcomes of the logic of elimination can include officially encouraged miscegenation, the breaking-down of native title into alienable individual freeholds, native citizenship, child abduction, religious conversion, resocialization in total institutions such as missions or boarding schools, and a whole range of cognate biocultural assimilations. All these strategies, including frontier homicide, are characteristic of settler colonialism.
>
> (Wolfe, 2006: p. 388)

Settler colonialism occurs in a context of Indigenous and First Nations people not ever having ceded their sovereignty and their ongoing resistance to settler colonial rule.

Criminal justice systems (notably policing and prison incarceration) have been and continue to be key ways through which settler colonial rule is enacted, and the law has a central role in shaping these practices as legitimate and just (see Cunneen, 2019b; Cunneen & Tauri, 2016; Cunneen, et al., 2013). Indigenous and First Nations people are detained in high numbers in police custody, prisons and juvenile detention throughout settler colonial nations and they have experienced considerable violence and premature death through policing and incarceration. Cunneen argues that in an Australian context institutional racism not only pervades the criminal justice system, but also social welfare policy (notably child welfare and social housing). While social welfare policy might appear prima facie equal in its application, Cunneen (2019a) proposes that it is instead structured to channel Aboriginal and Torres Strait Islander people into the criminal justice system. He states that: 'Paternalist policies which are based on coercion, by their very nature, require increased intervention and penalties for those who do not comply' (Cunneen, 2019a: p. 35).

The violence of criminal justice systems in relation to Indigenous and First Nations people is evidenced by high-profile reports such as the Royal Commission into Aboriginal Deaths in Custody (1991) in Australia and the more recent Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory (2017) in light of the torture of Aboriginal boys in juvenile detention. The recent National Inquiry into Missing and Murdered Indigenous Women and Girls (2019a, 2019b) in Canada has highlighted the gendered dimensions of settler colonial violence and death through criminal justice systems. Much of this conduct occurs in the course of routine, mundane policing, prison administration and summary court judicial decision-making exemplary of what is permitted by criminal legal doctrine and legal process. While in a minority of instances these harms are recognised through court decisions and government inquiries as unlawful and unjust, too often the very legal processes purportedly tasked with ensuring government accountability instead facilitate government inaction in the aftermath of outcomes of these processes and legitimate these harms variously as lawful, necessary, benevolent and just (see, for example, Razack, 2015). Bond (2017), who is an Aboriginal (Munanjahli) and South Sea Islander Australian, explains Aboriginal violence and death as central to the Australian settler colonial project:

> Where murder is not even considered manslaughter, where Black witnesses are deemed 'unreliable', where royal commission recommendations aren't implemented, where coroners refuse to exercise their power to make recommendations, and where White murderers of Black children enjoy the privilege of being unnamed for their own protection, it is blatantly clear whose lives really matter in Australia. …
>
> The settlers have long insisted that our death was destined, that our race was doomed, and that we, as a people, were vanishing. Our disappearance was inevitable because it was necessary to sustain *terra nullius*, the foundational myth of Australia. Black deaths rationalised White invasion and land expansion in Australia. …
>
> In our dying, rather than in our living, our bodies mattered most to the colonial project.

In the context of broader demands for self-determination and the fact that across many Anglo jurisdictions Indigenous sovereignty was never ceded, Cunneen points out that 'Indigenous peoples argue for transformation of criminal justice within the context of the collective right to self-determination—this is not a demand for the reform of justice but for its reconceptualization' (Cunneen, 2019b: p. 13).

Turning specifically to Indigenous and First Nations *disabled* people in the criminal justice system, it is important to note that many Indigenous and First Nations people reject diagnostic labels of disability. Individualised diagnoses broken down to specific internal characteristics do not reflect Indigenous and First

Nations cultural epistemologies and ontologies, nor do they capture the collective, intergenerational and structural nature of trauma experienced by reason of ongoing practices of white supremacy, settler colonialism and imperialism (for example, Avery, 2018; Raju & Penak, 2019; Westerman in Qadar, 2020). Moreover, as I elaborate in Chapters 3 and 4, disability diagnosis itself has a long history of being used to pathologise and dehumanise Indigenous and First Nations people and legitimate genocide and, in contemporary contexts, can be a barrier to collective self-determination and nation-building. Indeed, Million (Tanana Athabascan), writing in the context of Canadian First Nations, has argued that Western, medicalised discourses of 'trauma' and 'healing' that have structured reconciliation processes in Canada can fold back into rather than disrupt the very systems and practices of colonial control they are purportedly directed towards redressing (Million, 2013b). Some Indigenous and First Nations people instead propose a strengths-based approach to wellbeing. For example, Dudgeon and colleagues suggest an approach of 'social and emotional wellbeing', which is a multifaceted concept that acknowledges that a person's wellbeing is determined by a range of interrelated domains: body, mind and emotions, family and kinship, community, culture, Country, and spirituality (Dudgeon et al., 2017: p. 316; see also Avery's work on Indigenous culture as key to disability inclusion: Avery, 2018). Such approaches are situated in cultural safety work and collective self-determination rather than narrowly focused on individual diagnosis and coercive mental health treatment or disability case management, or even more purportedly progressive western ideas of individual empowerment and recovery.

With these caveats about disability in mind, research has noted that Indigenous and First Nations people who are disabled might be particularly exposed to violence and premature death. For example, a recent media investigation into ten years of Aboriginal and Torres Strait Islander death-in-custody cases in Australia found that:

> Mental health or cognitive impairment was a factor in 41% of all deaths in custody. But Indigenous people with a diagnosed mental health condition or cognitive impairment, such as a brain injury or foetal alcohol syndrome disorder, received the care they needed in just 53% of cases.
>
> (Allam, Wahlquist & Evershed, 2018)

Racialised minorities in Anglo jurisdictions—including diasporas formed from generations of slavery and indentured labour—are also subject to dynamics and forces of oppression pertaining to settler colonialism and imperialism including in the context of criminalisation and incarceration (Cunneen, 2019b). For example, disabled people who are Indigenous and First Nations people and other racialised minorities, including those not yet charged with criminal offences, are the target of discrimination, violence (including lethal violence) and harm by police officers (El-Enany & Bruce-Jones, 2015; Maqbool, 2018; Nicholson & Marcoux, 2018; Perry, 2017; Sins Invalid, 2016; Zhou, 2018). There are

innumerable examples of activism and resistance in the aftermath of policing killings or deaths in custody, including activism against police violence by Black Lives Matter; the 'Justice For Tanya Day' Facebook site maintained by children of Tanya Day, an Aboriginal (Yorta Yorta) woman who died in police custody in Australia; Latoya Rule's activism in relation to her daughter Rebecca Maher, an Aboriginal (Wiradjuri) woman who died in police custody in Australia; and Marcia Rigg's activism in relation to the death in police custody in England of her brother Sean Rigg, a Black man diagnosed with schizophrenia. These demonstrate the resistance to state violence against Indigenous and First Nations people and other racialised minorities and the depths of the impacts of such violence on bereaved family members and communities.

While not a focus of this book, there are also important intersections between the criminal justice, immigration and mental health systems in relation to racialised minorities. While some progressive scholars and activists have argued for medical treatment as a basis on which undocumented migrants can be released from immigration detention or be granted residency or citizenship (such as the recent activism in Australia around 'Medevac' law reforms which would enable transfer of individuals from offshore immigration detention to Australia for medical treatment (Dehm, 2019)), some disability scholars have drawn attention to the ways in which the mental health system simply exacerbates racialised violence. For example, Tam states:

> … while liberal health advocates have secured more funding for specialized detainees mental health services, they have failed to comprehend how Black people are already subject to early detention and crisis intervention, a fact that has directly contributed to the criminalization, detentions, and deportations, and deaths of Black migrants in Canada. I argue that increased mental health assessment and treatment of immigration detainees is not only paradoxical but further exacerbates conditions of distress by contributing to the expansion, rather than abolition, of the detention and deportation systems.
>
> (Tam, 2017: p. 340; see also Joseph, 2015; Soldatic & Fiske, 2009; Ticktin, 2011)

My discussion here of Indigenous and First Nations people and other racialised minorities in the criminal justice system emphasises that the injustices of criminal justice systems and criminal law are not only apparent along disability lines but implicate interlocking dynamics and forces of oppression.

Before moving on, I pause to emphasise this book's ambition to forge new sociolegal connections between disability, law and settler colonialism. Critical disability studies scholarship outside of law, in the past decade, has increasingly engaged with settler colonialism (see Ben-Moshe, Chapman & Carey, 2014; Chapman & Withers, 2019; Chen, 2012; Puar, 2017; Tam 2013). This disability scholarship builds on the foundational work of critical race theorists in making apparent the colonial, racial and white supremacist dynamics of criminal justice

systems and criminal law (see, for example, Davis, 2005; Roberts, 2017). In contrast, the scholarship on disability and law is marked by a relative absence of critical engagement with imperialism, settler colonialism and eugenics (see, however, Bielefeld & Beaupert, 2019; Steele, 2018d; see also Krishnarayan, 2017), including in relation to questions of redress for past injustices and how to support Indigenous and First Nations self-determination and nation-building. It is absolutely urgent and necessary for disability law scholars *across* Anglo jurisdictions to reflect on the settler colonial, imperial and racial dimensions of court diversion, and criminal and disability/mental health law more broadly. This is not only to address current oppression occurring through court diversion (and other areas of disability law) on Indigenous and First Nations populations and other racialised minorities. It is also to encourage tracing relationships between jurisdictions in terms of the form and reform of mental health law (noting that many settler colonies' mental health laws are based on those of England and Wales) and thus prompt scholarly debate about ongoing responsibility and accountability of settler colonial nations, *and particularly* imperial nations for injustice and violence that becomes possible and legitimate in law through disability (and related concepts of mental capacity, rationality etc.) over centuries.

Returning to the discussion of viewing court diversion through a prism of disability injustices in part associated with criminal justice systems, it is also important to note that the violence and deprivation characteristic of incarceration mean prison itself can disable individuals or exacerbate existing disabilities (Ben-Moshe, 2017: pp. 280–282; Ribet, 2010). As well as this material disablement, individuals become disabled through the criminal justice system in the sense of being officially categorised by police, courts or prisons as disabled. This recognition is typically contingent to legitimating specific interventions or outcomes, such as enabling solitary confinement or segregation in prison, or, alternatively, can sometimes be a basis for avoiding criminal justice intervention by shifting them from police responsibility to mental health systems.

Forensic mental health laws enable the transfer of disabled people in the criminal justice system between police custody and prisons into mental health facilities, and also provide for detention, coercive treatment, supervision and other forms of control of disabled people found unfit to be tried or not guilty by reason of mental illness. These laws have been criticised primarily because they enable indefinite detention of disabled people, including in prison and by reason of an absence of appropriate 'therapeutic' community options. In the Australian context, with state-based criminal law jurisdictions, forensic mental health laws in some states have been criticised for their particular impact on Aboriginal and Torres Strait Islander disabled people, including exposing them to violence and self-harm in prison and removing them from Country.

The preceding discussion demonstrates iterative relationships between disability and criminalisation and the indelible and harmful impacts criminal justice systems can have on disabled people who come into contact with police, criminal courts and prisons. For these reasons, from here on the book will use *criminalised*

disabled people to refer to disabled people in the criminal justice system. As will become more apparent throughout Chapters 3, 4 and 5, this term more accurately reflects the deep entanglements of criminality and disability in terms of how control by law becomes possible and legitimate *through* disability for certain bodies marked as unfit and deviant (including those who are racialised, poor and/or Indigenous or First Nations), rather than 'disability' (as an *a priori* state of being) and 'criminal justice' being separate phenomena. This term also draws attention to the ways in which disability itself becomes criminalised (such as through civil mental health contact with police, altercations in group homes or public expressions of mental distress and trauma being categorised as public nuisance). Moreover, it is important to note that whether people are materially or institutionally/managerially/legally 'disabled' is very much interconnected with forces and dynamics of oppression discussed above. For example, disabled people who are of racialised minorities might be particularly targeted for discrimination and other harms in prison, including because of racialised perceptions of their behaviour that invite particularly punitive rather than therapeutic responses to their disability. One English study on racial minority women in the prison system suggests that 'mental health issues of women from minority ethnic groups may be classed as "anger management", as a result of racial prejudice and stereotyping, and a black woman is more likely to be sent to segregation than to be referred for appropriate treatment' (Prison Reform Trust, 2017: p. 29).

Based on this brief survey of the harmful impacts of criminal justice systems, it is certainly not an overstatement to say that policing, incarceration and other criminal justice interventions in relation to criminalised disabled people are significant political issues, with people's safety, health and, indeed, lives literally on the line. Yet, this survey also illuminates that the injustices for criminalised disabled people of the criminal justice system cannot be reduced to the absence of disability and mental health services, nor can they be solved by channeling criminalised disabled people through a framework of legal doctrine and legal process built purely on diagnosed disability. I say this because the oppression underscoring these injustices—control, violence, precarity, discrimination and inequality—engages interlocking dynamics and forces of oppression that cut to the heart of broader, structural political issues of social justice, and the law actually makes possible and legitimate (rather than counters) this oppression through disability.

Oppression of criminalised disabled people through criminal law and criminal justice systems—including through court diversion—is but one example of a range of ways in which oppression of disabled people is *politically tolerated and accommodated in law*. Mitchell and Snyder (2005: p. 628) note that '[o]ne of the primary oppressions experienced by disabled people is that they are marked as perpetually available for all kinds of intrusions, public and private'. Across society (and beyond the criminal justice system), disability is a lawful and legitimate basis on which to circumvent equality and drastically shift the thresholds of violence and justice. This is so whether it be immigration restrictions (Dolmage, 2018; Joseph, 2015; Soldatic & Fiske, 2009), negligible and exploitative wages in 'sheltered

workshops' (Malaquias, 2019), non-consensual sterilisation (Steele, 2016), removal of children from disabled parents by child welfare services (McConnell & Llewellyn, 2000), prevention from bringing civil legal proceedings to seek damages for violence and other legal wrongs (ALRC, 2014: pp. 210–224), disqualification from serving as a juror (ALRC, 2013: pp. 234–242) and segregation (even caging) in schools (Steele, 2018b). In many of these examples, *perceived* criminality (often by proxy of 'race' or Indigeneity) provides further justification for different thresholds of violence and justice. Moreover, the rollback of the welfare state associated with neoliberalism has resulted in exposure of disabled populations to extreme precarity, including in relation to housing, income support, health services and legal assistance. Disabled people become increasingly constructed as pariahs and burdens on the state's finances. The significant impacts this has had are evidenced in the United Kingdom by the documented increases in disability hate crime and suicides of disabled people (Pring, 2017).

Disabled people experience higher rates of violence than non-disabled people (Hughes et al., 2012). While this violence pervades society, violence against disabled people in institutional settings (mental health facilities, large disability residential centres, nursing homes, group homes, supported employment) is a particularly significant issue (Cadwallader et al., 2018). This violence can be unlawful violence, such as physical or sexual assault by disability support workers or co-residents—the kind of violence we are familiar with in relation to non-disabled people (although disabled people, notably disabled women, experience higher rates of these forms of violence and institutional settings heighten vulnerability to such violence). Yet, as I discuss further in Chapter 2, this violence can also occur in ways only possible and legitimate for disabled people—what I first referred to (and other scholars and activists now refer to) as *disability-specific* lawful violence (see conceptual origins in Steele, 2013; Steele, 2014; and subsequent developments and applications in Steele, 2015; Steele, 2017b; Steele, 2017d; Steele, 2018b; Steele, 2018c). This violence consists of coercive interventions that are regulated by legal doctrine and legal process—including involuntary inpatient or community-based mental health treatment, involuntary detention in mental health facilities, non-consensual sterilisation and abortion, and restrictive practices (chemical, physical and mechanical restraint, and seclusion). Some might dispute my characterisation of disability-specific coercive interventions as a form of violence, on the basis these are done in people's 'best interests'. However, literature from survivor activists, Mad studies scholarship and critical disability scholarship supports this characterisation by emphasising the harms endured through the non-consensual interventions themselves and in the denial of autonomy and failure to acknowledge the worldview of disabled people (referred to as epistemic and symbolic violence). Indeed, some argue the harm of these interventions can far exceed that which the intervention was trying to prevent (for example, Daley, Costa & Beresford, 2019; Daya, 2019; Minkowitz, 2007; Roper, 2019). Often, violence involves an indiscernible mixing of unlawful and lawful violence, signalling the lack of legal oversight of these spaces. High-profile examples include the widespread abuse at

a privately run assessment and treatment unit for disabled people with complex needs, 'Winterbourne View' in England (BBC News, 2012), and recently at another unit 'Whorlton Hall' (BBC News, 2019; Plomin, 2019); abuse at the Huronia Regional Center in Canada (Rossiter & Rinaldi, 2018); abuse, including through use of electric shock 'treatment' of young disabled people, at the Judge Rotenberg Center in the United States of America (Adams & Erevelles, 2017; Pilkington, 2018); and sexual and physical assault in Australian disability group homes (McKenzie, 2014). Legal doctrine and legal process is complicit in multiple ways in violence perpetrated against disabled people in disability and mental health systems, including by purposing particular sites as institutions, enabling confinement of individuals in institutional settings, enabling specific interventions to occur in institutional or community settings, and limiting the scope of available redress and the ability of disabled people to seek this redress. In a related vein, institutionalisation and control of disabled people outside of prison occurs through the various large-scale disability institutions across Anglo jurisdictions that have not yet been shut down *and* through their progressive, 'deinstitutionalised' community alternatives such as group homes and boarding houses. Institutionalisation remains lawful and legitimate by reason of legal frameworks that both purpose these places for institutional use and enable the confinement of disabled individuals within them.

Attention to violence and institutionalisation through disability and mental health systems is vital to understanding the acute problems with court diversion. This is because, while court diversion is conventionally understood as protecting criminalised disabled people from harm in criminal justice systems (notably prison), this assumption overlooks that diversion moves people into a system where violence and control is pervasive. What is missing in the conventional approach to court diversion is any critical reflection on the injustices of disability and mental health services and coercive interventions. It is deeply troubling that court diversion might not only heighten the exposure of criminalised disabled people to violence and control beyond prison but, in positioning law as facilitating a humane alternative to the criminal justice system, might on a structural level also mask the violence of disability and mental health services and of the law. Treatment and support is indelibly bound up in criminalised disabled people's oppression, and this troubles the conventional view that access to disability and mental health services through court diversion is desirable use of law.

Viewed through the prism of a matrix of injustices traversing criminal justice and disability and mental health systems, the overarching concern is that, far from being a necessary and benevolent solution to the problem of overrepresentation of disabled people in the criminal justice system, court diversion might actually be sustaining a much larger and deeper problem of disability injustice. Moreover, there are various ways in which law (legal doctrine and legal process) and legal actors might be complicit in disability injustice, not least because of the various disability-specific legal processes and outcomes available to enact coercive intervention specifically on disabled people. An inter-system survey across criminal justice and disability/mental

health systems helps to show the interconnections across legal domains, sites and modes of control of and violence against criminalised disabled people. The book proposes that we need to disentangle disability from coercive interventions (whatever their proximity to the prison and even if they are in disability and mental health services) and be cautious about embedding disability as a special category in law.

An alternative approach: disability, debility and law

In light of the problems with and broader contexts of court diversion introduced above, this book critically reassesses court diversion through an interdisciplinary analytical frame. This frame is grounded in a Foucauldian approach to power in terms of biopolitics and, hence, is particularly attentive to how control and violence become possible and legitimate in law through disability—in the senses of diagnosed disability and disability and mental health treatment and support. It is vital at this point to emphasise that this book is not advancing universal claims about law's role in control and regulation of everyone in society. Rather, I will be making a very particular argument specifically about the nature of and justifications for control through law of criminalised disabled people. As I have already intimated and will go on to argue throughout the following chapters, this control, which is of a carceral, psychiatric and medical nature, is underpinned by assumptions about the inherent need for intervention in criminalised disabled people's bodies and lives and the assumed benefits of this intervention to the individuals and to society more broadly. It is in this context that I propose that the control that occurs through court diversion is violent, discriminatory and debilitating. I elaborate on the analytical framework in Chapters 3 and 4 through which I develop this argument. Here I introduce the primary moves in this frame that serve to set out this book's alternative approach to court diversion.

Disability

Critical disability studies scholars have challenged the conventional understanding of disability through a medical lens, or 'medical model', whereby disability is viewed as a diagnostic category that may be associated with the presence of conditions linked to genetic or structural conditions of the body. Viewed through a medical lens, characteristics of disability reside in the individual awaiting discovery through the expert process of diagnosis. In this medical approach, disability is something undesirable, a burden on carers and society. Disability evokes (at best) pity and (at worst) disgust and contempt. In this medical approach, collective efforts should be directed towards curing and rehabilitating individuals so they can try to live something approximating a non-disabled life. This medical approach does not comprehend disability in terms of political questions of power and oppression.

Disability activists have long argued that disability is a political issue and have contested segregation, discrimination, violence and inequality in public space,

workplaces and schools and through disability institutions of confinement. Drawing on this activism and insights from other anti-oppression scholarship, such as feminist, critical race and queer scholarship, critical disability scholars have argued that disability can be understood by reference to constructed norms of ability that reflect what is socially, politically and economically valued in society. Some scholars who take a Foucauldian approach argue that disability is a biopolitical category through which individuals are controlled or 'disciplined' and populations divided, organised and governed. In this way, disability is instrumentalised in specific power relations to enable control of certain bodies and populations that is otherwise not possible or legitimate. In court diversion, disability enables judges to order forms of coercive intervention not otherwise possible in criminal legal doctrine and legal process and, in turn, empowers disability and mental health services to act on these individuals.

Control and violence through disability do not run parallel and separate to settler colonial control and violence. Rather, the legal system as a whole is founded on legitimating the white, fit, settler subject and nation, such that it is vital to appreciate that through court diversion disability becomes a way to invigorate (as well as mask) ongoing practices and impacts of settler colonialism and imperialism, contribute to oppression of racialised minorities, and obstruct Indigenous and First Nations self-determination and nation-building. Through court diversion the law vindicates the settler colonial project, insofar as its legal framework built around disability pathologises Indigenous criminalised disabled people and positions settler colonial society and criminal justice systems as rescuer (irrespective that Indigenous sovereignty was never ceded), while eliding the ways in which they are complicit in constructing those people as 'abnormal'. In so doing, a critical approach to disability illuminates how court diversion is implicated in settler-colonial nation-building in ways that might not otherwise even be contemplated.

Debility

This book moves beyond arguing that court diversion merely subjects individual criminalised disabled people to control, violence and precarity. Instead, it argues that court diversion actually has structural impacts on criminalised disabled people as a population. Criminalised disabled people do not reflect an even cross-section of the community. They are subject to what Dowse (2018) refers to as 'corrosive social disadvantage'. The positioning of criminalised disabled people cannot be explained by reference to hierarchies of ability alone, because criminalised disabled people are abjected *within* the category of disability. Their subordination cuts deeper and is messier than being attributable to a 'pure' disability.

The argument about court diversion's impacts on criminalised disabled people as a population draws on the concept of 'debility' (Puar, 2017). Ultimately, not *all* disabled people are equally entitled to the positive entitlements that can come from being recognised as disabled. There is a bifurcation of disability; for some, disability can be celebrated through access to individual disability rights that

elevate one to a position of relative privilege; for others (including criminalised disabled people), disability is part of a messier combination of deprivation that positions individuals as undeserving of recognition of full citizenship and access to resources. This bifurcation matters because it challenges the assumption (which seems to underpin the support for court diversion) that explicit inclusion of disability in law can only ever be equally positive for all disabled people in giving them access to political and material entitlements. Debility is a process of positioning populations in an ongoing state of precarity *through* disability—of systematic deprivation and violence, 'the slow wearing down of populations'. This is contrasted to *capacity*, which is a basis on which disability becomes a means through which to realise individualised rights to freedom, equality and inclusion.

This book argues that law debilitates criminalised disabled people through court diversion. Court diversion can never 'capacitate' subjects into full citizenship because court diversion is premised on control and, in turn, violence and precarity. Moreover, access to resources through court diversion is conditional on subjection to control and violence and, hence, does not capacitate those who are diverted into free-market consumers exercising choice and control over their disability and mental health services and, ultimately, their bodies and lives. Thus, through court diversion law debilitates those who are diverted by subjecting them to control and violence and by giving them only conditional access to resources in an overarching legal framework explicitly based on situating them outside of criminal legal liberal citizenship. Court diversion debilitates all criminalised disabled people because it sustains criminal justice systems *and related laws* that enable the incarceration and control (in prisons and police custody) of criminalised disabled people who are not diverted. In a neoliberal context of self-directed funding and consumer choice, court diversion bifurcates disabled populations along lines of criminality and, in so doing, removes the opportunity for self-direction and choice from criminalised disabled people by coupling their purported access to liberty, resources and inclusion with carceral control outside the prison. Court diversion stratifies disabled populations in a deinstitutionalisation era to sustain the ongoing inequality and relative deprivation and precarity of those who are criminalised, even in the face of disability rights.

Carcerality

Understanding the full extent of the debilitating effect of law through court diversion requires moving beyond seeing court diversion as a standalone, isolated system of control to seeing how it serves to forge connections between criminal justice and disability and mental health systems and move individuals between them, effectively consolidating the oppression occurring in each of these two systems. Goffman's (2017) theorising of the 'total institution' highlights common features of control and degradation across a variety of places of confinement. Foucault's (1979) theorising of carceral (prison-like) control shows how control can exceed a specific place of confinement and, instead, circulate in power relations. My use in this book of the concept of *carcerality* makes apparent multiple