Travelling Our Way or No Way!: The Collision of Automobilities in Australian Northern Territory Judicial Narratives

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Abstract

The regulation of driving and cars has taken on increasingly criminal guises. Apart from the role of insurance companies and motor vehicle registries, criminal law has stepped in to penalise drivers and car owners through more draconian measures. This article examines the problems that this presents for Indigenous drivers whose concepts of automobility are at odds with those of the nation state. It details the judicial narratives of this collision of automobilities in sentencing Indigenous drivers to argue that the Australian 'settler state' is continuing the practice of using mundane regulatory laws to dismantle and assimilate Indigenous communities.

Keywords:

Automobility and the law, driving offending, Indigenous legal relations, criminal sentencing,

Introduction

This article examines the collision of Indigenous concepts of the motor vehicle and the traffic laws of the settler state as illustrated in judicial narratives. It draws upon appeal decisions of

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the Supreme Court of the Northern Territory that consider sentencing remarks by the lower criminal courts in relation to road traffic and motor vehicle offenders. As a source of law these are unremarkable documents; routine and short in length demonstrating a superior court exercising supervisory jurisdiction over a lesser tribunal in what are, from this perspective, minor criminal matters.

However, from the perspective of documenting and representing the collision of automobilities they are rich texts that show the enacting and embodiment of Indigenous automobility (obligations to drive, shared vehicle ownership), and the strategies of denial used by the settler state (moral outrage, archives of transgression). Through the universalising the settler state's expectations of individual responsibility, the courts identifies Indigenous automobility as a risk that needs to be managed by punishment (usually imprisonment). However, behind the punitive justifications of minimising risk, recidivism, and dangerousness is the colonial legacy of controlling and managing Indigenous laws and practices.

This article is in three sections. The first section maps the disciplinary terrain of Automobility and Law. It is argued that studies on laws relating to vehicles and automobility have tended to be focused on homogenised car cultures, and the laws discussed were the state-centric legalities of the formal legal system. It argues that this article (with its focus on Indigenous people, their laws and automobilities) expands the scope of Automobility and Law to plural and contested car cultures and legal spaces. This section goes on to overview the Supreme Court of the Northern Territory appeal decisions in relation to traffic, driving and motor vehicle offences and the method used to identify the judicial narrative relating to automobility in the decisions.

The second section sets out the findings of the study. The decisions illustrate a collision of automobilities. They document practices of Indigenous automobility. Disclosed are the obligations to drive kin and conceptions of vehicles as a collective and shared resource. Also encapsulated in the decisions are judicial strategies that deny Indigenous automobility. Evident is condescension and moral outrage at the behaviour of the driver and deployment of archives of past transgression. Ultimately, within the decisions there is a brutal universalisation of settler state's expectations of individual responsibility for self and vehicles.

The third section traces the consequences of the collision of automobilities as revealed in the decisions. Behind the hyperbole of recidivism and dangerousness the settler state (true to form as a 'settler state') can be seen furthering a colonial project. In previous eras the motor vehicle was used by the settler state as tool that allowed the intervention into the lives of Indigenous families and the removal of children. This study shows that by targeting Indigenous automobility the settler state is using mundane regulatory laws and practices to continue the project of dismantling and assimilating Indigenous communities. This study exposes the 'subtle and extensive forces that saturate the everyday mundane actions and policies that shape the world in the interests of White people'.²

Automobility and law

Law and car culture

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² Gillborn (2015) p 278.

In recent year there has begun to emerge an embryonic literature of ‘Automobility and Law’. This literature has contributed to understandings of relationships between vehicles, humans, social meaning, regulatory acts and physical space.³ Automobility refers to systems of movement that ‘[include] cars, car-drivers, roads, petroleum supplies and many novel objects, technologies and signs.’⁴ Its regulatory network comprises insurance schemes; traffic rules, and ensuing criminal penalties; regulations for driver licensing, car registration, urban planning, road construction and maintenance; consumer safety, and emission standards.⁵ The state and its legal and regulatory apparatus have from the earliest eras of the motor vehicle sought to minimise its real and perceived disruptive effects on public order.⁶ Due to the prevalence of automobility and state responses, Guzik describes the motor vehicle as ‘a primary object that mediates people’s relationship with legal authorities.’⁷

While literature in Automobility and Law deepens the manifold and many intersections of law and driving, it is still embedded in three liberal-normative presumptions: that *driving* is conducted on public roads for the purpose of human travel in space; that *drivers* are autonomous individuals⁸ who share common cultural assumptions about driving and motor vehicles, and that *cars* are private commodities (albeit with collective uses) obtained for the purpose of private travel and identity.⁹ This produces a dichotomy between *freedom* associated with driving on public roads and state *restrictions* that control driving behaviour in public. This

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³ Simon (1997), p 522; Tranter (2003), p 67; Tranter and Martin (2014), p 713; Guzik (2013), p 523; Doyle and Tranter (2017).

⁴ Urry (2004), p 25.

⁵ Butler (2008), p 470; Simon (1997); Guzik (2013); Tranter and Martin (2014), pp 713-15).

⁶ Tranter (2005); Emsley (1993), 357; Guzik (2013) pp 530-532.

⁷ Guzik (2013), p 526.

⁸ This autonomy in the car may be contrasted with constraints outside of the car. For example, women drivers express their autonomy in escaping from an oppressive domestic sphere or social landscape. See Garvey (2001), p 133.

⁹ Gartman (2004), pp 169,192.

article will highlight that this binary has limitations for conceptualising the relationships between First Nations drivers and the nation state.

Nonetheless these assumptions can be seen in recent Automobility and Law studies. Guzik's examination of the Mexico's Public Registry of Vehicles focuses on the automation of roadways through digital surveillance of vehicles.¹⁰ He overviews how the Public Registry of Vehicles has established these 'surveillant assemblages' to ensure compliance with state law in a context whereby police officers have proven ineffective and corrupt, and many vehicles in Mexico are foreign vehicles purchased in the United States.¹¹ Guzik suggests the need for the state to regulate and police the roads is particularly significant in the Mexican context of the War on Crime where the mobility of the motor vehicle is essential to the operations of criminal drug cartels.¹² In Guzik's study the freedom that the motor vehicle accords organised crime, and the unreliability of the police, has seen the state to turn to surveillance assemblages that directly monitors and regulates vehicles on the road.

Tranter's study into how Australian social security administrators use a recipient's vehicle as an indication of the recipient's deservingness of social security benefits also shows these basic assumptions.¹³ Tranter argues that the social meanings within Australian culture about certain makes and models of motor vehicles have become encoded into law.¹⁴ Like Guzik, Tranter's focus is on state law and forms of state surveillance of motor vehicles; although the law in his study did not directly concern the road and driving, and the surveillance identified was the prejudices of ascribing negative characteristics to individuals seen in certain motor vehicles.

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¹⁰ Guzik (2013), pp 539-540.

¹¹ Guzik (2013) pp 535-536.

¹² Guzik (2013) pp 537- 538.

¹³ Tranter (2014).

¹⁴ Tranter (2014), p 726.

What can be seen in Tranter's study, as was identified in Guzik, is the dichotomy where the freedom of the motor vehicle (for movement and for self-expression) is a site of state regulation.

However, what has been absent in Automobility and Law generally and in Guzik's and Tranter's studies specifically, is the contestation of the law of the state and its conflict with different cultures of automobility. It is exactly these complexities that are emphasised in this study of the collision of Indigenous and Western automobilities in the judicial narratives from the Supreme Court of the Northern Territory.

Judicial narratives of car use from the Supreme Court of the Northern Territory

The Northern Territory comprises the central northern portion of the Australian continent; stretching from the islands in the Arafura Sea and the northern coastline, including Kakadu National Park, that hugs the Timor Sea, down to the 'red centre' of Uluru. Within the Australian federal constitution the Northern Territory is not a state, but since 1978 has been a self-governing 'territory' under the auspices of the Commonwealth government.¹⁵ It is a vast area, 1.42 million km², over double the size of Texas and six times the size of the United Kingdom, with a population in July 2017 of 246 100.¹⁶ Significantly, at the last Australian census on 30 June 2016, 74 509 identified as Indigenous¹⁷ confirming past trends that the Northern Territory has the highest percentage of Indigenous inhabitants of all Australian states and territories.¹⁸ It is a jurisdiction of sparse settlement with two major towns of Alice Springs in the centre and Darwin, the capital, on the northern coastline. A large percentage of the Indigenous inhabitants

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¹⁵ Williams (2012); Carne, (2013).

¹⁶ Australian Bureau of Statistics (2017a) p 6).

¹⁷ Australian Bureau of Statistics (2017a) p 32.

¹⁸ Taylor and Bell (2015).

reside away from these towns in settlements that were established as government or mission stations from the late nineteenth century, or in even smaller communities on ‘country.’¹⁹ Up until the 1970s, a substantial portion of the Indigenous population worked on cattle stations and sustained the profitability of this industry for almost a century.²⁰ Within the Northern Territory alone, there are over 130 separate Indigenous nations that have survived for thousands of years. Although many have been moved off their country, many Indigenous nations have maintained their languages, laws and cultural practices; notwithstanding substantial change and trauma from government policies of relocation, removal of children and segregation.²¹

To enforce settler administration of justice on these ancient lands and nations, the Supreme Court of the Northern Territory was established in 1911.²² It comprises a Court of Appeal, a Court of Criminal Appeal and a Trial Division. One function of the Court is to hear appeals from the lower level criminal court. Prior to 2015 the first tier criminal court in the Territory was the Court of Summary Jurisdiction presided over by magistrates. In 2015 this court was amalgamated with the first tier civil court to form the Local Court with Judges, exercising criminal and civil jurisdiction.²³ It is from the exercise of this appellate jurisdiction, precisely appeals from the Court of Summary Jurisdiction/Local Court on sentences imposed under the *Traffic Act 1987* (NT), that is the source of material for this article. From the perspective of Australian traffic and criminal law the decisions analysed are common and unremarkable, showing the superior Supreme Court determining whether the sentence imposed on the driver

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¹⁹ ‘Country’ is a term used by Indigenous Australians to refer to their traditional or customary land and/or land that is seen by Indigenous people as belonging to them either without settler state recognition or with settler state recognition through mainstream land law or native title or statutory aboriginal land grants. See Fredrick, (2011), pp 82-83; Sutton (1995).

²⁰ Anthony (2004).

²¹ The history, legacy and continual manifestation of the colonisation of the Northern Territory is detailed in section three below.

²² Mildren (2011).

²³ The Court of Summary Jurisdiction presided over by magistrates was amalgamated with the previous civil Local Court to form a new Local Court by the *Local Court Act 2015* (NT) s 84.

was appropriate. The decisions were identified through keyword searches on the Australian Legal Information Institute (AustLII) online repository²⁴ and the online archive of decisions of the Supreme Court of the Northern Territory²⁵, following an approach used in other studies.²⁶ Various keywords were used, including ‘traffic act’, ‘driving under the influence’, ‘unlicensed’, and, ‘unregistered.’ This produced a raw list of decisions. Each decision was then perused and false positives eliminated. This produced the list of decisions for analysis. The earliest dated decision was in 1995 and the latest was delivered in 2017.

The list was then divided into two groups: decisions involving an Indigenous driver and decisions involving a non-Indigenous driver. Indigeneity was identified two-ways. First, the text of the decision details the lawyer for the driver. Indigenous drivers were represented by the various Aboriginal Legal Services²⁷ while the non-Indigenous drivers were represented by either private practitioners or the Northern Territory Legal Aid. Identifying the lawyer is a proxy for indigeneity. While it was very unlikely that a non-Indigenous driver was represented by an Aboriginal Legal Service; Northern Territory Legal Aid and private practitioners do represent Indigenous drivers. To reduce error, the second approach was a careful examination of decisions where the driver was not represented by an Aboriginal Legal Service, to see if there were any disclosing comments, such as statements regarding membership of an Indigenous community, or of a relation to country or about kin obligations, that would suggest that the driver was Indigenous.²⁸ Through this process we are confident regarding the

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²⁴ AusLII <<http://www.austlii.edu.au/>>. Accessed 31 January 2018. On Austlii see Greenleef, Mowbray and Chung (2011).

²⁵ Supreme Court of the Northern Territory Decisions <<http://www.supremecourt.nt.gov.au/decisions/>>. Accessed 31 January 2018.

²⁶ Tranter and Kelly (2014), p 32; Wagstaff and Tranter (2014), p 172.

²⁷ A list of these services can be found at Northern Territory Legal Aid Commission, Useful Contacts <https://www.legalaid.nt.gov.au/2016/07/05/aboriginal-legal-aid-services/>. Accessed 31 January 2018.

²⁸ For example on basis of looking at lawyers the driver in *Choolum v Heath* [2017] NTSC 41 was initially considered non-Indigenous, as he was not at the Supreme Court represented by an Aboriginal Legal Service. However, a closer examination of the text of the decision revealed that the driver was Indigenous, he was

indigeneity of the drivers, especially identifying Indigenous drivers. There is a small chance that we coded an Indigenous driver non-Indigenous.

There were 49 decisions in total; 36 decisions involving an Indigenous driver and 13 a non-Indigenous driver. This was the total of available decisions concerning driving matters. The predominate offences were various driving under the influence offences under Part V, and offences relating to driving while disqualified, driving without a license, and driving an unregistered vehicle under Part VI of the *Traffic Act 1987* (NT).

Having assembled the two sets of decisions, they were then examined to identify the collision of automobilities. This way of reading legal decisions to reveal social practices is novel. As such the focus was not on the formalist legal reasoning of the judge. Others have recently criticised the sentencing rationales of the Northern Territory courts as it relates to driving while disqualified offences.²⁹ Rather the interest was on the narratives of car use, and the interactions between the settler state and Indigenous drivers documented within the decisions. In particular, the focus was on the parts in the decision where the judge summarised the facts of the matter or extracted the comments of the Court of Summary Jurisdiction/ Local Court or discussed the driver's use of a motor vehicle directly. Through a process of identifying, extracting, coding, and then reviewing and repeating, material from the decisions regarding law and automobility in the Northern Territory was identified. This included documentation of the Western expectations of car use by the settler state and actual examples of Indigenous car use. Most

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represented by an Aboriginal Legal Services at Local Court and, while not an exclusive illness to Indigenous people, he suffered from a renal condition and had as a previous address the predominately Indigenous community of Ti Tree. *Choolum v Heath* [2017] NTSC 41 Hiley J [25]. On renal disease in Northern Territory see Hoy (2014).
²⁹ Murphy and Moodie (2016).

significantly what was also identified from the texts was the relations and interactions between Western and Indigenous car uses.

Collision of automobilities

Written court decisions are the end point of a judicial process that involves formalising a dispute through use of relevant forms, the tendering and testing of evidence, and submissions made by the parties. Written court decisions are, therefore, not necessarily an Indigenous representation of automobility. Nonetheless, the decisions highlight differences between Indigenous and non-Indigenous expectations and practices of automobility and reveal the subjectivity of the settler legal discourse. The decisions disclosed Indigenous automobility as involving obligations to drive family and kin, and regarding of vehicles as collectively shared resources. Conterminous with this disclosure, the decisions contained strategies that denied Indigenous automobility. These strategies involved condescending moral outrage at the behaviour of the offender and deployment of archives of past transgressions. Ultimately, what was disclosed is the brutal universalisation of settler state expectations of individual responsibility for self and vehicles.

Indigenous automobility

Obligation to drive.

The foremost aspect of Indigenous automobility in the Indigenous decisions related to the explanations of why the Indigenous person was driving. These were usually documented in matters where the Indigenous driver was convicted of unlawfully driving while unlicensed, or driving an unregistered, uninsured, unregistered, or unsafe vehicle. The offences of driving

unlicensed, uninsured, and unregistered often occur simultaneously for Indigenous offenders and are referred to as the ‘driving trifecta.’³⁰

The explanation most recorded in the Indigenous decisions was that for Indigenous people driving is a means of assisting family and kin with mobility, and is considered obligatory. Most of the decisions involving Indigenous drivers disclosed that when police pulled over the vehicle it was occupied with passengers. In some of these decisions the passengers remained abstract and anonymous. In *Lalara v Malogorski* ‘there were two passengers in the vehicle’³¹ and in *Cincaid v Cahill* ‘there were also two children as passengers in the rear passenger seat’.³² In *Dixon v Mumu* ‘the respondent was observed driving a Ford car in a southerly direction...there were four occupants of the vehicle’.³³ However, in most a family or kin relationship between driver and passengers was disclosed. In *Marshall v Court* the driver was documented as ‘driving, with his wife as a passenger’³⁴ and in *Breadon v Nicholas*, Mildren J notes that ‘[o]n the evening of the offending, the appellant had been at a 24-hour shop with a cousin...apparently, the aunt was also with them’.³⁵ This driving a vehicle with family was not a feature of the non-Indigenous decisions. In those decisions the driver was either alone³⁶ or in the company of others described as ‘friends’³⁷ or simply a ‘passenger’.³⁸

The striking distinction between the Indigenous and non-Indigenous decisions was the justifications given for driving the motor vehicle. Within both Indigenous and non-Indigenous

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³⁰ Anthony and Blagg (2012), 12.

³¹ *Lalara v Malogorski* [2012] NTSC 53 Mildren J, [2].

³² *Cincaid v Cahill* [2009] NTSC 40 Olsson AJ, [13].

³³ *Dixon v Mumu* [2005] NTSC 55 Olsson AJ, [14].

³⁴ *Marshall v Court* [2013] NTSC 75 Mildren AJ [6].

³⁵ *Breadon v Nicholas* [2010] NTSC 70 Mildren J, [9].

³⁶ *Forrester v Nicholas* [2012] NTSC 61; *Keil v Westphal* [2012] NTSC 11; *Kilvington v Burgoyne* [2005] NTSC 46; *Davis v Howley* [2003] NTSC 6.

³⁷ *McMahon v O’Neill* [2015] NTSC 58 Hiley J, [6].

³⁸ *Patterson v Balchin* [2007] NTSC 19 Angel J [3].

decisions there were often documented statements (attributed to the driver) explaining or justifying why they were in control of the vehicle. Within the Indigenous driver decisions these related strongly to the passengers; that the driving was fulfilling an obligation to help a relation's mobility. There were some distinct patterns. The first was that the driving happened because a relation asked. In *Breadon v Nicholas* it was to take the aunty home.³⁹ In *Dixon v Mumu* it was to take his sister-in-law to 'BP Camp' [also known as Mpwetyerre].⁴⁰ In *Henda v Cahill* the driver 'was driving members of his family home from a birthday party.'⁴¹ In *Small v Nash* the driver was driving because he was requested to do so by his father.⁴² In *Choolum v Heath* the driver, repeatedly intercepted with passengers in the vehicle, would justify his unlicensed driving on the need to provide transport for others.⁴³ In *Thomas v Henderson* the driver 'told police that he had been drinking at the Bagot Community and was travelling to the barbecue area at Lake Alexandra to pick up relatives.'⁴⁴ The relationship between driving and alcohol consumption in *Thomas v Henderson* opens to the second pattern: that the obligation to drive was because the driver was seen as sober or the most sober of the group. In *Carcuro v Norris* the Indigenous driver was convicted of the driving trifecta under the *Traffic Act 1987* (NT), driving while disqualified (s 31(1)), driving an unregistered vehicle (s 33(1)), and driving an uninsured vehicle (s 34(1)). Southwood J contextualised these offences:

The appellant and a number of his friends had travelled from Darwin to Katherine in the Ford sedan ... On the evening of 11 October 2006 the appellant's friends drunk some beer and they became intoxicated. The appellant did not drink any beer ... After they finished drinking beer his friends decided that they wanted to go

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³⁹ *Breadon v Nicholas* [2010] NTSC 70 Mildren J, [9].

⁴⁰ *Dixon v Mumu* [2005] NTSC 55 Olsson AJ, [17].

⁴¹ *Henda v Cahill* [2009] NTSC 63 Riley J, [6].

⁴² *Small v Nash* [2001] NTSC 34 Thomas J, [13].

⁴³ *Choolum v Heath* [2017] NTSC 41 Hiley J [3, 5].

⁴⁴ *Thomas v Henderson* [2001] NTSC 54 Martin CJ, [5].

fishing and they asked him to drive them to a place where they could fish. Initially the appellant refused to do so. The appellant's friends then said that if he did not drive them they would drive the Ford sedan themselves. As he believed that there may be a motor vehicle accident if one of his friends drove the appellant relented and he drove.⁴⁵

In other decisions the driver had also been drinking: 'the appellant had been drinking with other people who had put him under some pressure to drive them back home.'⁴⁶ In *Lalara v Malogorski* the driver 'was asked to drive by the other persons there because they were so drunk that they were unable to drive, and he was the only one with a license. It was submitted that he "succumbed to the pressure to drive."⁴⁷ Chief Justice Martin in *James v Burgoyne* called this the 'all too familiar scenario he was asked to drive because he was the least affected by alcohol of those present.'⁴⁸

The third, and least common pattern, was an explanation proffered for the driving pertaining solely to the driver. In *Lynch v Dixon* the driver's explanation to why he was driving was simply "To get a feed"... "I was hungry. That's all"⁴⁹, in *Garling v Firth* it was to 'get a few beers' for a Christmas party⁵⁰, and in *Nadjulurru v Hales* a drunken dispute with family triggered a dangerous driving rampage.⁵¹ In *Morris v Heath* the claim went one further, the Indigenous man arrested while leaving the vehicle was convicted of driving under the influence claimed that he was not the driver at all.⁵² In this, the third pattern of explanations mirrored the non-

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⁴⁵ *Carcuro v Norris* [2007] NTSC 18 Southwood J, [7].

⁴⁶ *Kelly v Winzar* [2006] NTSC 59 Olsson J, [10].

⁴⁷ *Lalara v Malogorski* [2012] NTSC 53 Mildren J, [4].

⁴⁸ *James v Burgoyne* [2003] NTSC 52 Martin CJ, [3].

⁴⁹ *Lynch v Dixon* [2014] NTSC 45 Olsson AJ, [12].

⁵⁰ *Garling v Firth* [2016] NTSC 41 Hiley J, [4].

⁵¹ *Nadjulurru v Hales* [2003] NTSC 11 Thomas J [33].

⁵² *Morris v Heath* [2017] NTSC 79 Mildren AJ [4-5].

Indigenous decisions where the motivations for driving tended to relate to the driver. In *Forrester v Nicholas* the driver was driving home after a work function.⁵³ In *McMahon v O'Neill* the driver drove to 'get a chicken because he was hungry'⁵⁴ and in *Davis v Howley* the driver was driving to a friend's place.⁵⁵

However, foremost in the Indigenous decisions was that driving was occurring because of familial or kin obligation that could not be tempered by the regulations of settler state law. Unlike what was recorded in the non-Indigenous decisions, driving was generally for someone else and the decisions tend to disclose that someone else as a family member. In *James v Burgoyne* the appellant was the least intoxicated and 'forced' by his brother-in-law to drive him and other persons. Below is an extract of the interchange between the arresting police and the driver in this case:

When asked why he had been driving and drinking, he replied: 'That bloke [brother-in-law] he been forced me'. Further investigations revealed he was not the holder of a driver's licence. His excuse for driving without a licence was, 'That bloke with the yellow cap, he forced me to drive that car'. When it was found that the vehicle was unregistered and did not have a current compensation contribution, he replied, 'That bloke with the yellow cap he forced me to drive'.⁵⁶

What this quote shows is the strong sense of obligation towards facilitating the mobility of family. Anthropological studies have documented that obligations to drive kin, who sits where in a vehicle, who a driver can say no to, and who they cannot refuse are highly dynamic and forceful within Indigenous communities in the Northern Territory.⁵⁷ The sense of being

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⁵³ *Forrester v Nicholas* [2012] NTSC 61 Blokland J, [10].

⁵⁴ *McMahon v O'Neill* [2015] NTSC 58 Hiley J, [10].

⁵⁵ *Davis v Howley* [2003] NTSC 6 Thomas J, [15].

⁵⁶ *James v Burgoyne* [2003] NTSC 52 Martin CJ, [2].

⁵⁷ Stotz (2001); Altman and Hinkson (2007), pp 181-203.

compelled (if not bullied) that might be seen in the quote by a ‘brother-in-law’ resonances with the ‘demand sharing’ and ‘humbugging’ around access to, and use of, resources, particularly motor vehicles, within Indigenous communities.⁵⁸ Anthropologists doing fieldwork with the Kuninjku of Western Arnhem Land have observed vehicles being destroyed ‘as a way of resolving the stress that can quickly accumulate in conflicting demands.’⁵⁹

In the above quote from *James v Burgoyne* what is presented is the imagery of hatted authority competing for the driver’s obedience, with the then khaki hats⁶⁰ of the Northern Territory police officers and the yellow cap of the driver’s brother-in-law. However, for the driver it is law embodied by the ‘bloke in the yellow cap’ that he is accountable to. Further, what this quote shows is how the cultural context of the driving meant that the driver of the vehicle not only saw his driving as involving something more than just his responsibility but that the condition and legalities of the vehicle were also something that went beyond his sole responsibility. This sense that vehicles are collective resources was another theme within the Indigenous decisions.

Vehicle as collective.

Throughout the Indigenous decisions drivers were being subject to the settler state’s criminal laws because of the condition and legalities of the vehicle that they were observed driving. The non-Indigenous decisions Ownership and responsibility for the vehicle was often identified as collective. In some decisions the collectiveness of the vehicle was acknowledged in the text of

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⁵⁸ Myers (1989), pp 23-26; Stotz (2001), pp 233-239; MacDonald (2000) pp 87,93-101; Gerrard, (1989).

⁵⁹ Altman and Hinkson (2007), p 195.

⁶⁰ Until 2012 police officers in the Northern Territory worn khaki uniforms; this was changed in 2012 to be blue uniform similar in style and colour of the police forces from the States of Queensland and New South Wales Australian Broadcasting Corporation News (2011).

the decision. In *Marshall v Court* the driver was in what was described as ‘a family-owned Toyota Spacio’.⁶¹ In many decisions the vehicles were identified as belonging to a family member; it was the driver’s cousin’s vehicle⁶², or the sister-in-law’s vehicle.⁶³ In other decisions, the ownership and legal responsibility for the vehicle was not disclosed – the driver was simply described as driving a vehicle. For example, in *Tolson v Burgoyne* the driver was convicted of driving an unsafe vehicle but there was no indication as to who was the owner of the vehicle.⁶⁴ In *Small v Nash* the driver was appealing three separate traffic convictions relating to three different matters, all involving different vehicles.⁶⁵ However, the ownership of any of the vehicles was not disclosed. In *Morris v Heath* all that the police observed was a ‘white Falcon sedan.’⁶⁶

That Indigenous automobility involves complexity around ownership of vehicles has been well documented by Gertrude Stotz in her fieldwork with the Warlpiri in the Northern Territory. She observed how gender, kin relations, and individual social entrepreneurialism meant that ‘assignment of ownership to one Boss and accumulated ownership rights through use gives the Toyota a composite identity’⁶⁷ that was negotiable and in-flux. Even in decisions where legal ownership and responsibility for a vehicle was clearly identified with the Indigenous driver, collective and kin relationships were also emphasised. For example in *Dickson v Houseman & Dickson v Harland* the Indigenous driver’s lawyers submitted that the driver should not be given a custodial sentence as imprisonment would mean that the driver would not be earning

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⁶¹ *Marshall v Court* [2013] NTSC 75 Mildren AJ, [3].

⁶² *Breadon v Nicholas* [2010] NTSC 70 Mildren J, [9].

⁶³ *Dixon v Mumu* [2005] NTSC 55 Olsson AJ, [17].

⁶⁴ *Tolson v Burgoyne* [2003] NTSC 46 Martin CJ, [6].

⁶⁵ *Small v Nash* [2001] NTSC 34 Thomas J, [5].

⁶⁶ *Morris v Heath* [2017] NTSC 79, Mildren AJ [5].

⁶⁷ Stotz (2001), p 234.

income resulting in the family's vehicle being repossessed and greatly reducing the family's mobility.⁶⁸

This diffusion of ownership was not a feature in the non-Indigenous decisions. In these decisions whoever owned and was responsible for vehicles was clearly demarcated. In *Davis v Howley* the driver was driving 'her car'.⁶⁹ In *Kruger v Kidson* it was 'his car'.⁷⁰ In *Paterson v Balchin* it was the young driver's anxiety around responsibility for 'the family car' that caused the offences.⁷¹ This is not to suggest that denotations of ownership of the vehicle with the driver were entirely absent from the Indigenous decisions.⁷² However, what was disclosed in the Indigenous decisions was greater complexity regarding individual identification with vehicles. This complexity is well illustrated by *Ross v Toohey* where Mildren J related the trigger for offences. Having been drinking and then subject to a physical assault by persons unnamed, the driver:

...called upon relatives whom he asked to drive him home. These relatives were looking after his car whilst his licence was suspended and were permitted to use the car in return for which they undertook to drive him wherever he wanted to go. For some reason, they refused to drive him home. The appellant angrily grabbed the keys to drive himself home but his intoxication and rage took over which led to the present offending.⁷³

This quote shows contestations of individual ownership of vehicles for Indigenous drivers. The transparency that was evident in the non-Indigenous decisions of a clear relationship between

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⁶⁸ *Dickson v Houseman & Dickson v Harland* [2016] NTSC 28, Kelly J, [9, 16].

⁶⁹ *Davis v Howley* [2003] NTSC 6 Thomas J, [12].

⁷⁰ *Kruger v Kidson* [2004] NTSC 24 Mildren J, [5].

⁷¹ *Patterson v Balchin* [2007] NTSC 19 Angel J [12].

⁷² *Ivinson v Parsons* [2011] NTSC 19 Blokland J, [7]; *Jongmin v Phipps* [2014] NTSC 63 Barr J [2].

⁷³ *Ross v Toohey* [2006] NTSC 92 Mildren J, [12].

vehicle-driver-owner is rendered more complex in the Indigenous decisions. The material recorded in the Indigenous decisions suggests that not only is the act of driving regarded as involving collective obligations and responsibilities, but access to vehicles similarly has a cultural and collective mediation. This cultural and collective dimension demarks a particular Indigenous form of automobility that seems quite different to Western norms and expectations.

The gap between Indigenous automobility and Western norms can be seen in the strategies used by magistrates and judges to deny Indigenous automobility. Two strategies were paramount. The first was the deployment of moral outrage. The second was recounting the archives of past transgressions.

Strategies of denial

Moral outrage.

The moral tone in the language of the magistrates and judges in the decisions involving Indigenous drivers was striking in its condemnation and reprimand. There were several targets of this moralising. The first was the moral character of the Indigenous driver. An Indigenous driver was described as ‘making these stupid decisions about driving cars’.⁷⁴ Another was spoken about as a ‘drunken idiot’ endangering the lives of other road users.⁷⁵ A third’s lack of honesty was emphasised: ‘He deliberately screwed on false number plates to the motor vehicle, knowing it was unregistered and uninsured, put them on there, calculated to deceive, and drove off.’⁷⁶ In *Marshall v Court* the morality was that of an untrustworthy oath-breaker:

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⁷⁴ *Glenn v Dixon* [2005] NTSC 33 Riley J, [7] quoting the sentencing magistrate.

⁷⁵ *Small v Nash* [2001] NTSC 34 Thomas J, [13] quoting the sentencing stipendiary magistrate.

⁷⁶ *Lynch v Dixon* [2014] NTSC 45 Olsson AJ, [26] quoting from the sentencing deputy chief magistrate.

...you came to this court on the 21 August last year and you made a solemn promise to the court that you would stay out of trouble for 12 months. You did so knowing full well that if you break that promise you'd go to gaol for 28 days or a part thereof. You broke your promise 3 months and 10 days into your 12 month promise. What that indicates to the court is that the promise wasn't worth anything, you didn't take it seriously and possibly had little or no intention of keeping your promise.⁷⁷

This personal moral judgement crossed into criminal law lexicon. One driver was described as having 'steady offending over the years'⁷⁸, another as a 'serial offender when it comes to traffic offences'⁷⁹, while a third was criticised because he 'doesn't display much remorse at all'.⁸⁰

These terms, associated with criminal law, link with the second identifiable focus of moralising in the decisions where the judges and magistrates considered the Indigenous driver's relation to settler state law. A driver was spoken about as having 'shown a continuing disregard for the law over a significant period'⁸¹, another had 'demonstrated some degree of contempt for what the Court had said to him on previous occasions'⁸², and 'he's got to understand the law has got to prevail. He can't keep driving a motor vehicle in defiance of court orders.'⁸³ A further driver was told 'that her cavalier attitude could not be tolerated'.⁸⁴ In *Choolum v Heath* it was:

...of particular concern when a person who has not held a driver's licence for a long time, if ever, and who appears to have no regard for important traffic laws

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⁷⁷ *Marshall v Court* [2013] NTSC 75 Mildren AJ, [4].

⁷⁸ *Jongmin v Phipps* [2014] NTSC 63 Barr J [11] quoting the sentencing magistrate.

⁷⁹ *Dickson v Houseman & Dickson v Harland* [2018] NTSC 28 Kelly J [6].

⁸⁰ *Lynch v Dixon* [2014] NTSC 45 Olsson AJ, [26] quoting from the sentencing deputy chief magistrate.

⁸¹ *Wayne v Cornford* [2013] NTSC 01 Kelly J, [17].

⁸² *McDonald v Cornford* [2011] NTSC 109 Blokland J, [9].

⁸³ *Lynch v Dixon* [2014] NTSC 45 Olsson AJ, [26] quoting from the sentencing deputy chief magistrate.

⁸⁴ *Cincaid v Cahill* [2009] NTSC 40 Olsson AJ, [32].

designed to ensure that passengers are carried safely in registered and insured motor vehicles, continues to drive a motor vehicle.⁸⁵

The comments of the sentencing magistrate in *Marshall v Court* are, again particularly striking.

Concerning the driver's breach of bail, Borchers SM (as he then was) stated:

You were given the bail papers, you had those bail papers, you chose not to come to court because you knew you were in trouble. I say that and I make that inference because of course you did nothing, if you had forgotten you could easily, given your constant contact with the court system, the Police and Aboriginal legal aid, have made arrangements to come to court and surrendered on the basis that you did forget, you could have done so almost immediately and there would have been little difficulty for you but you chose to do nothing, you chose to evade the court and you're only here because you were arrested yesterday at your house.⁸⁶

A set of negative moral connotations flow from Borchers SM's statement: that the driver is sneaky, actively 'choosing' to evade the court by 'doing nothing', and only through the physical actions of the settler state in the form of arresting police and overnight incarceration was the driver in court to receive this moral lashing. It must be noted that there was no disagreement with these comments on appeal at the Supreme Court. Indeed, Mildren AJ ruled that Borchers SM's sentence of imprisonment would 'act as a personal deterrent, and as a deterrent to those who contumeliously disobey the law'.⁸⁷ Less extreme than *Marshall v Court*, yet still with a moralistic tone were the Justices of the Peace⁸⁸ constituting the sentencing Court of Summary Jurisdiction in *Cincaid v Cahill* who spoke to an Indigenous driver 'you're obviously not learning every time you come to court'.⁸⁹

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⁸⁵ *Choolum v Heath* [2017] NTSC 41 Hiley J, [28].

⁸⁶ *Marshall v Court* [2013] NTSC 75 Mildren AJ, [5] quoting Borchers SM.

⁸⁷ *Marshall v Court* [2013] NTSC 75 Mildren AJ, [20].

⁸⁸ Justices of the Peace are non-salaried honorary position.

⁸⁹ *Cincaid v Cahill* [2009] NTSC 40 Olsson AJ, [21].

The implication in *Cincaid v Cahill* of ‘obviously not learning’ points to the third target of moralising language related to descriptions of Indigenous driver’s reasoning and choice making. The strong implication was that the Indigenous driver was incapable of making appropriate judgements or was particularly selfish and irresponsible. For example in *Henda v Cahill* Riley J remarks that the ‘appellant drove simply as a matter of convenience. In so doing he drove with others in the vehicle placing them at risk along with the risk he posed to other road users.’⁹⁰ For the sentencing magistrate in *Thomas v Henderson* it was ‘outstanding’ that the driver:

can go to gaol for ten months on several charges ... come out within a month or two and do exactly the same thing ... From all the reports he is not an unintelligent man, he refuses to give up the grog, and apparently when he drinks he drives. He can’t separate the two things apparently.⁹¹

In *Carcuro v Norris* the magistrate suggested that instead of driving the passengers, ‘an alternative course could have been just taking the keys and departing, and that way none of you would have been in trouble.’⁹² In *Marshall v Court* Mildren AJ identified that: ‘there was no acceptable excuse for the offending on this occasion. As the learned Magistrate pointed out, there was no demonstrated need to drive the car to do the shopping. There was a shop which sold food within walking distance from the appellant’s home’.⁹³ Finally in *Morris v Heath* Judge Borchers’ sentencing statement was reproduced by the Supreme Court in detail:

It’s clear that you have no insight or understanding of the danger that you pose to other road users and passengers in your motor vehicle. It is clear that any term of

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⁹⁰ *Henda v Cahill* [2009] NTSC 63 Riley J, [13].

⁹¹ *Thomas v Henderson* [2001] NTSC 54 Martin CJ, [21] quoting the sentencing magistrate.

⁹² *Carcuro v Norris* [2007] NTSC 18 Southwood J, [9] quoting the presiding magistrate.

⁹³ *Marshall v Court* [2013] NTSC 75 Mildren AJ, [17].

imprisonment in the past has not deterred you from continuing with this highly dangerous conduct.⁹⁴

These contrast with the non-Indigenous decisions where the only driver who is spoken about as having a choice was the journalist driver in *Peach v Toohey* whose choice to follow professional obligations to report a story was regarded as a mitigating factor in not imposing a substantive sentence beyond recording of a conviction.⁹⁵

A fourth identifiable target for moral outrage was the Indigenous driver's vehicle. In several decisions the driver's vehicle was described as 'unsafe.'⁹⁶ In *Mick v Burgoyne* Southwood J particularly emphasises the faults with the vehicle: '[a] window was broken, a tyre was in bad condition, the mirrors of the motor vehicle were missing, the car could start without a key and the battery was not tied up properly.'⁹⁷ This listing of defects, each time reinforcing the poor moral character of the Indigenous offender for driving in such dangerous machine, was not a feature in the non-Indigenous decisions. In those decisions only one driver had been charged in relation to the poor condition of his vehicle. Rather than strongly condemning terms such as 'unsafe', that vehicle was described as in an 'unacceptable condition.'⁹⁸

In summary, the decisions show that Indigenous drivers – particularly their character, their attitude to settler state law, their choices, and their vehicles – were subject to a strong moralised discourse by the lower criminal court and also the Supreme Court on appeal. Their moral self and moral decision making was found to be more than just inadequate but rather characterised as dangerously unsafe. In this context of heightened moralising, it is unsurprising that the

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⁹⁴ *Morris v Heath* [2017] NTSC 79 Mildren AJ quoting Judge Borchers.

⁹⁵ *Peach v Toohey* [2003] NTSC 57.

⁹⁶ *Wayne v Cornford* [2013] NTSC 01 Kelly, [17]; *Tolson v Burgoyne* [2003] NTSC 46 Martin CJ, [1].

⁹⁷ *Mick v Burgoyne* [2006] NTSC 5 Southwood J, [10].

⁹⁸ *Kilvington v Burgoyne* [2005] NTSC 46 Riley J, [9].

judicial officials of the settler state saw Indigenous drivers as needed to be ‘be taught a lesson’⁹⁹ and the Indigenous community needed to be sent a ‘message’ about unlawful driving.¹⁰⁰ However, this moralising was not the only strategy used to deny Indigenous automobility; it was coupled with deployment of the archive.

Archives of past transgression.

The strength of the archive is in its supposed objectivity.¹⁰¹ The moralisation strategy with words and phrases like ‘drunken idiot’¹⁰², ‘calculated to deceive’¹⁰³ and ‘contumeliously disobey’¹⁰⁴ were highly emotive and subjective. The archive of past transgressions had a similar effect of negatively characterising the Indigenous driver through the listing of their past breaches of settler state law. This process can be seen through the comments of Thomas J in *Crowson v Pryce*:

This is quite an appalling record of offences for drink driving. This offence is Mr Crowson’s 9th conviction for a drink driving offence within a period of a little over 10 years and his 5th conviction for drive disqualified.¹⁰⁵

Two aspects as to how the archive was deployed as a strategy of denial emerges from this extract. First there was an arithmetic of transgressions, a calculation of number of offences over time. Second, there was a direct and explicit link to moralising and negative moral language with ‘appalling’. The setting out of arithmetic of transgressions was a common feature of the decisions. Indeed, consideration of past offences and sentences served is a formal

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⁹⁹ *Henda v Cahill* [2009] NTSC 63 Riley J, [7] quoting sentencing magistrate.

¹⁰⁰ *Dickson v Houseman & Dickson v Harland* [2018] NTSC 28 Kelly J [20] quoting Oliver SM.

¹⁰¹ The archive and technical tendency to archive is made possible by a desire for an outside of the subjective self that remembers. ‘*There is no archivewithout a place of consignment, without technique of repetition, and without a certain exteriority. No archive without outside.*’ Derrida (1996), 11 (Italic in original).

¹⁰² *Small v Nash* [2001] NTSC 34 Thomas J, [13] quoting the sentencing magistrate.

¹⁰³ *Lynch v Dixon* [2014] NTSC 45 Olsson AJ, [26] quoting from the sentencing deputy chief magistrate.

¹⁰⁴ *Marshall v Court* [2013] NTSC 75 Mildren AJ, [17, 20].

¹⁰⁵ *Crowson v Pryce* [1995] NTSC 133 Thomas J, [17].

dictate of the sentencing regime that the settler state decision makers were working under. This does not reduce its effectiveness as a strategy of denial. Various formats were used to set out drivers' past convictions and sentences. In some decisions, there was a focus, in forensic detail, on dates of specific convictions:

He had 24 prior convictions, amongst them for driving with a blood alcohol concentration of .066 in 1994 for which he was fined, another in 1996, the concentration being .109 for which he was fined, another in 2000, the concentration being .143 for which he was fined and disqualified from driving for 12 months. He breached the disqualification on 15 March 2001 at which time he was found to have a concentration of alcohol in his blood of .189. In July 2000 he drove a motor vehicle while disqualified and was apprehended on the same day for failure to supply a sufficient sample of his breath. The last four matters came before the court at the one time, 16 March 2001. For those offences the effective sentence was five months imprisonment, including three months for the drink driving offence, all suspended after 28 days with an operational period of 18 months being fixed.¹⁰⁶

In other decision bullet points were utilised:

The learned magistrate was informed that the appellant had a number of prior relevant convictions dating back to early 2002. These included:

- three separate offences of driving a motor vehicle while unlicensed;
- driving a vehicle with a blood alcohol concentration of 0.162%;
- driving a vehicle in a manner dangerous;
- two other miscellaneous vehicle related offences;
- bringing liquor into a restricted area; and

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¹⁰⁶ *James v Burgoyne* [2003] NTSC 52 Martin CJ, [5].

- disorderly behaviour.¹⁰⁷

Some decisions were more succinct on this issue, the decision maker highlighting salient convictions within a vitae of offending:

This disclosed that he had a long history of prior convictions extending back to late 1991. These spanned offences such as unlawful entry, stealing, criminal damage, resisting arrest and assaulting police, a variety of motor vehicle offences, aggravated assault, firearms offences and receiving. In many instances there were repeat offences of those generic types...It is fair to say that, in more recent times, the majority of offences have in fact been motor vehicle offences, including offences associated with the consumption of alcohol.¹⁰⁸

The settler state's archive also did not seem to forget. In *Dickson v Houseman & Dickson v Harland* an Indigenous driver who had had a long break in offending was told by the sentencing magistrate Oliver SM that while: 'True it is that there has been a gap in your offending...it only takes one occasion of drink driving to harm someone through an accident because of your inability to drive properly.'¹⁰⁹

Regardless of format, the effect of setting out the archive was to present the Indigenous driver as an outlaw – as someone routinely and potentially pathologically at odds with settler state law. The numerical facts of the archive were to speak for themselves. However, sometimes the settler state officials explicitly made the connection. Justice Barr in refusing an Indigenous driver's appeal, made explicit the moral message to be taken from the setting out of the archive:

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¹⁰⁷ *Kelly v Winzar* [2006] NTSC 59 Olsson J, [8].

¹⁰⁸ *Dixon v Mumu* [2005] NTSC 55 Olsson AJ, [24]. See also *Sultan v Guerin* [2016] NTSC 33 Blokland J, [26].

¹⁰⁹ *Dickson v Houseman & Dickson v Harland* [2016] NTSC 28, Kelly J [20] quoting Oliver SM.

that the driver's conduct 'is properly to be regarded as a contumelious or contemptuous disregard of the law, particularly given the appellant's record of prior offending.'¹¹⁰

The deployment of the archive was not as strong a feature in the non-Indigenous decisions. In some past offending was documented but was not prioritised in the reasoning.¹¹¹ Many decisions did not set out a driver's past record.¹¹² In the decisions that did, what was mostly absent was the negative moralising that was seen in the Indigenous decisions. For example, the driver in *Davis v Howley* who had repeated drink driving offences did not attract the level of opprobrium that Indigenous drivers seemed to. This is despite that she was arrested with an open can of beer in the vehicle, which she admitted to be drinking while driving, and that she gave a false name at first instance to the arresting police. For Thomas J even the open alcohol can in the vehicle was 'not...of great significance'.¹¹³ In *McMahon v O'Neill* Hiley J set out the non-Indigenous driver's extensive record of alcohol related violence and offending, and then concluded with the fairly neutral under-statement that this archive 'clearly indicates ongoing problems with alcohol and associated disorderly behaviour'.¹¹⁴

In summary, the deployment of an archive of past transgressions meshed with the moralising tone as it related to Indigenous drivers. The moral character of Indigenous drivers was questioned in the decisions, a questioning that was backed up with evidence of past transgressions. This seemed in contrast to how non-Indigenous drivers were described. Even

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¹¹⁰ *Jongmin v Phipps* [2014] NTSC 63 Barr J, [30].

¹¹¹ *Keil v Westphal* [2012] NTSC 11 Kelly J, [4].

¹¹² *Forrester v Nicholas* [2012] NTSC 6; *Kruger v Kidson* [2004] NTSC 24; *Bielefeld v Winzar* [2003] NTSC 109; *Kilvington v Burgoyne* [2005] NTSC 46; *Sekubumba v Sims* [2009] NTSC 64. This could be because the non-Indigenous driver did not have a past record, or it was not considered relevant for the traffic offences that were the subject of the appeal.

¹¹³ *Davis v Howley* [2003] NTSC 6 Thomas J, [2].

¹¹⁴ *McMahon v O'Neill* [2015] NTSC 58 Hiley J, [10-12].

non-Indigenous drivers with past criminal records were not subject to the same negative judgement and harsh language that was directed to Indigenous drivers.

Universalisation of Settler State's expectations of individual responsibility

The decisions with Indigenous drivers have revealed a culture of car use that seems highly distinct from Western automobility. In contrast to Western dichotomies of individual freedom and state regulation, Indigenous engagement with the motor vehicle in the Northern Territory can be seen as collective, contested, and culturally informed. Yet for the courts of the settler state any departure from the paradigm of the Western norms of individual freedom and state regulation, as enacted by the *Traffic Act 1987* (NT) with its focus on the unitary legal subject that can hold a license and be held responsible for vehicles, was simply abhorrent. Such embodiments of a very different form of automobility were not only to be met with criminal sanction but condemned in the strongest moral terms.¹¹⁵

This explains the discourse of individual responsibility present in the decisions. Indigenous drivers were told to 'take the responsibility for your actions'.¹¹⁶ In the context of a young Indigenous driver, a sentencing judge was of the 'view' that

persons who are within a range of 16 or 17 ... should be responsible for their actions when it comes to dealing with motor vehicles. *I wouldn't think it would be good for this court to excuse them from liability* for things such as driving an unregistered or uninsured car.¹¹⁷

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¹¹⁵ Anthony and Blagg (2013).

¹¹⁶ *Carcurio v Norris* [2007] NTSC 18 Southwood J, [9] quoting the presiding magistrate.

¹¹⁷ *Abbott v Wilson* [2017] NTSC 50, Hiley J [9] quoting the sentencing Youth Justice Court judge, italic added by Hiley J.

However a non-Indigenous driver with a substantial criminal record was told ‘you have been through the wars in your life, probably your own fault but it is easy to say that’ and was congratulated on increasing evidence of signs ‘of your responsibility’¹¹⁸. However, for Indigenous drivers, arguments about their increasing responsibility were problematic. In *Jongmin v Phipps* the submission from the defence, that the driver’s family commitments and 10 year employment history ‘demonstrated that he could take responsibility for his drinking and be a reliable employee’¹¹⁹, did not displace the assumption that he had come ‘before the Court today with no explanation for his driving.’¹²⁰ Only when an Indigenous driver had no prior convictions and was a well-regarded football player did the settler state court acknowledge his ‘good character’.¹²¹

In short, the decisions demonstrate a collision of automobilities with some very clear signposting from the settler state courts concerning which is right and which is wrong. Engaging with the motor vehicle in ways that does not strongly manifest individualism and adherence to the dictates of settler state law is to be punished – and punished severely. Most of the Indigenous drivers had been sentenced to a period of imprisonment.¹²² This contrasts significantly with only one non-Indigenous driver with a custodial sentence.¹²³ Most non-Indigenous drivers were usually apprehended by police because the vehicle was speeding or

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¹¹⁸ *Burnham v Westphal* [2012] NTSC 2 Southwood J, [8] quoting the sentencing magistrate.

¹¹⁹ *Jongmin v Phipps* [2014] NTSC 63 Barr J [8].

¹²⁰ *Jongmin v Phipps* [2014] NTSC 63 Barr J [27] quoting the sentencing magistrate.

¹²¹ *Warlapinni v Cumming and Moore* [2009] NTSC 39 Mildren J [11].

¹²² See for example *Breadon v Nicholas* [2010] NTSC 70 – 4 months imprisonment; *Henda v Cahill* [2009] NTSC 63 – 3 months imprisonment; *Choolum v Heath* [2017] NTSC 41 – 5 months; *Jongmin v Phipps* [2014] NTSC 63 – 3 months imprisonment; *Ross v Toohey* [2006] NTSC 92 – 3 months imprisonment suspended after 1 month; *Wayne v Cornford* [2013] NTSC 01 – 5 weeks imprisonment *Warlapinni v Cumming and Moore* [2009] NTSC 39 – 14 days imprisonment.

¹²³ Only one non-Indigenous driver sentenced was initially sentenced to 4 months imprisonment but had it reduced to 14 days on appeal: *McMahon v O'Neill* [2015] NTSC 58 Hiley J, [6].

erratic on the road¹²⁴, had caused an accident¹²⁵ or the driver had been observed drinking alcohol while driving.¹²⁶ The Indigenous decisions tell a different story. Most Indigenous drivers were ‘found by the police’¹²⁷, ‘observed’¹²⁸, ‘stopped’¹²⁹, or just ‘driving’¹³⁰ without any outward signs that the vehicle was in contradiction to settler state law.¹³¹ Only one Indigenous driver attracted police attention because of the external disrepair of the vehicle.¹³² The suggestion from these juxtapositions is that Indigenous drivers appear to be targeted by the police simply because they are Indigenous and driving a motor vehicle; the phenomenon known in the United States as ‘driving while black’.¹³³ The overall impression is that the settler state is looking for Indigenous drivers and when it finds them it is more likely to remove them from their communities through incarceration. This interest in controlling and criminalising Indigenous mobility and actively moving Indigenous people into institutions through routine

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¹²⁴ *Forrester v Nicholas* [2012] NTSC 61; *Sekubumba v Sims* [2009] NTSC 64.

¹²⁵ *McMahon v O'Neill* [2015] NTSC 58 Hiley J, [7]; *Bielefeld v Winzar* [2003] NTSC 109 Mildren J [2].

¹²⁶ *Davis v Howley* [2003] NTSC 6 Thomas J, [15].

¹²⁷ *Crowson v Pryce* [1995] NTSC 133 Thomas J, [5].

¹²⁸ *Cincaid v Cahill* [2009] NTSC 40 Olsson AJ, [11]; *Morris v Heath* [2017] NTSC 79 Mildren AJ [5]; *Crowson v Millar* [2014] NTSC 61 Riley CJ, [2].

¹²⁹ *O'Neill v Brumby* [2016] NTSC 10 Kelly J, [2].

¹³⁰ *Lalara v Malogorski* [2012] NTSC 53 Mildren J, [2]; *Dixon v Mumu* [2005] NTSC 55 Olsson AJ, [14]; *Breadon v Nicholas* [2010] NTSC 70 Mildren J, [8]; *Kelly v Winzar* [2006] NTSC 59 Olsson J, [4]; *Jongmin v Phipps* [2014] NTSC 63 Barr J [2]; *Andalong v O'Neill* [2017] NTSC 77 Grant CJ, Southwood and Riley JJ, [2].

¹³¹ Although in a few decisions the erratic or dangerous operation of the vehicle brought the driver to police attention. See for example *Rigby v James* [2004] NTSC 6 Mildren J, [7].

¹³² *Carcuero v Norris* [2007] NTSC 18 Southwood J, [4] the vehicle was observed in the evening with no working taillights. While several Indigenous drivers were convicted on driving an unsafe vehicle, identification of the disrepair of the vehicle only became obvious to the police once the vehicle was stopped on other grounds (for example *Mick v Burgoyne* [2006] NTSC 5 Southwood J, [9-10]). There is immortalised in Australia a particular vision of a vehicle owned by Indigenous people in the Northern Territory. In 1992 the Australian Broadcast Corporation screened a Warlpiri Media Association production *Bush Mechanics* on national television. This humorous insight into Indigenous automobility showed the Warlpiri men driving, repairing and coping with highly dilapidated vehicles. The vehicles were patchwork machines created by the merging together of different cars; with the resultant vehicle functional but missing the windscreens, lights and some panels. Episodes showed highly innovative roadside repairs including the replacing of a broken front wheels and suspensions with a tree-branch outrigger. See Batty D (2001) ‘Motorcar Ngutju (Good Motorcar)’ *Bush Mechanics*. Australian Broadcasting Corporation, first broadcast 2 October 2001 Australia. On *Bush Mechanics* see Clarsen (2002). On the practice of bush mechanics and the resultant vehicles see Young (2011). Recent interviews with Warlpiri people has suggested a decline in the practice of bush mechanics, because of modern vehicle engineering and electronic components, Anthony and Blagg (2012), p 49.

¹³³ Lamberth (2010); Lundman and Kaufman (2003), p 195; Harris (1999), p 265.

policing of regulatory laws has antecedents in Australia's history. Indeed, it is colonialism redux.

Colonialism redux: Expanding the boundaries of Automobility and Law

This section traces the consequences for the collision of automobilities revealed in the decisions. It shows that by targeting Indigenous automobility the settler state is using mundane regulatory laws and practices to continue the colonial project of dismantling and assimilating Indigenous communities. Drawing also on a Western framework to the regulation of automobility, Automobility and Law studies are only partially relevant to many Indigenous experiences of driving in the Northern Territory.¹³⁴ It has yet to consider how the mobility through the motor vehicle occurs within a pluralistic legal context: where cultural obligations coexist with policing regimes of the settler state.¹³⁵ Our findings suggest that the regulation of Indigenous vehicles and drivers is based on an intersection, indeed a collision, between Indigenous and Western notions of automobility on dirt tracks, townships and highways in the Northern Territory.

Presumptions made by previous Automobility and Law studies have limited significance for understanding automobility in Indigenous communities in the Northern Territory.¹³⁶ This is

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¹³⁴ Clarsen (2010) has warned of universalising national automobilities to world-wide phenomena. This can equally be said about the regulatory responses that are embedded in place and history.

¹³⁵ Guzik (2013), p 526. Guzik recognises that this focus of state law in the Automobility and Law framework tends towards 'juridical monism.' Guzik (2013), p 526.

¹³⁶ See Pleshet (2006) for an overview of the history of the motorisation of Indigenous people in the Northern Territory.

because, first, in the large number of remote communities in the Northern Territory the roadscape bears little resemblance to the urban public streetscape with its bitumen roads, guttering, markings, signage, and traffic lights.¹³⁷ Frederick also notes the whiteness of concepts of road travel: '[R]oad travel is also one of the ways by which white belonging is enacted. Roads, highways, petrol stations, and motels normalise the occupation and governance of land by non-Indigenous authority and capital.'¹³⁸ Rather, road travel in remote Indigenous communities is over a series of dirt thoroughfares and bush tracks that integrate small remote communities and places of important cultural meaning for Indigenous people.¹³⁹ Second, the decisions shows that access to vehicles and driving is a profoundly culturally mediated and contested activity. There are complex relationships and obligations that require negotiation through the use of the vehicle. The dichotomy between individual freedom and state restriction within existing Automobility and Law scholarship seems simplistic where vehicle use is a means of connecting Indigenous people to country and facilitating cultural, educational, sporting, and work opportunities. This is compounded when access to vehicles is regulated by complex and shifting cultural mores that are opportunities for personal and kin power and prestige.¹⁴⁰

Third, while Automobility and Law studies identify legal constraints on the motor vehicle and driving¹⁴¹ for Indigenous Australians these are one part of a long continuum of state control of their mobility. Colonial takeover of land from the late eighteenth century (on the eastern coast) until the twentieth century (in central and northern Australia) was given effect through a form

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¹³⁷ Wagner (2006), p 311.

¹³⁸ Frederick (2011), p 87.

¹³⁹ Frederick (2011), p 89.

¹⁴⁰ Anthony and Blagg (2013), p 48; Young (2001); Stotz (2001); Stotz (1993); Young (2005); Peterson, (2000) p 205.

¹⁴¹ Guzik (2013); Tranter (2005).

of ‘carceral mobility’. Indigenous peoples on the frontier were forcibly and often brutally removed, frequently in chains, from their land, and concentrated in prisons, lock-ups, missions or settlements¹⁴² or given incentives to move off land, such as the availability of flour or rations at stations, reserves, and other settlements.¹⁴³ The motor vehicle was graphically implicated in the process of removal of Indigenous children, known as the ‘Stolen Generation’¹⁴⁴, with scenes of forceful taking of Indigenous children from their mothers who watched as their children were thrown in the back of vehicles to be transported to institutions and white families.¹⁴⁵

The pattern of colonial policing that emerged on the frontier has become weaved into new sites of power over the past decade, with distinct impacts on Indigenous drivers. A police surge in 2006 in remote Indigenous communities of the Northern Territory saw the deployment of local and Federal police, and army officers, the installation of 18 police stations, the broadening of police powers, and the establishment of crime intelligence taskforces.¹⁴⁶ The police surge was given legislative backing by the *Northern Territory National Emergency Response Act 2007* (Cth) and related administrative measures, which were collectively known as ‘the Intervention’.¹⁴⁷ Through designating these measures as an ‘emergency’, the Commonwealth Government was seeking to respond to a moral panic over Indigenous child sexual abuse and family violence in remote Northern Territory communities.¹⁴⁸ The emergency legislation produced a distinct legal regime for 80 prescribed Indigenous communities, which covers most Northern Territory Indigenous communities and over 20 000 Indigenous people. It legitimised

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¹⁴² Howard-Wagner and Kelly (2011) p 107.

¹⁴³ Rowse (2002).

¹⁴⁴ Human Rights and Equal Opportunity Commission (1997).

¹⁴⁵ Tranter (2003) pp 76-77.

¹⁴⁶ Cripps (2007) p 6.

¹⁴⁷ Nicholson, Watson, Vivian, Longman, Priest, De Santolo, Gibson Behrendt and Cox (2011).

¹⁴⁸ Anthony (2009) p 90; Vivian and Schokman (2009) p 78; Macoun (2011) p 519.

the Commonwealth Government annexing remote Indigenous communities and introducing broad-sweeping controls without public or Indigenous community consultation. For Altman this exclusion of Indigenous people from decision making constituted another paternalist phase in state colonial power in Australia.¹⁴⁹ The Intervention provides a critical context for how Indigenous drivers came to be controlled and policed.¹⁵⁰

In the ‘Emergency Zone’ of the Intervention within remote Australia, Indigenous automobility came under enormous scrutiny. Northern Territory legislation relating to alcohol restrictions and police powers regarding the apprehension of intoxicated people was amended to increase the restricted zones. For example, the police were given the power, without a warrant, to randomly enter, search, seize or dispose of any ‘thing’, namely a vehicle, involved in the carriage or consumption of alcohol in prescribed communities.¹⁵¹ This authorised the police to use their powers in prescribed Indigenous communities on Indigenous land, including in Indigenous motor vehicles and homes, as if it were a public place.¹⁵² These policies, along with a shift in police business plans that prioritised law enforcement for unlawful driving and Northern Territory government reforms to road rules and provision for a Remote Area Traffic Patrol, meant that since 2007 Indigenous driving became a new focus by the settler state and its criminal justice apparatus.¹⁵³

The accumulative effect of these ‘reforms’ has been substantial increases in Indigenous prison rates, including the rate of prosecutions for minor driving-related offences across the Northern

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¹⁴⁹ Altman (2007).

¹⁵⁰ Anthony and Blagg (2012).

¹⁵¹ *Northern Territory National Emergency Response Act 2007* (Cth) s 17; *Liquor Act 1979* (NT) s 95.

¹⁵² *Police Administration Act 1978* (NT) s 7; Pilkington (2009), pp 55, 174.

¹⁵³ Anthony and Blagg (2013), p 56.

Territory.¹⁵⁴ Police processing of *minor* regulatory traffic and vehicle offences (unlicensed driving, unregistered driving, driving un-roadworthy vehicles, and driving uninsured) increased by 505 percent between 2005 and 2017.¹⁵⁵ In 2014-15, 9 percent of Indigenous people in prison were there for traffic-related offending as their principal offence.¹⁵⁶ Of these 33.5 percent were imprisoned for driving without a license as their principal offence.¹⁵⁷ The findings from the decisions do not directly reflect this increasing in policing and convictions. The Intervention in 2006 does not mark a significant increase in the number of appeals by Indigenous drivers, with 2-4 appeals per year both before and after 2006. This potentially reflects that the Indigenous legal services have not increased funding to traffic appeals and that the Crown has been generally content with the sentences of the Court of Summary Jurisdiction/ Local Court. However, critical themes of the Intervention are reflected in the Indigenous decisions.

The enhanced criminalising of driving offenders has had a distinct impact on Indigenous women. A study found that between 2010-12 driving and vehicle related offences (driving without a license, registration offences, exceed prescribed alcohol content, regulatory driving offences, driver license offences, driving while license disqualified or suspended) were among the most common offences for which Indigenous women appeared before Northern Territory courts.¹⁵⁸ When combined, the driving and vehicle offences account for 68 percent of the total

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¹⁵⁴ The prison rate has increased by 65 per cent since 2006, faster than any other state or territory. It has the highest imprisonment rate (878 prisoners per 100,000 100,000 adults), and proportion of Indigenous prisoners (84%). Australian Bureau of Statistics (2017b), table 14.

¹⁵⁵ In 2005-2006 the total reported traffic offences in the Northern Territory was 12 890. In 2016-2017 it was 65 083. This is a 505% increase. Northern Territory Police, Fire and Emergency Services (2006), p 158; Northern Territory Police, Fire and Emergency Services (2017), p 157. About 25 percent of inmates in Northern Territory prisons are driving offenders and 99 per cent of these are Indigenous. McCarthy (2011).

¹⁵⁶ Northern Territory Department of Corrective Services (2016), p 28 table 21. Indigenous traffic offenders was 295, total Indigenous offenders 3 296.

¹⁵⁷ Northern Territory Department of Corrective Services (2016), p 28 table 21. Indigenous driving licence and other traffic offences was 99 out of total of 295. The other 196 were for drink driving offences.

¹⁵⁸ MacGillivray and Baldry (2015), p 4.

top ten sentencing occasions for Indigenous women.¹⁵⁹ In the Indigenous decisions, women drivers were being prosecuted and convicted for operating a motor vehicle on a learner's permit without appropriate supervision¹⁶⁰ and imprisoned for driving with twice the permissible blood alcohol limit.¹⁶¹ Another feature of the Intervention that has impacted on Indigenous women and mobility was the introduction of income management for Indigenous social security recipients within the Northern Territory. This scheme involved issuing Indigenous social security recipients with a 'BasicCard' that could not be used to purchase restricted items like alcohol.¹⁶² A difficulty with the 'BasicCard', especially when first introduced, was it could only be used in larger stores and the chain supermarkets that were in the towns and urban areas. This meant Indigenous people, and especially women, had to travel further and into the cities to purchase items that previously could be purchased at more remote stores. This put mobility pressure onto Indigenous women, making them more likely to travel by car into towns and more likely for them, and their vehicle, to come to the attention of the settler state. It also provides a wider context for decisions like the 2013 decision of *Marshall v Court* where Mildren AJ admonished an Indigenous driver because there 'was no demonstrated need to drive the car to do the shopping. There was a shop which sold food within walking distance from the appellant's home'.¹⁶³ This might have been so, but whether the driver and his passenger wife could have used their BasicCard at the closer shop was not considered by the court.

In mainstream Australia minor traffic infringements such as driving unregistered, uninsured, and unlicensed, driving without a seatbelt, and not stopping at a 'stop' sign are regulatory

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¹⁵⁹ MacGillivray and Baldry (2015), p 4.

¹⁶⁰ *Cincaid v Cahill* [2009] NTSC 40.

¹⁶¹ *Breadon v Nicholas* [2010] NTSC 70 Mildren J, [2].

¹⁶² Bray, Gray, Hand, Bradbury, Eastman and Katz (2012), xv; Farrell (2011), p 33.

¹⁶³ *Marshall v Court* [2013] NTSC 75 Mildren AJ, [17].

offences that are generally processed by way of a ticket (infringement notice), and a fine.¹⁶⁴ However, for Indigenous Australians, these offences have increasingly fallen within the domains of courts and prisons. Our findings have shown that the law has been applied in a manner to condemn and punish Indigenous practices of automobility.

This policing seems clearly targeted. The settler state appears to be continuing its practices of carceral mobility. What is at stake here is who controls whose mobility. In clamping down on Indigenous automobility the settler state is sending a strong message of denial to Indigenous people's use of motor vehicles; a declaration to stay immobile. However, the policing, and the imprisonment, constructs a form of passive mobility; the moving of Indigenous people from country to the prisons located in the urban settlements. The Stolen Generation under the Aboriginal Protection Acts involved the settler state removing Indigenous children from their families under a pretext of assimilation and moral concern about Indigenous parenting.¹⁶⁵ What the judicial narratives examined in this article reveal is the same pattern of settler state colonialism. The mundane regulatory offences in the *Traffic Act 1987* (NT) are being used to master Indigenous mobility. It is being used simultaneously to keep Indigenous people in place and then used to target specific individuals – individuals who seemingly challenge white authority through having the audacity to drive a car – and move such challengers from community and country to incarceration. While it is a collision of automobilities; it is more properly a war on Indigenous mobility by the settler state; a declaration to travel our way or no way!

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¹⁶⁴ Brown (2006).

¹⁶⁵ Henriss-Anderssen (2002), p 286.

While the laws might be different to the Aboriginal Protection Acts; the effects on Indigenous communities is not. Controlling mobility and removal of individuals has repeatedly been identified as the essential violence that can shatter Indigenous culture and individuals.¹⁶⁶ To not be able to move around country, to not be able to do ceremony, and not be able to connect with kin, puts unbearable pressure on Indigenous culture. Where the car has been instrumental in expanding the geographies required for cultural work (through earlier era of disposition and relocation), denial of automobility at this stage is a cruel and isolating act. It is further cruel and isolating in its specific targeting of individual Indigenous drivers. Australia's continuing shame in Indigenous imprisonment rates, in Indigenous suicide rates, in the 'gaps' in education, employment, health, and life expectancy outcomes between Indigenous and non-Indigenous populations has its origins in the carceral mobility imposed on Indigenous people by the settler state and its continuation in the current war on Indigenous automobilities that this article has documented. In recent years the roadscape of the Northern Territory has become increasingly littered with abandoned vehicles, seemingly more than documented by the earlier anthropological literature.¹⁶⁷ These vehicles are silent memorials to this intensified phase of carceral mobility in the settler state's war on Indigenous automobility. These are the vehicles of an Indigenous driver who have been stopped, arrested, sentenced to a short period of prison, and who were unable, or whose kin were unable to return to collect the vehicle before bush mechanics and vandals destroyed it. These are the vehicle detritus evidencing a strong and confident colonialism in the Northern Territory.

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¹⁶⁶ Havemann (2005), p 57.

¹⁶⁷ Young (2001); Young (2011).

Conclusion

This article examined the judicial narratives from Supreme Court of the Northern Territory decisions on Indigenous and non-Indigenous drivers convicted of road traffic and motor vehicle offences. These brief and ordinary texts showed the enacting and embodiment of Indigenous automobility (obligations to drive, shared vehicle ownership) and the strategies of denial used by the settler state (moral outrage, archives of transgression). Ultimately the decision showed the universalisation of settler state expectations of individual responsibility over and against Indigenous automobility. This failure to take proper notice of Indigenous automobility reveals the punishments and the justifications for punishment as illusory. What could be seen was the settler state furthering continuing the colonial project of using mundane regulatory laws to dismantle Indigenous communities.

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