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RACE, AUSTRALIAN COLONIALISM AND TECHNOLOGIES OF MOBILITY IN KALGOORLIE

KIERAN TRANTER* AND THALIA ANTHONY**

This article argues that the legal texts that record the death of Indigenous boy Elijah Doughty in a reserve in Kalgoorlie-Boulder in 2016 highlights the intersections of technologies of mobility within the Australian colonial project. Elijah died when the small motorcycle he was riding was run over by a large utility vehicle driven by the non-Indigenous assailant, 'WSM'. This occurred within a wider social media centred context of racist anxieties and hate speech directed towards Indigenous children being in public and mobile around Kalgoorlie-Boulder. Elijah's death and the subsequent legal reactions, to Indigenous protests, to the endurance of social media racist hate speech directed to Kalgoorlie-Boulder's Indigenous children, to determining the location of the trial and who can speak at the trial, to the concern and pity expressed towards 'WSM', shows how technologies of mobility, reinstate and bolster colonial mobilities and their destructive effects on Indigenous people.

I INTRODUCTION

Mobility and its constraints have been central to Australian colonialism and colonial claims to sovereign jurisdiction.¹ Controlling the movement of peoples, livestock, and goods has been an essential feature of the Australian state since the British imposed its penal-colony on Gadigal Country at what is now known as Port Jackson. The dispossession of land through the squatting of non-Indigenous 'colonists', the violent segregation and dispersals of Indigenous people, and the exploitation of a 'waltzing' non-Indigenous labour force and indentured Indigenous workers — particularly in the pastoral industry in Western Australia, the Northern Territory and Queensland — helped expand

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¹ See generally Georgine Clarsen, "'Australia – Drive It Like You Stole It": Automobility as a Medium of Communication in Settler Colonial Australia' (2017) 12(4) *Mobilities* 520.

the colonial project from the late eighteenth century to the mid-twentieth century.²

While transformations in the means and modes of mobility have created new identities for states, in settler states, such as Australia, the colonial project has endured with the constraining of Indigenous peoples' freedom of movement through new technological means.³ The necessity of the motor vehicle for stolen generation policies⁴ and controls on driving and movement on Country, including through the penal regime of the *Northern Territory Emergency Response Act 2007* (Cth) and Western Australia's restrictions to access homelands,⁵ are specific examples where technologies of mobility were deployed to control and restrict Indigenous people's movement.⁶

This paper is about the traces left in law by the intersections of technologies of mobility within the Australian colonial project. It takes as its study the death of 14-year-old Indigenous boy, Elijah Doughty, on the morning of 29 August 2016 in Kalgoorlie-Boulder, Western Australia. His death occurred amidst a storm of violent racism directed towards Indigenous people accused of stealing motorcycles on social media. Elijah died when the small motorcycle he was riding was run over by a Nissan Navara ute driven by the non-Indigenous assailant, 'WSM'.⁷ The incident happened off-road as WSM chased the motorcycle. WSM believed that the motorcycle had been stolen from his residence the day before. The police had informed WSM where he might find his stolen motorcycle and WSM pursued the motorcycle intending to apprehend the rider.⁸

WSM's spontaneous vigilantism became a flash point within Kalgoorlie-Boulder. For elements of the non-Indigenous community, his actions were refracted through an existing racist 'law and order' narrative advocating

² Kieran Tranter, *Living in Technical Legality: Science Fiction and Law as Technology* (University of Edinburgh Press, 2018) 164–82.

³ Harry Blagg and Thalia Anthony, *Decolonising Criminal Justice* (Palgrave, forthcoming).

⁴ Consider generally Kieran Tranter, 'Mad Max: The Car and Australian Governance' (2003) 5(1) *National Identities* 67.

⁵ Thalia Anthony, 'Governing Crime in the Intervention' (2009) 27(2) *Law in Context* 90; Thalia Anthony and Harry Blagg, 'STOP in the Name of Who's Law? Driving and the Regulation of Contested Space in Central Australia' (2013) 22(1) *Social and Legal Studies* 43.

⁶ Thalia Anthony, 'Labour Relations on Northern Cattle Stations: Feudal Exploitation and Accommodation' (2004) 4(3) *The Drawing Board: An Australian Review of Public Affairs* 117.

⁷ The driver is known by this pseudonym at sentencing. In early reports he is referred to as 'MWSD'.

⁸ *State of Western Australia v WSM* [2017] WASC 128. The authors received permission from the Western Australian Supreme Court Registrar to purchase these sentencing remarks for the purpose of research for this article.

extrajudicial action to combat Indigenous youths.⁹ The Kalgoorlie-Boulder Indigenous community, and Indigenous communities across Australia, regarded WSM actions and Elijah Doughty's death as a coming to pass of these racist threats. Further, the local Indigenous community was concerned that a predominately non-Indigenous jury empanelled in Kalgoorlie would not be impartial, including because vigilante social media sites continued to operate despite Indigenous calls for authorities to shut them down. Grievances led to peaceful protests by over 200 people on 30 August 2016 when WSM was scheduled for a mention at Kalgoorlie courthouse.¹⁰ After it was learnt that WSM was charged with manslaughter — rather than murder — and that several of Elijah's family members and friends were denied entry to the court proceedings, some protesters broke windows and the court building was evacuated, police locked down the city, and riot police were deployed.¹¹ At about the same time, there was also an arson attack on the WSM's rental residence, although investigations did not uncover the offender or motivation.

In relation to the legal process, the issue became what to do with WSM. The Indigenous community placed strong pressure on the prosecutor to institute a prosecution for murder, although this was denied and instead prosecutions were brought for dangerous driving causing death and manslaughter. At law, there were two discrete hearings that were dealt with in separate decisions of the Supreme Court of Western Australia. The first, *MWSD v State of Western Australia* [2017] WASC 125 (*MWSD*), concerned the question of the locale of trial. This matter concerned the balance between a fair trial for WSM and justice for Elijah Doughty's family along with the perceived practicalities of a militarised police operation to secure the court if it was scheduled in Kalgoorlie.¹² It also dealt with an (unsuccessful) application for amicus curiae from relatives of Elijah Doughty to address the accused's application for a change of location. The second, *State of Western Australia v WSM* [2017] WASC 128 (*WSM*), concerned WSM's sentencing. WSM had been convicted by a Perth jury — that did not have a single Indigenous jury

⁹ Chris Cunneen and Sophie Russell, 'Social Media, Vigilantism and Indigenous People in Australia' in K Biber and M Brown (eds), *Oxford Encyclopedia of Crime, Media, and Popular Culture* (Oxford University Press, 2017) DOI 10.1093/acrefore/9780190264079.013.109.

¹⁰ *MWSD v State of Western Australia* [2017] WASC 125 (5 May 2017) [49]–[54] (Jenkins J).

¹¹ Andrea Booth, 'Why Clashes May Be the Shot at Justice Kalgoorlie Needs: Pastor', SBS News (online), 2 September 2016 <<https://www.sbs.com.au/news/why-clashes-may-be-the-shot-at-justice-kalgoorlie-needs-pastor>>.

¹² *MWSD v The State of Western Australia* [2017] WASC 125 (5 May 2017).

member — of dangerous driving causing death and was found not guilty of manslaughter.¹³

We argue that these legal decisions, which record the incident and aftermath, disclose the intertwining of mobility and technology within the ongoing colonialist enterprise of the Australian settler state. This detailed engagement with the legal texts is in five sections. The first section sets out the immediate context of Kalgoorlie-Boulder, a town shaped by movement and conflict which was particularly manifest within the social media activities of members of the non-Indigenous community before 29 August 2016. The second connects Elijah Doughty's death specifically to the motor vehicle. The third sees mobility and the cascade of violence in the immediate aftermath of the crime and the question for the mobile justice of settler state law where WSM's trial should be held. The fourth looks to the question of punishment — how the law should respond to the violent use of a motor vehicle — finding a remarkable set of statements where the death of an Indigenous child within a context of racist vigilantism is minimalised and the rights and racist righteousness of motor vehicle owning and driving non-Indigenous men are given credence by the settler state. It compares the favourable sentencing remarks in *WSM* with the more condemning remarks of the Supreme Court of Western Australia in other, arguably less callous, driving causing death incidents. The final section deals with WSM's movements after sentencing. Running through these sections is a continual anxiety about the politics of movement — who can and who cannot move through the world in specific ways.

Central to the analysis that follows is a concern with the reoccurrence of motifs and themes of mobility within legal texts. 'Mobility' is a contested term. In recent decades 'mobility' has been an ascending concept in social thought. Globalisation and digital communication technologies have presented a world where space and time has become compressed; where people, ideas, and capital are seemingly free to move within a global world-system. Vincent Kaufmann has warned against some of the celebratory naivety associated with this definition.¹⁴ Movement of people, ideas, and capital does mean a victory of fluidity over structure. Recent decades might have witnessed an increase in the speed of movement, but it does not mean that the structures and purposes

¹³ *State of Western Australia v WSM* [2017] WASC 128 (21 July 2017).

¹⁴ Vincent Kaufmann, *Re-Thinking Mobility: Contemporary Sociology* (Routledge, 2016) 3–4.

driving the transfers are also in flux. John Urry's 'automobility' is an example of a more nuanced conceptualisation of mobility. Urry looks at the complex intertwining networks of culture, economy, infrastructure, global trade, and law that stabilises and normalises the 'car system' in Western societies.¹⁵ Mobility and technologies of movement can be transformative but are often conservative — maintaining their own systemic functions and facilitating established and orthodox power relations. This paper shares this orientation. To be mobile does not mean to be free and autonomous. Rather, through a detailed analysis of the legal texts concerned with Elijah Doughty's death, and the trial and sentencing of WSM, the reoccurrence of motifs and themes of mobility are identified. In this identification the colonial politics of mobility in Australia comes into focus.

II MOVEMENT AND CONFLICT IN KALGOORLIE-BOULDER

Elijah Doughty died on the morning of 29 August 2016 on a track at Gribble Creek Reserve, located in Kalgoorlie-Boulder. Kalgoorlie-Boulder is a town of movement and conflict. Located on the goldfields in the western desert of Western Australia, 600 kilometres east of Perth. Kalgoorlie-Boulder is a large town by inland Australian standards. At the 2016 census it had a population of 30 059 with 2 147 identifying as Indigenous.¹⁶ Most of the residents worked in the mining industry.¹⁷ With mining comes wealth for mining corporations and high incomes for their predominantly non-Indigenous workforce.¹⁸ The evidence can be seen in the economic demographics of Kalgoorlie-Boulder where there are higher rates of fulltime employment and higher personal and household incomes than the Western Australian and national averages, and substantially higher than the incomes of non-Indigenous Australians; including in Kalgoorlie-Boulder.¹⁹ This income is being spent: 47% of households were paying a mortgage and 61% had two or more motor vehicles.²⁰

¹⁵ See generally John Urry, 'The "System" of Automobility' (2004) 21(4-5) *Theory, Culture and Society* 25.

¹⁶ Australian Bureau of Statistics, *2016 Census Quick Stats: Kalgoorlie-Boulder* (3 September 2018) Australian Bureau of Statistics <http://www.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/LGA54280>.

¹⁷ Ibid.

¹⁸ See generally Kersty Hobson, "'Say No to the ATO": The Cultural Politics of Protest Against the Australian Tax Office' (2004) 3(1) *Social Movement Studies* 51.

¹⁹ Australian Bureau of Statistics, above n 16.

²⁰ Ibid.

The issue of mobility is deeply connected with mining in Australia. Waves of immigration generated by mining booms brought interactions between Indigenous land owners and the incoming miners, and also brought people from diverse cultural backgrounds to the minefields.²¹ The booms and busts of the mining cycle, and scarcity of resources, led to conflict. The antagonism and violence towards Chinese on the colonial gold fields is well studied.²² So has the colonial practice of removing Indigenous people to facilitate Western Australian mining.²³ The colonial experience of mining bringing conflict continues. The recent mining boom saw significant conflict arising from perceptions of crime and violence within rural farming communities against ‘fly in; fly out’ (‘FIFO’) workers,²⁴ as well as by non-Indigenous newcomers — including, WSM — against Indigenous children.

Kalgoorlie-Boulder has shared this history of movement and conflict. For instance, before World War Two there were several riots directed towards Southern Europeans.²⁵ Its history of violent take-over of Wangkatja land enabled non-Indigenous corporations and people to profit from exploiting Indigenous land and benefit from the subordination of Wangkatja people.²⁶ The criminal law has played a role in regulating the conflict between miners and Wangkatja people in the interests of the order and morality of the settlement. This includes records of police raiding local camps and attempting

²¹ See generally David Goodman, *Gold Seeking: Victoria and California in the 1850s* (Stanford University Press, 1994).

²² See generally Sophie Loy-Wilson, ‘Coolie Alibis: Seizing Gold from Chinese Miners in New South Wales’ (2017) 91 *International Labor and Working-Class History* 28; Fei Sheng, ‘Creating the Threatening “Others”: Environment, Chinese immigrants and Racist Discourse in Colonial Australia’ in Marco Armiero and Richard Tucker (eds), *Environmental History of Modern Migrations* (Routledge, 2017) 124, 140; Mae M Ngai, ‘Chinese Gold Miners and the “Chinese Question” in Nineteenth-Century California and Victoria’ (2015) 101(4) *Journal of American History* 1082.

²³ See generally Mark Finnane and John McGuire, ‘The Uses of Punishment and Exile: Aborigines in Colonial Australia’ (2001) 3(2) *Punishment and Society* 279.

²⁴ Kerry Carrington et al, ‘Crime Talk, FIFO Workers and Cultural Conflict on the Mining Boom Frontier’ (2012) 53 *Australian Humanities Review* 1; Kerry Carrington and Margaret Pereira, ‘Assessing the Social Impacts of the Resources Boom on Rural Communities’ (2011) 21(1) *Rural Society* 2.

²⁵ Sarah Gregson, ‘“It All Started on the Mines”? The 1934 Kalgoorlie Race Riots Revisited’ (2001) 80 *Labour History* 21; John N Yiannakis, ‘Kalgoorlie Alchemy: Xenophobia, Patriotism and the 1916 Anti-Greek Riots’ (1996) 11(2) *Early Days: Journal of the Royal Western Australian Historical Society* 199.

²⁶ See generally W J K Christensen, ‘Aborigines of Kalgoorlie-Boulder’ in Ronald M Berndt and Catherine H Berndt (eds), *Aborigines of the West: Their Past and their Present* (University of Western Australia Press, 1979) 126.

to regulate sexual relations between miners and Wangkatja women.²⁷ This history of conflict between the Indigenous community and non-Indigenous people in Kalgoorlie-Boulder has continued to shape the relationship in more recent decades. A 2000 study found that members of the non-Indigenous community in Kalgoorlie-Boulder had more prejudicial attitudes towards Indigenous people compared to Perth residents.²⁸ In 2002, the Australian Human Rights Commission specifically identified racism in Kalgoorlie-Boulder as a particular problem and attempted to facilitate greater social harmony and respect through a series of inter-community meetings.²⁹

By 2016, as the gulf between the wealth of the Indigenous and non-Indigenous residents grew, adverse attitudes held by members of the non-Indigenous community in Kalgoorlie-Boulder towards Indigenous people intensified. A moral panic about Indigenous offending manifested on Facebook and social media over the 2010s.³⁰ A feature of this discourse was expressions of explicit violence towards Indigenous people, particularly Indigenous children.³¹ Like earlier documented moral panics in Western Australia,³² the express target was Indigenous children who were seen as lawless, causing damage to persons and property, and who were not being adequately dealt with by the criminal justice system.³³ The tenor of this discourse was towards vigilantism and encouraging extrajudicial violence. In the days prior to Elijah Doughty's death, posts on the then two main crime sites, 'Kalgoorlie Crimes Whinge and Whine' and 'Name Shame Crimes Kalgoorlie', were explicit and horrifying. In response to a woman posting about observing two Indigenous youths breaking into a vehicle, another had commented 'feel free to run these oxygen thieves off the road if you see them' and another posted '[e]veryone talks about hunting down

²⁷ See generally Mary Anne Jebb, 'The Lock Hospitals Experiment: Europeans, Aborigines and Venereal Disease' (1984) 8 *Studies in Western Australian History* 68; Sandra Wilson, 'Police Work: The Role of the Police in the Kalgoorlie Community, 1897-1898' (1982) 6(11) *Journal of Australian Studies* 9.

²⁸ See generally Anne Pedersen et al, 'Attitudes Toward Aboriginal Australians in City and Country Settings' (2000) 35 *Australian Psychologist* 109.

²⁹ Human Rights and Equal Opportunity Commission, *Annual Report 2002-2003*, Human Rights and Equal Opportunity Commission, (2003) 40, 152-4.

³⁰ Thalia Anthony and Craig Longman, 'Blinded by the White: A Comparative Analysis of Jury Challenges on Racial Grounds' (2017) 6(3) *International Journal for Crime, Justice and Social Democracy* 25, 37.

³¹ Cunneen and Russell, above n 9, 11.

³² See generally Neil Morgan, 'Capturing Crims or Capturing Votes? The Aims and Effects of Mandatories' (1999) 22 *University of New South Wales Law Journal* 267.

³³ Cunneen and Russell, above n 9, 11-12.

these sub human mutts, but no one ever does'.³⁴ Further, it seemed that these racist discourses were not limited to a small enclave within the non-Indigenous community. Rather, out of a town of 30 000, the two sites had 18 000 followers combined.³⁵ These sites were not only spaces for hate speech, but involved the dissemination of images of Indigenous youths in public. In May 2016, an image of Elijah Doughty riding his own motorcycle was uploaded.³⁶ A post underneath was 'Run the f**kers over'.³⁷

The racist and violent social media discourse in the months before Elijah Doughty's death had a particular connection with mobility. The violence directed to Indigenous young people involved using motor vehicles as weapons — for example, exhortations between the non-Indigenous social media prosumers to use their motor vehicles to 'run over' Indigenous children. This seems to be in response to anxieties over the mobility of Indigenous children — that they were moving in public spaces and that they were riding motorcycles. And, that this illicit and affronting public movement needed to be surveilled and documented through posts and images. Troubling in itself that this racist and hateful speech was allowed to flourish in Australian communities,³⁸ Elijah Doughty's death on 29 August 2016 brought a confluence of word and deed.

III ELIJAH DOUGHTY'S DEATH AND MOTOR VEHICLES

Elijah Doughty died when he was knocked off the motorcycle he was riding and was run over by WSM's vehicle. This 'event', as the Supreme Court of Western Australia repeatedly described this serious crime,³⁹ happened in Gribble Creek Reserve near Clancy Street on the Boulder side of Kalgoorlie-Boulder. Gribble

³⁴ James Purtill, 'Racist. Violent. Deleted: The Facebook Posts Dividing Kalgoorlie', *Triple J Hack* (online), 1 September 2016 <<http://www.abc.net.au/triplej/programs/hack/the-facebook-posts-dividing-kalgoorlie/7805346>>.

³⁵ Cunneen and Russell, above n 9, 11.

³⁶ Paul Toohey, 'The Seething Streets of Kalgoorlie-Boulder, WA, Where Racism Towards Indigenous Boys Has Hit a Flashpoint' *Perth Now* (online) 13 November 2016 <<https://www.perthnow.com.au/news/wa/the-seething-streets-of-kalgoorlie-boulder-wa-where-racism-towards-indigenous-boys-has-hit-a-flashpoint-ng-d47a67bb37f772da4239e83dbb31ae13>>.

³⁷ Ibid. See also Larissa Behrendt, 'Debbie Carmody - Kalgoorlie Unrest Following the Death of a 14 Year Old Boy' *Speaking Out* (online) 11 September 2016 <<http://www.abc.net.au/radio/programs/speakingout/kalgoorlie-unrest-following-death-of-teenager/7832164>>.

³⁸ See Cunneen and Russell, above n 9.

³⁹ *State of Western Australia v WSM* [2017] WASC 128 (21 July 2017) [6], [11], [13] (Martin CJ).

Creek Reserve is an area of open bush land running through Kalgoorlie-Boulder criss-crossed by dirt tracks. Figure 1 shows the view onto Gribble Creek Reserve from Clancy Street. At trial, CCTV evidence from a house on Clancy Street showed the motorcycle Elijah Doughty was riding entering Gribble Creek Reserve at this point and progressing along the south-west track, followed by the vehicle driven by WSM.⁴⁰ This footage of a chase, of a small rider on a small motorcycle being followed by a large four-wheel drive utility vehicle, immediately prioritises automobility as the primary site of conflict.



Figure 1: Gribble Creek Reserve from Clancy Street. Source Google Maps accessed 20 May 2018

The two Supreme Court of Western Australia decisions establish a narrative of the actions leading up to and after the chase. WSM had returned home the evening before to find his rental property broken into and two motorcycles missing.⁴¹ In response to WSM's notification of the thefts, the police that attended his property suggested that often stolen motorcycles were being used in the nearby Gribble Creek Reserve.⁴² It is not clear from the

⁴⁰ Ibid [6].

⁴¹ Ibid [2].

⁴² Ibid [3].

judgments what was intended by those remarks. There is no indication that the police investigated Gribble Creek Reserve for the missing motorcycles on the evening of the 28 August 2016 or the following morning. Indeed, the remarks seemed to be directed towards, and were interpreted by WSM, as tacit approval for him to go to Gribble Creek Reserve to find the missing bikes and the ‘perps’ who took them.

WSM had a brief search of Gribble Creek Reserve on the evening of the 28 August 2016. He took the next day off work to continue the search.⁴³ A key feature of automobility has been affection — that motor vehicles take on meanings beyond utilitarian transport and become intertwined with identity and expressions of self.⁴⁴ The object of affection for WSM was described in the decisions as ‘a white 50 cc Honda’ that had sentimental value to his wife.⁴⁵ However, it was not the *l’objet de l’affection* of the Honda that WSM identified Elijah Doughty riding. Rather, WSM found during the morning search Elijah Doughty riding the other stolen motorcycle, described as red, 70 cc, Chinese made, and of limited sentimental value.⁴⁶

The subsequent chase was brief. It lasted just over 20 seconds.⁴⁷ At sentencing, the Supreme Court accepted WSM’s account that the motorcycle had swerved unexpectedly into the path of his vehicle.⁴⁸ The Supreme Court relied upon forensic evidence that determined that at the point of impact WSM’s vehicle was possibly travelling at over 60 kilometres per hour — 20 kilometres per hour faster than the determined speed of the motorcycle.⁴⁹ Further, the Supreme Court accepted evidence that the injuries to Elijah Doughty and the damage to the motorcycle were consistent with being run over by a large, fast moving vehicle.⁵⁰ It also determined that Elijah Doughty died instantly through massive trauma.⁵¹

⁴³ Ibid.

⁴⁴ Sarah Redshaw, *In the Company of Cars: Driving as a Social and Cultural Practice* (Ashgate, 2008); Kylie Doyle and Kieran Tranter, ‘Automobility and “My Family” Stickers’ (2015) 29(1) *Continuum: Journal of Media and Cultural Studies* 70.

⁴⁵ *State of Western Australia v WSM* [2017] WASC 128 (21 July 2017) [2] (Martin CJ).

⁴⁶ Ibid [5].

⁴⁷ Ibid [10].

⁴⁸ Ibid [9].

⁴⁹ Ibid [8].

⁵⁰ Ibid [10].

⁵¹ Ibid.

At one level, to adopt the Supreme Court's repeatedly used term in the sentencing remarks, this 'tragedy'⁵² of a motorcyclist dying in an accident with a vehicle is just that; another, often repeated tragedy, that has come with the current forms of automobility. Elijah Doughty was another Indigenous kid in a regional town who died riding a motorcycle. That integration of the motor vehicle into the everyday of Australian lives, economy, and culture is so complete that there are well established laws and administering regimes to account for the human lives lost to motor vehicles. In 2016, there were 194 road fatalities in Western Australia.⁵³ This total included 13 children Elijah Doughty's age⁵⁴ and 40 motorcyclists.⁵⁵ It is possible that Elijah Doughty is not counted in this number. It could be that the thanatological mechanisms that keep account of the road toll might not have registered Elijah Doughty's death on the 'tracks' in Gribble Creek Reserve as within jurisdiction. Elijah Doughty was not wearing safety equipment, although the medical evidence of his injuries was that helmet, jackets, and leggings would not have saved his life. In the eyes of the system, death from motor vehicles is a familiar, mundane, ever-present reality of contemporary automobility — something regretted but accepted.⁵⁶ Something so normal and every-day that there are annual reports and 'real-time' websites keeping account. That a child died using a motor vehicle in a collision with another motor vehicle is, for the courts, unremarkably tragic.

There is a second unremarkable intertwining of automobility and law embedded in Elijah Doughty's death. The motor vehicle can be a vector of crime — transporting criminals and their loot. Or instead, an instrument of crime — a mobile space in which sexual assault can occur or weaponised as an instrument of terror.⁵⁷ Vehicles can also be the object of crime.⁵⁸ Elijah Doughty's death stemmed from the theft of two motorcycles. Motorcycle theft within Kalgoorlie-Boulder was a particular focus of the social media moral

⁵² Ibid.

⁵³ Road Safety Commission, *2016 Summary: Preliminary Fatal and Critical Injuries on Western Australian Roads*, Road Safety Commission (2017) 13 table 3.

⁵⁴ Ibid 17 table 6.

⁵⁵ Ibid 20.

⁵⁶ Tranter, above n 2, 180.

⁵⁷ Thalia Anthony and Kieran Tranter, 'Car Crime in the Popular Imagination' in Nicole Rafter (ed), *Oxford Research Encyclopaedia, Criminology and Criminal Justice* (Oxford University Press, 2016) DOI 10.1093/acrefore/9780190264079.013.21.

⁵⁸ Ibid.

panic in the lead up to 29 August 2016.⁵⁹ Indeed, Elijah Doughty's own motorcycle had been stolen. There was no finding or indication that Elijah Doughty was involved in the theft from WSM's residence.⁶⁰ Nevertheless, for 'regional' Western Australia in 2016-2017, there were 1 687 reports of stolen motor vehicles⁶¹ and 5 763 burglaries of dwellings.⁶² It could be expected that the offences against WSM are included in these statistics. In this there is nothing remarkable. Crimes against property have been reported and tallied.

Stripped of its temporal location, the 'event' of 29 August 2016 is another tragic manifestation of automobility. Elijah Doughty died because of motor vehicles. He died because he was riding a motorcycle and he was hit and run over by a larger and heavier vehicle. He died because the vehicle that hit him was being driven by a man incensed that his motor vehicle property had been stolen. Australian law has had over 100 years to come to a reckoning with the motor vehicle⁶³ and the cost in lives and money of its attendant culture of automobility. The everydayness of this regulation of this specific form of mobility is well encapsulated through the legal texts of the 'event'.

IV MOBILITY AND CASCADES OF VIOLENCE AFTER THE 'EVENT'

While in isolation Elijah Doughty's death is another tragic loss of life to the motor vehicle. The simmering of racial violence on social media and in pursuits of Indigenous children by non-Indigenous drivers was unleashed with the

⁵⁹ Purtil, above n 34. See also *MWSD v State of Western Australia* [2017] WASC 125 (5 May 2017) [60] (Jenkins J).

⁶⁰ Martin CJ does make a brief comment that WSM's belief that the motorcycle that Elijah Doughty was riding was his stolen red 70 cc Chinese made bike as 'correct': see *State of Western Australia v WSM* [2017] WASC 128 (21 July 2017) [32].

⁶¹ *Road Traffic (Administration) Act 2008* (WA) s 4 defines a 'motor vehicle' as a 'means a self-propelled vehicle that is not operated on rails.' The *Road Traffic Act 1974* (WA) s 49AAA defines a 'motor cycle' as a motor vehicle with two or three wheels. Under s 1 of the *Criminal Code 1913* (WA) the definition of 'motor vehicle' in the *Road Traffic (Administration) Act 2008* (WA) is adopted. Following this, motorcycles are identified as a motor vehicle for reporting of motor vehicle thefts.

⁶² Western Australian Police Force, *Crime Statistics* <[https://www.police.wa.gov.au/Crime/CrimeStatistics#/>](https://www.police.wa.gov.au/Crime/CrimeStatistics#/).

⁶³ See generally Kieran Tranter, "'The History of the Haste-Wagons": The *Motor Car Act 1909* (Vic), Emergent Technology and the Call for Law' (2005) 29 *Melbourne University Law Review* 843.

killing of Elijah Doughty and tensions within the Indigenous community quickly reached boiling point.⁶⁴

Throughout the ongoing tensions, the Indigenous community perceived the police as facilitating the assailant and failing to properly investigate the killing in order to bring the assailant to justice.⁶⁵ This police facilitation and mishandling of the matter not only occurred when the police directed WSM to Gribble Creek, but also straight after WSM caused Elijah Doughty's death when the police failed to seal off the scene of the crime. During the cascade of violence, another technology of mobility becomes intertwined in the tragedy. This technology is directly introduced in the Supreme Court's sentencing remarks. Speaking to WSM concerning his immediate actions after the incident, the Supreme Court narrates:

After a little difficulty unlocking your telephone, you telephoned ooo. However, after becoming exasperated by the fact that the operator of that service did not appear to be in Kalgoorlie or have any knowledge of the Kalgoorlie area, you discontinued that call and *telephoned the policeman who had given you his number the previous evening*.⁶⁶

This image of WSM frantically fumbling with his mobile telephone and trying to call help in the aftermath of the incident is familiar. The ubiquitous mobile telephone as a technology of mobility⁶⁷ enables WSM to connect with the authorities within, apparently, moments of killing a child. The Supreme Court commends WSM's action of calling for assistance and staying on the line and following the police officer's directions.⁶⁸ This act of linking into mobile technology is presented by the Supreme Court as partly redeeming WSM's character after his offence.

⁶⁴ Laura Murphy-Oates, 'Kids of Kalgoorlie: in The Wake of Elijah Doughty, Vigilantism Thrives', *SBS The Feed* (online) 11 September 2017 <<https://www.sbs.com.au/news/the-feed/kids-of-kalgoorlie-in-the-wake-of-elijah-doughty-vigilantism-thrives>>.

⁶⁵ Alex McKinnon, 'Police Criticised Following Deaths', *The Saturday Paper* (online) 28 July 2017 <<https://www.thesaturdaypaper.com.au/thebriefing/2017/07/28>>.

⁶⁶ *State of Western Australia v WSM* [2017] WASC 128 (21 July 2017) [11] (Martin CJ) (emphasis added).

⁶⁷ See generally Richard Ling, *Taken for Grantedness: The Embedding of Mobile Communication into Society* (MIT Press, 2012); Gerard Goggin, *Cell Phone Culture: Mobile Technology in Everyday Life* (Routledge, 2012).

⁶⁸ *State of Western Australia v WSM* [2017] WASC 128 (21 July 2017) [27] (Martin CJ).

While WSM's use of his mobile phone might have been a means of mitigating against his dangerous use of his Nissan Navara, the wider mobile media in Kalgoorlie-Boulder after 29 August 2016 sought to aggravate the circumstances. Immediately, the tenor of posts on the non-Indigenous community crime social media forums became righteous: '[g]ood job you thieving bastard. Don't think you'll be touching another bike any time soon ahaha About time someone took it into their own hands hope it happens again'.⁶⁹ Some were more circumspect 'Condolences to the driver trying to get his bike back. Went a bit too far',⁷⁰ while others were explicitly and blatantly racist:

Aboriginals...don't deserve to live. That's good that young boy got killed. Aboriginals don't own Australia. Aboriginals live in the bush. They are filthy animals. They all need the death sentence.⁷¹

For the Indigenous community, social media and mobile phones also became a focus after the incident. This happened three ways. First, Indigenous community members were seeing, documenting, and helping journalists archive the racist and inflammatory social media content from the crime forums. Second, members of the Indigenous community rallied around the #JusticeForElijah tag, which built on the momentum of Ferguson and the #BlackLivesMatter movement and challenged the mainstream media's prejudicial reporting — most notably that Elijah Doughty had stolen the bike. Third, mobile phones and social media became a site for grief, outrage, and organisation.

This use of social media and digital technologies connected to real world actions involving motor vehicles. Indigenous youths walking in public spaces and on motorbikes reported an increase in harassment from non-Indigenous drivers.⁷² There was a documented report of the arrest and charging with 'disorderly conduct' of a single non-Indigenous driver in relation to a

⁶⁹ Social media post quoted in Purtill, above n 34.

⁷⁰ Social media post quoted in Chris Graham, 'White Man's Manslaughter. Black Man's Murder. White Man's Riot. Black Man's Uprising' *New Matilda* (online) 31 August 2016 <<https://newmatilda.com/2016/08/31/the-kalgoorlie-uprising-a-rational-response-to-another-black-death/>>.

⁷¹ Social media post quoted in Toohey, above n 36.

⁷² *Ibid.*

harassment incidence.⁷³ Elijah Doughty's grandfather had vehicles lurking and hooning around his property. The house WSM was renting was deliberately set alight and he lost all his property.⁷⁴ A Justice Camp memorial to Elijah Doughty in Gribble Creek Reserve, where it was believed he died, was established. One of Elijah Doughty's own relatives committed suicide at the Justice Camp.⁷⁵

However, while some of these were noted in passing in the legal texts, what happened on 30 August 2016 came to be more than a trace within the textual ruminations of the Supreme Court. This involved recounting of evidence provided by Inspector Anthony James Colfer of the 'most frightening experience of his long police career'.⁷⁶ Described variously as a 'riot'⁷⁷ and 'anti-social behaviour',⁷⁸ it details how a protest group of Indigenous people caused damage to the Kalgoorlie Courthouse and police vehicles.⁷⁹ The extent of the damage included breaking several windows.

Movement and mobility is critical to how the Supreme Court, in early proceedings, narrates this event through Colfer's eyes. There was initially a protest gathering near the courthouse.⁸⁰ Most of the gathering were then prevented from entering the courthouse, except the members of Elijah Doughty's immediate family. There were multiple movements:

A large number of the group ... rushed towards the courthouse. The police were unprepared and outnumbered. Some of the group attempted to obtain access to the courthouse through the rear door. In their attempt they broke down the side gate to the courthouse in a violent manner. Colfer ran to the back of the courthouse and physically blocked their entry to it.⁸¹

This description of movement of bodies was supplemented with description of movement of projectiles: 'rocks and other like items'⁸² and 'loose

⁷³ *MWSD v State of Western Australia* [2017] WASC 125 (5 May 2017) [59] (Jenkins J).

⁷⁴ *Ibid.* See also *State of Western Australia v WSM* [2017] WASCSR 128 (21 July 2017) [28] (Martin CJ).

⁷⁵ David Prestipino, 'Relative Suicides at Site Where Kalgoorlie Teenager Elijah Doughty Died' (2016) *WA Today* (online) <https://www.watoday.com.au/national/western-australia/relative-suicides-at-site-where-kalgoorlie-teenager-elijah-doughty-died-20161011-grzfcg.html> accessed 30 May 2018.

⁷⁶ *MWSD v State of Western Australia* [2017] WASC 125 (5 May 2017) [71] (Jenkins J).

⁷⁷ *Ibid* [53], [55], [58].

⁷⁸ *Ibid* [53].

⁷⁹ *Ibid* [56].

⁸⁰ *Ibid* [49].

⁸¹ *Ibid* [50].

⁸² *Ibid* [51].

paving⁸³ thrown at the courthouse doors and at the ‘mobilised police’.⁸⁴ There was a removal of non-police and security court staff from the courthouse and the cordoning off and clearing traffic from around the courthouse.⁸⁵ The crowd dissipated when food was made available ‘some distance from the courthouse’.⁸⁶

Like with the road toll and the crime statistics, the Supreme Court supplements this intertwining of bodies, movement, and violence with numbers. In addition to the ‘approximately 200’⁸⁷ protesters, there were also approximately 50 police officers, of which 15 were reported as physically injured.⁸⁸ Thirty protesters were arrested and 55 charges laid.⁸⁹ The numbers of protesters injured, however, was not documented by the Supreme Court despite footage indicating such injuries.⁹⁰ Damage to police vehicles was precisely tallied as \$34 077 and the repairs to the courthouse were \$18 800.43 while the operational costs of the police deployment in response to the ‘incident’ was \$290 000.⁹¹

The point of the Supreme Court narrating moving bodies, violence, and numbers was to decide on where WSM should be tried. This story was located within a judicial calculus of whether the trial for manslaughter should be in Perth, as the Crown had organised, or Kalgoorlie as WSM lawyers had requested under s 135(1) of the *Criminal Procedure Act 2004* (WA). Also heard was an application by Petrina James, Elijah Doughty’s mother, and Albert Doughty, Elijah Doughty’s paternal grandfather, to intervene as amicus to introduce two affidavits to oppose the application for the venue of the trial by jury to be Kalgoorlie.

The basis for their application was that the affidavits contained evidence not adduced by the State.⁹² They wanted to convey their own experiences of the Kalgoorlie community that would provide a distinct set of perspectives to those provided by the State. The application was rejected by the Supreme Court on the grounds that the State has the capacity to adduce such evidence if it saw it as

⁸³ Ibid [52].

⁸⁴ Ibid [51]–[52].

⁸⁵ Ibid [53].

⁸⁶ Ibid [54].

⁸⁷ Ibid [49].

⁸⁸ Ibid [53].

⁸⁹ Ibid [54].

⁹⁰ ‘Tensions in Kalgoorlie Over Death of Aboriginal Teen’, *Te Karere TVNZ* (online) 31 August 2016 <<https://www.youtube.com/watch?v=3hnuofimPI>>.

⁹¹ *MWSD v State of Western Australia* [2017] WASC 125 (5 May 2017) [56] (Jenkins J).

⁹² Ibid [7]–[9].

relevant, and the amicus would bring nothing discrete to what the State may bring.⁹³ The Court's trust in the State's knowledge of place — conveyed by the Perth-located Director of Public Prosecutions — reflects a postcolonial institutional rejection of *Indigenous* place-based knowledges and standpoints on the basis that the state has a universal and superior capacity for truth-finding and truth-telling. There is a statement about the relationship between sovereignty and movement that is brutally evident in the Supreme Court's dismissal of the amicus curiae application. The Court declares that questions of locale of trials and the directing of movement of peoples and resources to that site of justice belongs exclusively with the settler state. Indeed, the Supreme Court did not just reject Elijah Doughty's family's application on substantive grounds but also added that, as a matter of law, amicus cannot adduce evidence. It is a judgment that denies the very people to whom a mobile court descends on to deliver justice, a right to be heard in its determining of where that descent should happen.

This is in stark contrast to WSM who, as the accused, had a statutory right to challenge where the trial was to be held. In response to his application, the Supreme Court balanced the issues of a fair trial with the risk to public safety and cost to the community if it was held in Kalgoorlie rather than Perth.⁹⁴ It found that there was no risk to a fair trial if it was held in Perth and, meanwhile, there were potential risks to safety if the trial was in Kalgoorlie. The Supreme Court determined that it was an 'exceptional case'⁹⁵ by virtue of what took place outside of the Kalgoorlie courthouse at the committal and held that WSM was to be tried for manslaughter in Perth.

The intertwining of mobile phones, bodies, and violence in the aftermath of the death of Elijah Doughty became a legal story of where the trial should be held. The State reserved to itself the location where its justice should be empanelled. This did not mean a decision based on abstract principles. The State took note, and kept a record of the situation in Kalgoorlie, and particularly the movements, damage, and costs that happened at the committal. What emerges from the Supreme Court judgment in *MWSD v State of Western*

⁹³ Ibid [22].

⁹⁴ Ibid [36], [38]–[39].

⁹⁵ Ibid [45].

*Australia*⁹⁶ is a practical and sophisticated mobile law; a law capable of moving in response to ‘events’ and movements at specific places.

V (NOT) PUNISHING THE VIOLENT USE OF A MOTOR VEHICLE

At trial in Perth the all-white jury, controversially, found WSM not guilty of the manslaughter of Elijah Doughty. WSM was convicted, in the alternative, of the lesser offence of dangerous driving causing death in s 59 of the *Road Traffic Act 1974* (WA). The deliberation for the Supreme Court of Western Australia was on the sentence — on what should be done with WMS. The Indigenous community felt there were substantial aggravating factors that warranted a long prison sentence, including the death of a child and the cruel and deliberate way in which Elijah was hit, and then driven over, by the four-wheel. The Indigenous community saw the sentencing as an opportunity, once and for all, to send a message to the non-Indigenous community that the violent racism directed to Indigenous people (in the name of stamping out motorcycle theft) and the encouragement of the murderous use of motor vehicles to run down Indigenous people had to stop.

They hoped the lines on the use of motor vehicles as a weapon deployed against Indigenous peoples would be drawn in favour of protecting Indigenous people through a harsh punishment that would encapsulate the harm of the crime, and its racial context, for both Elijah and Kalgoorlie’s Indigenous community as a whole. This was an opportunity for the Supreme Court to condemn the actions of the individual, WSM, and his role in Elijah’s death — whether advertent or inadvertent — in the broader racial violence directed towards Indigenous children.

The elements of the offence of dangerous driving causing death under s 59(1) of the *Road Traffic Act 1974* (WA) entail:

If a motor vehicle driven by a person (the *driver*) is involved in an incident occasioning the death of, or grievous bodily harm to another person and the driver was, at the time of the incident, driving the motor vehicle –

- (a) while under the influence of alcohol to such an extent as to be incapable of having proper control of the vehicle; or

⁹⁶ Ibid.

- (ba) while under the influence of drugs to such an extent as to be incapable of having proper control of the vehicle; or
- (bb) while under the influence of alcohol and drugs to such an extent as to be incapable of having proper control of the vehicle; or
- (b) in a manner (which expression includes speed) that is, having regard to all the circumstances of the case, dangerous to the public or to any person, the driver commits a crime and is liable to the penalty in subsection (3).⁹⁷

The penalties in s 59(3) are provided as a gradient:

- A person convicted on indictment of an offence against this section is liable –
- (a) if the offence is against subsection (1)(a), (ba) or (bb), or the offence is against subsection (1)(b) and is committed in circumstances of aggravation, to a fine of any amount and to imprisonment for –
 - (i) 20 years, if the person has caused the death of another person; or
 - (ii) 14 years, if the person has caused grievous bodily harm to another person; or
 - (b) in any other circumstances, to a fine of any amount and to imprisonment for –
 - (i) 10 years, if the person has caused the death of another person; or
 - (ii) 7 years, if the person has caused grievous bodily harm to another person,
 and, in any event, the court convicting that person shall order that he be disqualified from holding or obtaining a driver's licence for a period of not less than 2 years.⁹⁸

Causing death or serious injury to a person while driving a motor vehicle under the influence of drugs or alcohol is the opprobrium that attracts the most serious penalties.

In the absence of identifying intoxication or other aggravating factors, WSM was convicted under the lesser offence of s 59(1)(b)(i) of 'driving a motor vehicle in a manner [which expression includes speed] that is, having regard to all the circumstances of the case, dangerous to the public or any person'⁹⁹ and as such was liable to the penalties in s 59(3)(b)(i) of a maximum penalty of 10

⁹⁷ *Road Traffic Act 1974* (WA) s 59(1).

⁹⁸ *Ibid* s 59(3).

⁹⁹ *Ibid* s 59(1)(b).

years imprisonment. The maximum penalty was increased from four years' imprisonment in 2008 to take into account the seriousness of the offence.¹⁰⁰

WSM was sentenced to three years imprisonment backdated from the time WSM was in custody (29 August 2016) with eligibility for parole, and driver's licence disqualification for two-years.¹⁰¹ This penalty is well below the maximum sentence of 10 'years' imprisonment. The Supreme Court deemed the offence to lie at the 'lower half' of seriousness: 'between the middle and lower end of that range'.¹⁰² The Court expressly did not regard the offence to be 'at the upper end of the range of [dangerous] driving' offence'.¹⁰³ The Supreme Court cited 'significant mitigating factors'.¹⁰⁴ These factors — that the speed of the vehicle was not 'excessive', the offender was not driving an unsafe vehicle, the offender was not driving in a way that was 'recklessly indifferent to the consequences', and that the offender was not under the influence of alcohol¹⁰⁵ — combined to make the sentencing remarks into a discourse on the good character of the offender. The Court's favourable characterisation of WSM not only provided mitigation in itself, but also contributed to the Court's acceptance of the WSM's characterisation of the events, a characterisation that further reduced the offender's culpability.

The Supreme Court's remarks in *WSM* lacked condemnation for the offender's actions. Instead, there are expressions of sympathy for the hardship that WSM has faced following his offence. This contrasts with other sentencing remarks involving dangerous driving offences where the driving is described as 'outrageously bad', 'wholly dangerous and callous'¹⁰⁶ and exhibiting 'reckless behaviour of a high magnitude'.¹⁰⁷

¹⁰⁰ The maximum penalty for dangerous driving occasioning death, where the offence is not committed in circumstances of aggravation, was increased from four years' imprisonment to 10 years' imprisonment with effect from 1 August 2008 by *Criminal Law Amendment (Homicide) Act 2008* (WA) s 38.

¹⁰¹ *State of Western Australia v WSM* [2017] WASC SR 128 (21 July 2017) [47] (Martin CJ).

¹⁰² *Ibid* [21]–[22], [38] (Martin CJ).

¹⁰³ *Ibid* [21]–[22].

¹⁰⁴ *Ibid* [24].

¹⁰⁵ *Ibid* [19].

¹⁰⁶ *Devine v State of Western Australia* [2010] WASCA 94 (18 May 2010) [71] (McLure P, Buss JA and Jenkins J). See also *Billing v State of Western Australia* [2017] WASCA 80 (21 April 2017) [23] (Buss P, Newnes and Mazza JJA).

¹⁰⁷ *Kershaw v State of Western Australia* [2014] WASCA 111 (23 May 2014) [42], [114] (McLure P, Buss and Mazza JJA).

The Supreme Court's repeated deployment of the term 'tragedy'¹⁰⁸ infers that Elijah Doughty's death was unwilling. Other sentencing remarks, discussed below, are more inclined to focus on the 'deliberate' and 'intentional' nature of the dangerous driving, even in circumstances where there was no *pursuit of a victim* who ultimately died as was the case in *WSM*. For instance, in *Devine v State of Western Australia* [2010] WASCA 94, a speeding 21-year-old driver lost control of his vehicle causing the death of one of his passengers and severe injuries to another. There were no other road users in the vicinity of the offender's vehicle at the time.¹⁰⁹ The Court of Appeal of Western Australia described the offender's conduct as 'calculated, premeditated and deliberate'.¹¹⁰ In *Lutumba v State of Western Australia* [2013] WASCA 172, an inexperienced 29-year-old L-plate driver —in contrast to the professional driving experience of *WSM* — who was reluctantly driving his relatives who were in a rush to get to the airport,¹¹¹ crashed with another vehicle causing the death of one person and injuries to five others. The collision occurred because the driver went onto the wrong side of a road to overtake a truck and travelled at an 'unsafe distance behind the truck'.¹¹² The sentencing judge and Western Australian Court of Appeal described the offender's actions as 'deliberate'.¹¹³

The following sections outline the Supreme Court's characterisation of the offence, the offender, and the victims in *WSM* through a close examination of the factors of speed, vehicle safety; *WSM*'s driving, and the absence of alcohol. It compares the characterisation of the offender and offence with other sentencing remarks by the Supreme Court of Western Australia for comparable charges. And, it finds that despite the other cases being less culpable, *WSM* is presented in a more favourable light. It further contends that the Supreme Court did not attend to the vigilante context of *WSM*'s dangerous driving that spurred on drivers to attack Indigenous children and failed to send a message of deterrence to this racist vigilante community in Kalgoorlie-Boulder. It finally argues that the Court does not sufficiently come to terms with the trauma that the killing caused — and continues to cause — Elijah Doughty's family, local

¹⁰⁸ *State of Western Australia v WSM* [2017] WASC SR 128 (21 July 2017) [10] (Martin CJ).

¹⁰⁹ *Devine v State of Western Australia* [2010] WASCA 94 (18 May 2010) [77] (McLure P, Buss JA and Jenkins J).

¹¹⁰ *Ibid* [84].

¹¹¹ *Lutumba v State of Western Australia* [2013] WASCA 172 (1 August 2013) [36] (Buss, Newnes and Mazza JJA).

¹¹² *Ibid* [21] (Buss, Newnes and Mazza JJA).

¹¹³ *Ibid* [21], [39].

community, and broader Indigenous community. Whether this was due to the failure of the prosecution to highlight these features¹¹⁴ or a blindness on the part of the Court, we argue that a consideration of these circumstances would have shed light on the gravity of the offence, aggravating factors, and the need for a strong message of condemnation of the offender and general deterrence. Instead, the Supreme Court ruled that it could not identify ‘any’ aggravating factors.¹¹⁵

A *Speed*

The Supreme Court deemed WSM to be travelling at an average speed 67 kilometres per hour and Elijah Doughty to be travelling at 46 kilometres per hour.¹¹⁶ The offender was driving over 20 kilometre per hour faster than the speed at which Elijah Doughty was travelling. And further, was accelerating his vehicle to reduce his distance from Elijah Doughty.¹¹⁷ As has been noted, the Supreme Court accepted that WSM was travelling at such a velocity that Elijah Doughty died instantaneously, and after his vehicle hit Elijah Doughty, WSM drove straight over him.¹¹⁸ Nonetheless, the Supreme Court concluded that WSM was not driving at high speed.¹¹⁹ This interpretation obviates the relative speed of the vehicles. While 67 kilometre per hour may not be excessive speed where the vehicle in front is travelling at a similar speed on a sealed road, it can be regarded as a dangerously high speed where the vehicle in front is riding at 20 kilometres per hour slower on a dirt track. The dangerousness of the speed is intensified in this case by the fact that WSM’s Nissan Navara had the capacity to drive on bushy, uneven ground (see Figure 1) at speed, including through hazards, whereas the dirt bike driven by an inexperienced young rider was much more likely to struggle. The Court described the ground on Gribble Creek Reserve as made of red clay, grass, and gravel and on the 29 August 2016 as wet, boggy, uneven, and in a state of deterioration.¹²⁰ Given the relative capacities of the vehicles, and the drivers — and, that the offender was quickly

¹¹⁴ *State of Western Australia v WSM* [2017] WASC SR 128 (21 July 2017) [23] (Martin C).

¹¹⁵ *Ibid.* This reflects, as Martin CJ notes, the submissions by the State of Western Australia.

¹¹⁶ *Ibid* [8].

¹¹⁷ *Ibid* [5], [8].

¹¹⁸ *Ibid* [10].

¹¹⁹ *Ibid* [19].

¹²⁰ *Ibid* [5].

closing in on Elijah — the speed should have been considered dangerously ‘high’ and ‘excessive’.

In *Timbrell v State of Western Australia (No 2)* [2013] WASCA 269 (*Timbrell*), the Court of Appeal perceived speed *relative* to the circumstances. It was noted that although the speed of the vehicle was within the prescribed limit, a vehicle travelling at 70 km per hour ‘will collide with very considerable force’.¹²¹ It held that the offender’s driving of a heavy vehicle, a Toyota Prado four-wheel drive, through the red light in a ‘state of inattention’ in a ‘built-up area and at a time when it was highly likely that other vehicles would be present and travelling into his path’ gave rise to ‘the potential for serious injury’.¹²² Therefore, even though the offender ‘was not travelling in excess of the speed limit ... the potential for serious injury when a vehicle, travelling at that speed, collides with another vehicle is obvious’ and was ‘a serious breach of the standards expected of a reasonable driver’.¹²³

B *Safety of Vehicle*

In isolation, WSM’s Nissan Navara could be construed as safe. This was how it was presented by the Supreme Court. It was not unroadworthy nor unregistered. However, the context of the driving and the threat it posed to Elijah Doughty put the safety of WSM’s twin cab ute in a different light. WSM’s vehicle weighed more than 1.5 tonnes — that would have been at least 15 times heavier and bigger than the approximately 55 kilogram dirt bike that Elijah Doughty was riding. The fact that the WSM deliberately ‘gave chase’¹²⁴ to the bike that Elijah Doughty was riding — closely tailing him at speed — would make the four-wheel drive vehicle highly dangerous in the eyes of Elijah Doughty and onlookers. While the vehicle was not unsafe for the offender, or in terms of its likelihood of breaking down, it was unsafe from the standpoint of a child being chased by that vehicle.

The Supreme Court may have taken note of the apposite words of the original sentencing judge in the case of *Timbrell* when her Honour said that motor

¹²¹ *Timbrell v State of Western Australia (No 2)* [2013] WASCA 269 (23 November 2013) [76] (Buss, Mazza JJA and Hall J).

¹²² *Ibid* [115] (Buss, Mazza JJA and Hall J).

¹²³ *Ibid*.

¹²⁴ *State of Western Australia v WSM* [2017] WASC 128 (21 July 2017) [5] (Martin CJ).

vehicles are 'lethal weapons' that are discharged when they are driven unsafely, and accordingly, 'all drivers need to be on the utmost guard at all times, and taking into account not only the safety of themselves, but the safety of everyone else on the road'.¹²⁵

C *Reckless Indifference of Driver*

Given the observation in relation to WSM chasing Elijah Doughty, relative speed and size of the vehicles, the conditions of the track, and the relative experience and age of the drivers, it is submitted that it was open to the Court to regard the offender as recklessly indifferent to Elijah Doughty's life. The Supreme Court recognised these circumstances, but nonetheless maintained that WSM actions were not recklessly indifferent. The Court explains that WSM's:

culpability lies in driving a very large and heavy vehicle very close to a small motorbike at a speed, and on terrain which made it difficult to predict the course which the motorbike would take, and which also made it difficult if not impossible ... to either stop or change course so as to avoid a collision with the motorbike if the rider acted in a manner which was unexpected.¹²⁶

It is difficult to reconcile this observation with the finding that the WSM's driving was *not* reckless — a finding which lessened the seriousness of the offence placing it at 'lower end' of the offending spectrum and, therefore, the length of WSM's sentence. Other cases relegated to this lower end include *Timbrell* in which the 21-year-old driver went through a red light 'as a result of inattention' and thus caused the death of another driver.¹²⁷ In other sentencing matters for dangerous driving causing death where the offender was characterised as 'highly' reckless and dangerous, such as the case of *Kershaw v State of Western Australia* [2014] WASCA 111 ('*Kershaw*'), the offending did not involve a pursuit of the victim. In *Kershaw* the offender failed to advert to a 'clearly visible and glaringly obvious hazard on the edge of the highway' which

¹²⁵ *Timbrell v State of Western Australia (No 2)* [2013] WASCA 269 (23 November 2013) [25] (Buss, Mazza JJA and Hall J) quoting Sweeney DCJ.

¹²⁶ *State of Western Australia v WSM* [2017] WASCSR 128 (21 July 2017) [10] (Martin CJ).

¹²⁷ *Timbrell v State of Western Australia (No 2)* [2013] WASCA 269 (23 November 2013) [25] (Buss, Mazza JJA and Hall J).

caused the death of two people.¹²⁸ The majority in the Court of Appeal accepted that the offender's 'criminality was high' because he was determined to 'keep driving even though he knew he was fatigued and posed a risk to other road users.'¹²⁹ In another case, *LJM (a child) v State of Western Australia* [2005] WASCA 172 ('*LJM*'), a 14-year-old Aboriginal child was 'hooning about' on the boundaries of the Warmun Aboriginal community and lost control of the vehicle causing it to slide sideways into a steel power pole.¹³⁰ The two 15-year-old passengers consequently lost their lives. The sentencing judge described the incident as 'the product of the deliberate' manner of driving that meant that it fell 'near the top of the range in dangerousness'.¹³¹ In the case of *WSM*, however, the actions could be characterised as more calculated and intentional than either *Kershaw* or *LJM*. Yet, recklessness was deemed not a factor in *WSM* despite the driver deliberately and dangerously chasing a child through tailing him in a large imposing vehicle in treacherous terrain at accelerating speed.

D *Absence of Alcohol*

The fact that the *WSM* chased down Elijah Doughty while sober also operated in his favour in sentencing. His unintoxicated state provided the offender with a double benefit. He was freed from being charged under s 59(a)(i) of the *Road Traffic Act 1974* (WA) that carries a maximum of 20 years' imprisonment for offenders driving under the influence. Instead, *WSM* was subject to s 59(b)(i), which carries a maximum penalty of 10 years' imprisonment due to the absence of this aggravating factor. *WSM* then gained an additional benefit because of his sobriety within this lesser offence.¹³² This appears to be a double dipping into the sentencing benefits for *WMS*. First, as was not intoxicated he was not charged under the aggravated offence and further, that he was not intoxicated was treated by the Court as a mitigating factor when considering his culpability under the lesser offence.

¹²⁸ *Kershaw v State of Western Australia* [2014] WASCA 111 (23 May 2014) [86], [88] (McLure P, Buss and Mazza JJA).

¹²⁹ *Ibid* [177].

¹³⁰ *LJM (a child) v State of Western Australia* [2005] WASCA 172 (1 August 2015) [3] (Steytler P).

¹³¹ *Ibid* [4], [6] (Steytler P).

¹³² *State of Western Australia v WSM* [2017] WASCSR 128 (21 July 2017) [19] (Martin CJ).

E *Characterisation of the Harm and Impact of Offence*

Although the ‘principles of sentencing’ in the *Sentencing Act 1995* (WA)¹³³ require a sentencing court to determine the seriousness of the offence with reference to the ‘vulnerability of any victim of the offence’,¹³⁴ the vulnerability of Elijah Doughty was not presented in relation to WSM’s culpability. There are few details about Elijah Doughty’s vulnerability as a 14-year-old Indigenous boy who was a target of racist wrath by the non-Indigenous driving community. Elijah Doughty’s youth is also minimalised — the Supreme Court refers to him as a ‘young man’¹³⁵ rather than a boy or child. Elijah Doughty is also not named. There is power and respect in the naming of victims of violence where culturally sanctioned.¹³⁶ This is the logic behind the names on war memorials or in the memorials to victims of terrorism. It is to do the opposite of the thanatological accounting evident in the road tolls. Rather than reducing the dead to commensurable numbers, the unique specificity of the lives of the deceased are remembered and memorialised through being named. It must be noted that the Supreme Court’s non-disclosure did not come from respecting the wishes of Elijah Doughty’s family or community. His community in its social media and old media activity did not hide Elijah Doughty’s name, age, or image. In the sentencing remarks there was no sense that Elijah Doughty was a boy who just turned 14 or was a celebrated football player. This is a distinct contrast to the sentencing comments by the Supreme Court in, for example, *State of Western Australia v Francis* [2018] WASCR 106 (*Francis*). This case is a mirror to *WSM* but with critical differences: the offender was an Indigenous adult man who chased in his motor vehicle a 15-year-old non-Indigenous youth that he believed was riding his stolen motorcycle and the pursuit ended with the child dying from fatal injuries after colliding with another vehicle.¹³⁷ In *Francis* the victim’s youth and vulnerability is emphasised by his being named ‘Master Chase’¹³⁸ and being referred to as a ‘boy’,¹³⁹ and the word ‘fear’ or its derivatives is deployed seven times by the Court to describe the victim’s state as

¹³³ *Sentencing Act 1995* (WA) s 6.

¹³⁴ *Sentencing Act 1995* (WA) s 6(2)(b).

¹³⁵ *State of Western Australia v WSM* [2017] WASCSR 128 (21 July 2017) [10], [27] (Martin CJ).

¹³⁶ See generally Jenny Edkins, *Trauma and the Memory of Politics* (Cambridge University Press, 2003).

¹³⁷ *State of Western Australia v Francis* [2018] WASCR 106 (13 June 2018) [8]-[13] (Fiannaca J).

¹³⁸ *Ibid*.

¹³⁹ *Ibid* [1] (Fiannaca J).

he was being chased by the offender's vehicle.¹⁴⁰ Tellingly, the word 'fear', nor any of its synonyms — 'scared', 'frightened', and so on — are not used to describe Elijah Doughty's feelings in *WSM*.

The harm in *WSM* is discussed in the task of weighing up, first, the 'culpability of the driving', against second, 'the fatal consequences'.¹⁴¹ The Supreme Court refers to the loss of life as 'an element of the offence' and requiring a sentence to reflect 'the value which our community rightly attaches to the sanctity of human life and to the need to do everything we can to discourage its loss through tragic accidents of this kind'.¹⁴²

Moreover, the framing of the impact of the offence in these general terms and as a 'tragic accident' minimises the harm and sense of injustice that Elijah Doughty's family and broader Indigenous community experienced from his death.¹⁴³ It certainly does not account for, as discussed below, the aggravated sense within the Indigenous community that their children are being targeted by non-Indigenous vigilantes. It also does not recognise the injustice that has given the Indigenous community a feeling their lives don't matter. An injustice that the family and community hoped would be addressed and remedied in sentencing.¹⁴⁴

Elijah Doughty's mother's victim impact statement is mentioned very briefly by the Supreme Court in terms of placing 'no doubt' that Elijah's death 'has had a devastating effect on [Petrina James, Elijah's mother] and her family' with 'indefinite' ramifications.¹⁴⁵ In other cases, such as *Timbrell* and *Francis*, sentencing courts have described victim impact statements as 'absolutely heartbreaking'¹⁴⁶ and 'make for heart-wrenching reading'.¹⁴⁷ Victim impact

¹⁴⁰ Ibid [10], [18], [45], [80], [84] (Fiannaca J).

¹⁴¹ *State of Western Australia v WSM* [2017] WASCSR 128 (21 July 2017) [35] (Martin CJ).

¹⁴² Ibid [34] (Martin CJ).

¹⁴³ Claire Moodie, 'Elijah Doughty's Mother Pleads For "Everybody to Come Together" After Teen's Death', *ABC News* (online), 27 July 2017 <https://www.abc.net.au/news/2017-07-27/elijah-doughtys-mother-appeals-for-end-to-racial-divide/8749518>.

¹⁴⁴ Joanna Menagh and Sam Tomlin, 'Elijah Doughty Trial: Man Jailed for Three Years over Death of Kalgoorlie Teenager', *ABC News* (online), 21 July 2017 < <http://www.abc.net.au/news/2017-07-21/elijah-doughty-trial-man-found-not-guilty-of-manslaughter/8729122>>.

¹⁴⁵ *State of Western Australia v WSM* [2017] WASCSR 128 (21 July 2017) [16] (Martin CJ).

¹⁴⁶ *Timbrell v State of Western Australia (No 2)* [2013] WASCA 269 (23 November 2013) [23] (Buss, Mazza JJA and Hall J).

¹⁴⁷ *State of Western Australia v Francis* [2018] WASCR 106 (13 June 2018) [79] (Fiannaca J).

statements have been described ‘in some detail’ as an ‘eloquent’ exposition of the ‘emotional pain and loss suffered’ by family and friends.¹⁴⁸

The Supreme Court does not aver to the impact on the local or broader Indigenous community. It was widely reported that the Indigenous community felt that their safety was threatened and they were under siege by the white vigilantism directed at Indigenous people in Kalgoorlie-Boulder. Vigilantism which, in their eyes, ultimately manifested in the death of Elijah Doughty.¹⁴⁹ For Indigenous people, the fatal pursuit of Elijah Doughty was an attack on them all and their children. Well-known Aboriginal personality, Steven Oliver, said, ‘When I look at a photo of Elijah, I see my nephews’.¹⁵⁰

F *Significant Mitigating Factors: Offender’s Good Character and
Hardship from Offence*

Mitigating factors pervade the sentencing remarks in *WSM*. The ‘good character’ of the offender is regarded as the central and most ‘significant’ mitigating factor¹⁵¹ and also has the effect of validating his version of the events leading to the death of Elijah Doughty. *WSM*’s ‘good character’ is evidenced by his ‘unblemished’ criminal record which is given ‘full weight’ in sentencing mitigation,¹⁵² his ‘full cooperation’ with the police,¹⁵³ his guilty plea even though the plea was not accepted and the matter went to trial,¹⁵⁴ his attempt to assist

¹⁴⁸ *Timbrell v State of Western Australia (No 2)* [2013] WASCA 269 (23 November 2013) [60], [82] (Buss, Mazza JJA and Hall J).

¹⁴⁹ See, eg, Calla Wahlquist, ‘Sentence for Elijah Doughty’s Killer Sparks Anger. Was Justice Served?’, *The Guardian* (online), 27 July 2017 <<https://www.theguardian.com/australia-news/2017/jul/27/sentence-for-elijah-doughtys-killer-sparks-anger-was-justice-served>> ; Chris Graham, ‘The Killing Fields: How We Failed Elijah Doughty, and Countless Others’, *New Matilda* (online), 23 July 2017 <<https://newmatilda.com/2017/07/23/groundhog-day-elijah-doughty-joins-a-long-list-of-deaths-with-no-justice/>>; Courtney Bembridge ‘Kalgoorlie Protest: Community Mourns as Elders Call for Action Against Online Racism’, *ABC News* (online), 30 August 2016 <<http://www.abc.net.au/news/2016-08-30/community-mourns-as-elders-call-for-justice-after-riot/7799942>>; Calla Wahlquist ‘“Tell the World We Want Justice” Elijah Doughty’s Death Exposes Kalgoorlie’s Racial Faultline’, *The Guardian* (online), 8 September 2016 <<https://www.theguardian.com/australia-news/2016/sep/08/tell-the-worldwe-want-justice-elijah-doughtys-death-exposes-kalgoorlies-racial-faultline>>.

¹⁵⁰ Wahlquist, above n 149.

¹⁵¹ *State of Western Australia v WSM* [2017] WASC SR 128 (21 July 2-17) [14] (Martin CJ).

¹⁵² *Ibid* [14]-[15].

¹⁵³ *Ibid* [11].

¹⁵⁴ *Ibid* [25].

Elijah Doughty after he killed him, and his remorse.¹⁵⁵ Other factors that operated in WSM's favour to mitigate his sentence included his age as an older man, his fatherhood to teenage and adult children, and his lifetime of employment. The Supreme Court concluded that the offender has 'excellent' prospects of rehabilitation and never repeating the offence¹⁵⁶ and he thereby does 'not pose any risk or threat to the community'.¹⁵⁷ It states that a message of personal deterrence in sentencing WSM is not significant because of WSM's good character and, as such, 'there is no question of any need to protect the community from your conduct'.¹⁵⁸

However, the factors that the Supreme Court regarded as boding well for the offender's character — his older age of 55 years, his employment (including at the time as a long-term dump truck operator) and his position as a parent (who is depicted in a caring way through helping get his children, who are in fact teenagers, ready for school)¹⁵⁹ — could be regarded as aggravating culpability. Given WSM's standpoint and experience with professional driving and his understanding of the vulnerability and unpredictability of children on a motorcycle, it could be expected that someone in the offender's position would exercise greater care and be subject to a higher standard than others who do not possess these qualities. The fact that WSM would have been aware of the risks of driving a large and heavy four-wheel drive at speed in pursuit of a child on a motorcycle who could easily lose control on an unpredictable terrain makes his conduct particularly callous and reckless.

Nonetheless, the Supreme Court accepted that WSM was doing the best he could, including in providing his account of the offence. The Supreme Court states that WSM did his best to 'truthfully describe the events'.¹⁶⁰ The Court tells the offender, 'I have no reason to doubt that you were being open and candid with the police, and were endeavouring to recount the events ... as accurately and truthfully as you could. ... I accept the truthfulness of the version of events that you gave the police'.¹⁶¹ Even where there is evidence calling into question WSM's account, his version is accepted. For instance, the

¹⁵⁵ Ibid [27].

¹⁵⁶ Ibid [31].

¹⁵⁷ Ibid [46].

¹⁵⁸ Ibid [41].

¹⁵⁹ Ibid [4].

¹⁶⁰ Ibid [11].

¹⁶¹ Ibid [9].

Supreme Court accepts the ‘truthfulness’ of WSM’s statement to the police that Elijah swerved in front of him,¹⁶² despite CCTV evidence that Elijah was riding in front of the vehicle. Nonetheless, in accepting WSM’s account, the Court emphasises his low culpability.

The Supreme Court also highlighted the ‘hardship’ and ‘profound consequences’ flowing from the offence for the *offender* and his family, including the loss of their rental property and personal possessions, that the offender’s family had to move out of Kalgoorlie for their ‘safety’, and that the offender has experienced ‘guilt and anguish’.¹⁶³ Indeed, along with the sympathetic portrayal of WSM fumbling with his mobile phone, *WSM* reads almost as an empathetic and sorry story of a middle-aged man’s very bad day. Much less detail is given on the hardship facing the victim’s family that the offender caused.

G *Where is General Deterrence?*

Sentencing involves sending a message of deterrence to the broader community to prevent a repetition of the crime, except in the most unusual instances.¹⁶⁴ As a rule, general deterrence is of greater importance in circumstances where the crime is prevalent in a community. In cases, such as *Gray v State of Western Australia* [2015] WASCA 108 where the offender drove into a dust cloud and collided with a vehicle causing the death of the other driver, the sentencing court recognised that ‘general deterrence was an important sentencing consideration’.¹⁶⁵ General deterrence is also invoked to set basic standards on the road. For example, in the case of *Timbrell* where the offender inadvertently drove through a red light.¹⁶⁶ And, in *Rubin v State of Western Australia* [2016] WASCA 2 where a US citizen drove on the wrong side of the road causing two deaths where general deterrence was regarded as highly relevant in

¹⁶² *Ibid* [6].

¹⁶³ *Ibid* [28]–[30].

¹⁶⁴ *Paparone v The Queen* [2000] WASCA 127 (12 May 2000), cited by *Rubin v State of Western Australia* [2016] WASCA 2 (12 October 2015) [36] (Martin CJ, Mazza JA and Hall J).

¹⁶⁵ *Gray v State of Western Australia* [2015] WASCA 108 (28 May 2015) [104] (McLure P, Newnes and Mazza JJA).

¹⁶⁶ *Timbrell v State of Western Australia (No 2)* [2013] WASCA 269 (23 November 2013) [60], [82] (Buss, Mazza JJA and Hall J).

sentencing.¹⁶⁷ Most telling, however, are the comments in *Francis*. Having set out in detail the impact statements of the child victim's parents — a child who died because an adult man chased his motorcycle believing it was stolen, the Supreme Court concluded:

In short, their pain and suffering highlights the need for general deterrence in this type of offending. When people drive in the way that you did, when they intimidate and cause fear in other road users, lives can be lost and other lives are ruined.¹⁶⁸

The facts in *WSM* required a message of general deterrence that was not simply directed to deter dangerous driving broadly, but to specifically deter vigilantes who were chasing down Indigenous children. *WSM* dealt with general deterrence only in the broad sense: 'to deter others from driving in such a way as to put life at risk'.¹⁶⁹ However, the circumstances in *WSM* require a more nuanced approach to general deterrence that goes further than sending a message about driver safety.

WSM should have sent a message to deter racially-fuelled vigilantism in the form of chasing of Indigenous children in a vehicle. The racist speech and vigilantism hosted by social media before and after Elijah Doughty's death were public knowledge at the time of *WSM*'s sentencing. Indigenous community leaders such as Debbie Carmody were on the public record that non-Indigenous male vigilantism intent on tracking down Aboriginal children was widespread and had a long history in Kalgoorlie-Boulder: '[g]rown white men in 4WDs are still chasing after our youth. It's been happening for years'.¹⁷⁰ Further, the actions of the police who responded to *WSM* reporting of the break-in also demanded a serious response from the Court. In telling *WSM* to go to Gribble Creek Reserve to reclaim his motorcycles rather than undertaking the task of investigating and locating the stolen goods themselves, suggests tacit sanctioning by law enforcement of vigilantism by members of the non-Indigenous community against Indigenous children. Moreover, these attitudes

¹⁶⁷ *Rubin v State of Western Australia* [2016] WASCA 2 [32]–[36] (12 October 2015) (Martin CJ, Mazza JA and Hall J).

¹⁶⁸ *State of Western Australia v Francis* [2018] WASCR 106 (13 June 2018) [84] (Fiannaca J).

¹⁶⁹ *State of Western Australia v WSM* [2017] WASCSR 128 (21 July 2017) [15] (Martin CJ).

¹⁷⁰ Laura Murphy-Oates, 'Kids of Kalgoorlie: in The Wake of Elijah Doughty, Vigilantism Thrives', *SBS The Feed* (online), 11 September 2017 <<https://www.sbs.com.au/news/the-feed/kids-of-kalgoorlie-in-the-wake-of-elijah-doughty-vigilantism-thrives>>.

reflect a deeper structure of injustice in which non-Indigenous community had profited from mining — enabling the purchase of expensive twin cab utes — while the local Indigenous people became impoverished from the theft and destruction of their land.¹⁷¹

The message of general deterrence in *WSM* should have been directed to the non-Indigenous community that considers it acceptable to violently pursue Indigenous youth in revenge attacks. Given the widespread nature of these views in Kalgoorlie-Boulder, and the reports of harassment and attacks on Indigenous children, general deterrence should have been a significant sentencing principle. The Supreme Court needed to send a message — to the non-Indigenous community and law enforcement — that vigilante violence against children would not be condoned. Rather, it is submitted that the Supreme Court took the approach that the offence was an isolated, ‘tragic accident’¹⁷² which fails to recognise the surrounding vigilantism against Indigenous people.

However, the Supreme Court considered that *WSM*’s retributive conduct following the theft of his bikes as immaterial to sentencing.¹⁷³ *WSM* had submitted, for the purpose of mitigation, that he was seeking to reclaim his stolen goods. He intended for this to operate as a justification for ‘driving dangerously in the course of that pursuit’.¹⁷⁴ Like the attending police, there is suggestion in the sentencing remarks that a degree of vigilantism is acceptable: that ‘reasonable pursuit may have been justified’ just not ‘dangerous pursuit’.¹⁷⁵ Rather than sending a clear message of general deterrence that Indigenous children should not be pursued by self-proclaimed law-enforcing civilians, there are statements supportive of ‘reasonable’ vigilantism.

H *Where is the Message of Condemnation?*

Sentencing is more than an exercise in punishing the individual. Rather, it plays an important declaratory role in drawing the lines between acceptable and

¹⁷¹ ABC Radio National, ‘Death in Kalgoorlie’, *ABC RN*, 30 October 2016 (Sarah Dingle) <<http://www.abc.net.au/radionational/programs/backgroundbriefing/2016-10-30/7964472>>.

¹⁷² *State of Western Australia v WSM* [2017] WASC SR 128 (21 July 2017) [34] (Martin CJ).

¹⁷³ *Ibid* [32].

¹⁷⁴ *Ibid*.

¹⁷⁵ *Ibid*.

unacceptable conduct — what a society tolerates or condemns.¹⁷⁶ At common law, public denunciation of the unlawful conduct of an offender should ‘communicate society’s condemnation of the particular offender’s conduct’ because it encroaches on ‘our society’s basic code of values’, especially where it concerns the vulnerable.¹⁷⁷ However, the Supreme Court in *WSM* does not attend to this sentencing objective; nor does it seek to classify the vigilantism as an aggravating factor. Section 6(2) of the *Sentencing Act 1995* (WA) provides that a sentencing court must consider any aggravating factor, which includes any matter that ‘in the court’s opinion, increases the culpability of the offender’.¹⁷⁸ While the Act does not stipulate what this may include, it was open to the Court to consider whether ‘the offence was motivated by hatred for or prejudice against a group of people’ which is a matter for aggravation in comparable sentencing legislation.¹⁷⁹

However, the only message of condemnation that the Supreme Court seeks to send to the community is towards the aggrieved community — substantially comprising Indigenous people — that protested against the unjust circumstances of Elijah Doughty’s death. They were aggrieved by the law’s failure to stop racist vigilantes, including the police failure to respond to their calls to investigate Kalgoorlie-Boulder residents on social media calling for their Aboriginal children to be hunted down.¹⁸⁰ The tone in the sentencing remarks when discussing the actions of protestors on 30 August 2016 around the Kalgoorlie Courthouse is in particular contrast to the descriptions and epitaphs regarding *WSM*. The sense of moral condemnation and scorn is evident. The protestors are criticised as an ‘ill-informed’,¹⁸¹ ‘lawless’,¹⁸² ‘uncontrolled’,¹⁸³ and an ‘unruly group’.¹⁸⁴ The language seems to excise this group from the mythical ‘community’ whose values of human life sentencing is to protect.

¹⁷⁶ Thalia Anthony, *Indigenous People, Crime and Punishment* (Routledge, 2013) 193.

¹⁷⁷ *Ryan v The Queen* (2001) 206 CLR 267, 302 [118], citing *R v M* (CA) [1996] 1 SCR 500, 558 (Lamer CJ).

¹⁷⁸ *Sentencing Act 1995* (WA) s 7.

¹⁷⁹ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(h).

¹⁸⁰ ABC, ‘Debbie Carmody - Kalgoorlie Unrest Following the Death of a 14 Year Old Boy’, *Speaking Out*, 11 September 2016 (Larissa Behrendt) <<http://www.abc.net.au/radio/programs/speakingout/kalgoorlie-unrest-following-death-of-teenager/7832164>>.

¹⁸¹ *State of Western Australia v WSM* [2017] WASC SR 128 (21 July 2017) [35] (Martin CJ).

¹⁸² *Ibid*.

¹⁸³ *Ibid* [36].

¹⁸⁴ *Ibid* [37].

In short, the community that seems to be protected in *WSM* is the non-Indigenous community of ute drivers and motorcycle owners who become enraged by provocative behaviour — an Indigenous boy on what looked like a stolen motorcycle — and recklessly pursued him down a muddy and slippery dirt track. It is not the scared and angry Indigenous community whose children are being surveilled and stalked in social media, whose images are being circulated, who are being singled out with racist hate speech, and who were denied access to the court to witness *WSM*'s committal. The sentencing is a carefully worded exercise in marginalisation. There was an opportunity for sentencing reasons to address the concerns of the Indigenous community. It could have sent a stronger message to the non-Indigenous community that racially motivated killings of Indigenous children is heinous and that the use of a motor vehicle to kill is still taking life. Further, it could have emphasised that even Indigenous children riding motorcycles — no matter how repugnant that might seem to elements in the non-Indigenous community — possess the indelible sanctity of human life. However, that was not how the mobile justice of the Supreme Court of Western Australia manifested. The concern was with *WSM* and his very bad day. In much of the sentencing, *WSM* is spoken about as a passive passenger to the events in August 2016 rather than the driver and instigator. The strongest condemnation in the text went to the Indigenous protestors that disrupted the committal. This is the well-worn track of rough justice of the settler-state. Violence towards Indigenous people is dismissed and minimalised while any sign of Indigenous resistance is vehemently condemned.¹⁸⁵

VI STILL TRAVELLING

WSM was released on parole in March 2018.¹⁸⁶ He had served just over 18 months of the sentence. The parole board determined there was no risk to the Kalgoorlie-Boulder community from his release. Media reports indicate that on release *WSM* and his family moved interstate.¹⁸⁷ The situation in Kalgoorlie-

¹⁸⁵ Anthony, above n 176, 163–91.

¹⁸⁶ 9 News, 'Man Who Struck and Killed Aboriginal Teen Elijah Doughty Released from Prison on Parole', 9 News (online), 27 March 2018 <<https://www.9news.com.au/national/2018/03/27/16/53/elijah-doughty-killer-granted-parole-from-jail>>.

¹⁸⁷ *Ibid.*

Boulder continued. While ‘Kalgoorlie Crimes Whinge and Whine’ and ‘Name Shame Crimes Kalgoorlie’ were shut down, new social media locations for racial vilification of Indigenous people emerged.¹⁸⁸ Corresponding with WSM’s release there were reports and images of a police car in Perth running down an 18 year old Indigenous man, William Farmer.¹⁸⁹ Three months after WSM’s release there was the sentencing in *Francis* where the offender — incensed at the theft of his motorcycle chased a motorcycle riding youth causing a fatal incident — was sentenced to seven years. The reason that *Francis* is a mirror for WSM was the driver, Jude Francis — not protected by an alias at trial or in the media — was an Indigenous man, while the deceased was a non-Indigenous boy.¹⁹⁰

Elijah Doughty’s death and the subsequent treatment of WSM by the settler state’s courts shows that mobility and its assident technologies infuse the Australian colonial project. Racial conflicts fermented in Kalgoorlie-Boulder predicated on non-Indigenous reactions to Indigenous youths moving about in public and particularly riding motorcycles that might not belong to them. These become posted and shared through mobile phones and social media. The decisions of the Supreme Court showed a predication towards the legitimacy of non-Indigenous mobility and a hostility towards open manifestations of Indigenous mobility. WSM is treated with sympathy while the concerns of the Indigenous community are marginalised. Further, the affront to the settler state of a group of protesters venting frustration and grief on being denied access to the courthouse is particularly emphasised — seemingly as more problematic than the running down of Indigenous boy on a motorcycle.

¹⁸⁸ Cunneen and Russell, above n 9, 9.

¹⁸⁹ Lorena Allam, ‘Police Car Filmed Veering Across Road and Hitting Aboriginal Man’, *The Guardian* (online), 10 March 2018 <https://www.theguardian.com/australia-news/2018/may/10/police-car-filmed-veering-across-road-and-hitting-aboriginal-man?CMP=Share_iOSApp_Other>.

¹⁹⁰ Welcome to Country, ‘Aboriginal Man Receives Seven Years Jail Term for Killing White Teen Motorbike Rider’, *Welcome to Country* (online), 13 June 2018 <<https://www.welcometocountry.org/aboriginal-7-year-jail-motorbike-rider/>>. The Supreme Court did attempt to distinguish *WSM* on the grounds that Francis was convicted of manslaughter and that *WSM* stopped and rendered assistance, while Francis left the scene and that Francis had a minor criminal history involving traffic-related offences and possession of cannabis: see *State of Western Australia v Francis* [2018] WASCR 106 (13 June 2018) [108] (Fiannaca J). However, *WSM* did physically run over his victim. In terms of culpability, *WSM* — through chasing and running over Elijah Doughty — seems more responsible than Francis who was only chasing. While leaving the scene is a critical difference, the question must be asked whether it justifies four years of additional imprisonment.

In conclusion, the Australian settler state is still travelling. Essential to the settler state has been discrete and identifiable technologies of mobility — the bullock wagon, the steam train, the wool clippers, the motor vehicle, and the telephone. Over the decades each has been instrumental in addressing the ‘tyrannies of distance’. Of fundamental concern has been the controlling, regulating, and preventing of Indigenous mobility. Elijah Doughty’s death shows the continual centrality of the motor vehicle as an instrument through which non-Indigenous people can violently manage Indigenous people. It also shows the motor vehicle as a contested resource that non-Indigenous people, with the backing of the settler state, regard as rightfully belonging to them. Further, Elijah Doughty’s death shows the incorporation of mobile media into the colonialist project. Mobile phones and social media platforms became a resource and tool through which surveillance and mobilisation against Indigenous people can be undertaken by members of the non-Indigenous community. Again, seemingly with the tacit support of the settler state.

Technological objects are never innocent. A motor vehicle, a mobile phone, a social media platform are connected with wider contexts.¹⁹¹ To use and consume a technology is to participate in networks that exploit, normalise, and disrupt social and economic relations.¹⁹² This is not to suggest that technologies cannot be used in emancipatory and empowering ways, to create ‘new power’,¹⁹³ as witnessed by the #MeToo movement and possibly by the #JusticeForElijah tag used by members of the Kalgoorlie-Boulder Indigenous community. Indigenous Australians, including those in Kalgoorlie, use both mobile media and motor vehicles to challenge the colonial project of the settler state. But mechanised and virtual mobility is a double-edged sword. As Heimans and Timms point out, participatory social media has created ‘new power’ that is as much a source of dissent of the disempowered, as hatred by the empowered, citing Trump and racist interventions.¹⁹⁴

In this study, what becomes clear is how closely intertwined Australian colonialism is with these technologies of mobility. They facilitate a culture of

¹⁹¹ Tranter, above n 2, 184.

¹⁹² Ibid. 185.

¹⁹³ Jeremy Heimans and Henry Timms, *New Power: How Power works in our Hyperconnected World - and How to Make it Work for You* (Pan MacMillan, 2018) 3-4.

¹⁹⁴ Ibid. See also Donna Haraway who identified in the 1980s how the then emerging communication, command and control technologies which were birthed and nurtured in war can be co-opted for peace: Donna Haraway, ‘A Manifesto for Cyborgs: Science, Technology and Socialist Feminism in the 1980s’ (1984) 2(4) *Australian Feminist Studies* 1.

land dispossession and repression of Indigenous people in Kalgoorlie-Boulder. The drive to rectify the distribution of mobility resources is given precedence over the human injury and suffering that follows for Indigenous people. The sentencing remarks for the offender responsible for Elijah Doughty's death reinstate colonial mobilities and their destructive effects on Indigenous livelihoods and future generations.