*Heather Douglas**

ASSIMILATION AND AUTHENTICITY: THE 'ORDINARY ABORIGINAL PERSON' AND THE PROVOCATION DEFENCE

ABSTRACT

In many Australian States and Territories the provocation defence has recently been the subject of law reform. In the Northern Territory, since the 1950s judgements of Kriewaldt J, Aboriginal people's responses to provocation in that jurisdiction have been measured against the 'ordinary Aboriginal person' rather than the 'ordinary person'. Through a discussion of Northern Territory case law and legislation, this article examines the development of the provocation test in the Northern Territory and the construction of the 'ordinary Aboriginal person.' This article argues that Kriewaldt J's original formulation of the 'ordinary Aboriginal person' test was linked to his support for the assimilation policy and that current formulations of the test cause intractable problems. Ultimately the article argues that the problems with the formulation of the 'ordinary aboriginal person' test in the Northern Territory provide further support for the abolition of the defence.

INTRODUCTION

The role of provocation as a defence to murder is currently in a state of flux. In Tasmania and Victoria the defence has recently been abolished.[1] In the Northern Territory the provocation defence has been reformed.[2] In Western Australia abolition or change is on the agenda.[3] In the Northern Territory, unlike other Australian jurisdictions, Aboriginal people's responses to provocation have been measured against the 'ordinary Aboriginal person' rather

* Senior Lecturer, Law School, University of Queensland. The author wishes to thank Peter Rush, Lee Godden and Ian Leader-Elliott for reading and commenting on various drafts of this article.

1 *Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003* (Tas); *Crimes (Homicide) Act 2005* (Vic). The Model Criminal Code Officers Committee has also recommended abolition, see Attorney General's Department, *Fatal Offences Against the Person: Discussion Paper* (1998) 87.

2 See *Criminal Reform Amendment Act (No. 2) 2006* (NT) (assented to 3 November 2006) and Anne Barker, 2 October 2006, 'PM', ABC Radio, in discussion with Attorney General of the Northern Territory, Syd Stirling. See also Department of Justice, *Criminal Code Reform Issues Paper (*2006) 4-5.

3 Law Reform Commission of Western Australia, *Review of the Law of Homicide: An Issues Paper* (2006) 6-7.

than the 'ordinary person'.[4] This test has developed from the judgments of Kriewaldt J, the sole judge of the Northern Territory Supreme Court during the 1950s.[5] Given the current debates about the reform of the defence, it is pertinent to re-examine the way in which Kriewaldt J's test has come to be interpreted and applied.

This article overviews the current law and the development of the Northern Territory approach to provocation before turning to an analysis of the *Mungatopi* case.[6] It is argued that the consequence of the approach in the Northern Territory has been that courts are required to engage in an oppressive, and highly problematic, project of constructing the 'ordinary Aboriginal person' each time they apply the provocation defence to Aboriginal people in that jurisdiction. The article ultimately supports the abolition of the defence of provocation.

I BACKGROUND TO THE CURRENT LAW

Stingel v R has been the leading High Court decision on provocation in Australia since 1990.[7] In that case the High Court indicated that there is a large degree of conformity between the code and common law jurisdictions throughout Australia.[8] The provocation test set out by the High Court contains both subjective and objective elements. First, it requires that the accused was acting under provocation when she or he killed. At this point, the content and extent of the provocative conduct is assessed from the point of view of the accused. The test also incorporates an objective element which requires that the provocation be of such a nature as could, or might have, motivated the ordinary person to respond as the accused did.[9] The objective part of the test is divided into two further stages. The first stage allows that the:

---

4 *Jabarula, Jabarula and Jambajimba v Poore and Bell* (1989) 42 A Crim R 479, 486 ['*Jabarula v Poore*']; Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws,* Report No 31 (1986) 303.

5 See for example *R v Patipatu* (1951) NTJ 18, *R v Muddarubba* (1956) NTJ 317, *R v Balir Balir* (1959) NTJ 633 and *R v Nelson* (1956) NTJ 327.

6 *R v Mungatopi* (Unreported, Supreme Court of the Northern Territory, Ashe CJ, 14 August 1990). Any reference to the transcript of this case is a reference to the court recorded and transcribed version of the trial. Hereinafter referred to as '*Mungatopi* transcript'. Throughout the discussion of Mungatopi's trial the defence lawyer is referred to as 'Defence' and the prosecuting lawyer is described as 'Crown'. This case was appealed and the appeal is reported as: *Mungatopi v R* (1991) 105 FLR 161. The author thanks Rex Wilde, Director of the Northern Territory Department of Public Prosecutions for providing a copy of the transcript of this case to the author.

7 *Stingel v R* (1990) 171 CLR 312 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

8 *Stingel v R* (1990) 171 CLR 312, 320.

9 See Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2005) 273, citing *Masciantonio v The Queen* (1995) 183 CLR 58, 66 (Brennan, Deane, Dawson and Gaudron JJ).

> personal characteristics or attributes of the particular accused may be taken into account for the purpose of understanding the implications and assessing the gravity of the wrongful act or insult[10]

The second stage then requires assessment of:

> the possible effect of the wrongful act or insult, so understood and assessed, upon the power of self-control of a truly hypothetical 'ordinary person'.[11]

The first stage of the objective test could include cultural or racial characteristics if they were deemed relevant.[12] The second stage focuses on the ordinary person and whether, considering the gravity of the provocation, the ordinary person would have lost self-control and formed the intention to kill.[13] Importantly, in considering the Northern Territory position, the definition of ordinary person within the second stage excludes the personal, cultural and racial characteristics of the ordinary person of the first stage.[14] The *Stingel* test has been accepted in most Australian jurisdictions.[15] However, the Northern Territory has maintained a test for provocation that retains a form of an objective test that allows the response of the accused to be measured in relation to the 'ordinary Aboriginal person'. This distinction can be traced back to Kriewaldt J's judgments.

When Kriewaldt J was on the Northern Territory bench there was no criminal code in the Northern Territory, thus he was reliant on the common law. Kriewaldt J assumed that Aboriginal Defendants, in their current state of assimilation and civilisation, were more likely than others to retaliate with violence[16] and that they might be slower to 'cool down'.[17] He frequently directed juries to find provocation, directing them that the response of the Aboriginal person should be measured

---

10 *Stingel v R* (1990) 171 CLR 312, 327.

11 *Stingel v R* (1990) 171 CLR 312, 327.

12 *Stingel v R* (1990) 171 CLR 312, 326.

13 See *Green v R* (1997) 191 CLR 334, 382. The test has been criticised in *R v Mankotia* (2001) 120 A Crim R 492, especially by Smart AJ at 495. See also Sally Kift, 'Provocation: (Depending on Your Position) *Green v R*' (1998) Jan/Feb *Proctor* 25, 26.

14 *Stingel v R* (1990) 171 CLR 312, 327.

15 Queensland: *Buttigieg* (1993) 69 A Crim R 21, South Australia: *Georgatsoulis* (1994) 62 SASR 351, New South Wales: *Green v R* (1997) 191 CLR 334, Western Australia: *Verhoeven* (1998) 101 A Crim R 24.

16 Martin Kriewaldt 'The Application of the Criminal Law to the Aborigines of the Northern Territory of Australia' (1960-1962) 5 *University of Western Australia Law Review* 1, 13. For a discussion of Kriewaldt J's approach more generally see Heather Douglas, 'Assimilation, Lutheranism and the 1950s Justice of Kriewaldt' (2004) 8 (2) *Australian Journal of Legal History* 285.

17 *R v Nelson* (1956) NTJ 327, 335.

against the standard of the 'ordinary Aboriginal person'.[18] In many of the cases, where he directed provocation, the defence would not have been satisfied if the Defendant's response had been measured against the common law test.[19]

Justice Kriewaldt supported the 1950s assimilation policy; he believed that Aboriginal people would gradually become civilised and assimilated.[20] He noted in 1957 that:

> [t]here was a small proportion [of Aboriginal people who] had not had any or very little contact with white civilisation … a small proportion who had substantially adopted a way of life more nearly resembling that of white persons than the way of life their ancestors followed ... [Finally] there was an overwhelming majority who, although affected by white people, still retained a good deal of the outlook on life of their ancestors and followed their manner of living.[21]

The judge accepted that one role of the law was to assist Aboriginal people to learn civilised ways of behaving[22] so that they would gradually become 'useful' members of society.[23]

An underlying requirement of the assimilation policy was that certain behaviours should be checked and that other behaviours associated with being civilised encouraged.[24] In his provocation judgments, Kriewaldt J referred to a number of cues to lack of civilisation, these included; living in a separate community, the use

---

18 See for example *R v MacDonald* (1951-1976) *NTJ* 186 (1953), 189, *R v Muddarubba* (1951-1976) NTJ 317 (1956), 322 and *R v Balir Balir* (1951-1976) NTJ 633 (1959), 637. See also Colin Howard, 'What Colour is the "Reasonable Man"?' (1961) *Criminal Law Review* 41, 47.

19 For example the defendants in *R v Patipatu* (1951) NTJ 18, *R v Muddarubba* (1956) NTJ 317 and *R v Balir Balir* (1959) NTJ 633 did not appear to lose self-control but rather made a considered decision to use violence in light of customary law. The defendants in *R v Nelson* (1956) NTJ 327 and *R v Balir Balir* (1959) NTJ 633 also planned a violent response returning to effect it some time later. See *Duffy* [1949] 1 All ER 932 for the common law position at the time.

20 See Kriewaldt, above n 16, 15, 24 and 31; *Namatjira v Raabe* (1958) NTJ 608, 617-118.

21 *Namatjira v Raabe* (1958) NTJ 608, 621.

22 See 'Death Battle Over Woman' *Northern Territory News* 3 April 1958, 1 and *R v Charlie* (1953) NTJ 219.

23 Kriewaldt J commented that: '[the] negative and static in emphasis policy [of protection] condemned by Professor Elkin in 1937 has given way in the Northern Territory to a policy of assimilation whereby it is hoped to make the aborigine a useful member of the community', see Kriewaldt J above n 16, 31.

24 See the policy statement about assimilation, extracted in Russel McGregor, 'Nation and Assimilation: Continuity and Discontinuity in Aboriginal Affairs in the 1950s' in Julie Wells, Mickey Dewar and Suzanne Parry (eds), *Modern Frontier: Aspects of the 1950s in Australia's Northern Territory* (2005) 19.

of specific tools such as spears or nulla nullas, speaking Aboriginal languages and associating mainly with other Aboriginal people.[25] Importantly, in the context of this discussion of the provocation defence, Kriewaldt J commented that:

> [o]ne of the purposes of the criminal law is to restrain the instinct to resort to violence when a wrong has been suffered. This restraint is accepted in civilised communities partly from fear of punishment but partly also because there are other means of punishing the offender than resort to force.[26]

The judge equated the practice of Aboriginal law with a lack of civilisation, because it frequently entailed a resort to violence.[27] For Kriewaldt J, civilising required, among other things, that Aboriginal people refrain from practising Aboriginal Law.[28]

Kriewaldt J perceived Aboriginal people's inability to restrain violent responses as resulting from a lack of civilisation, and that this created a disadvantage.[29] To ameliorate disadvantage in this context, he directed that there be a shift in the standards of behaviour expected of Aboriginal people while they were being assimilated. This shift has been encapsulated in the phrase, the 'ordinary Aboriginal'. For Kriewaldt J the advantage of this approach was that it avoided the harsh penalties associated with a murder conviction, leaving the way open for a guilty verdict of manslaughter and the imposition of a penalty.[30] However, the penalty could be applied flexibly to discourage certain uncivilised behaviours and thus assist in the assimilation process.

---

25 For example *R v Muddarubba* (1956) NTJ 317, 322, 320 (Kriewaldt J); *R v MacDonald* (1953) NTJ 186, 188 (Kriewaldt J); *R v Patipatu* (1951) NTJ 18, 19 (Kriewaldt J). Leader-Elliott has raised the possibility that Aboriginal people living in 'remote enclaves' may well be appropriately subjected to a different test along the lines that Kriewaldt J espoused, Ian Leader Elliott, 'Sex, Race and Provocation: In Defence of Stingel' (1996) 20 *Criminal Law Journal* 72, 89, 95.

26 Kriewaldt, above n 16, 13. There is a particular message to Aboriginal people here because it asks Aboriginal people to forego customary law practices; see for example *R v Patipatu* (1951) NTJ 18, 19 (Kriewaldt J); the case of *Leo* discussed in 'Death Battle Over Woman' *Northern Territory News* 3 April 1958, 1; *R v Balir Balir* (1959) NTJ 633. Balir Balir's sentence is discussed in 'Angry Young Man Kills' *Northern Territory News* 10 March 1959, 1.

27 *R v Charlie* (1953) NTJ 219, 222.

28 See Kriewaldt, above n 16, 13.

29 Ibid 4-5.

30 See Kriewaldt, above n 16, 5, 7. Kreiwaldt J diverged from Justice Wells who preceded him on the Northern Territory bench. According to Kriewaldt J's research when outcomes were compared between the two, Wells J presided over more murder convictions and more complete acquittals, whereas Kriewaldt J presided over more manslaughter convictions, less murders and less complete acquittals. Wells J also did not support the assimilation policy, see Justice Dean Mildren, 'Forward' to the *Northern Territory Judgements 1918-1950* (2001) xv.

In 1983 the Northern Territory's *Criminal Code Act* was assented to and commenced operation on 1 January 1984.[31] Until 2006, Section 34 of the *Criminal Code Act* (NT) deals with provocation. Specifically the *Code* states at section 34(2):

> When a person who has unlawfully killed another under circumstances that, but for this subsection, would have constituted murder, did the act that caused death because of provocation and to the person who gave him that provocation, he is excused from criminal responsibility for murder and is guilty of manslaughter only provided:
>
> (a) he had not incited the provocation;
>
> (b) he was deprived by the provocation of the power of self-control;
>
> (c) he acted on the sudden and before there was time for the passion to cool; and
>
> (d) an ordinary person similarly circumstanced would have acted in the same or a similar way.

Further, 'provocation' is defined in section 1 of the *Criminal Code Act* (NT) as:

> any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person, to deprive him of the power of self-control.

There does not appear to have been any relevant background discussion about the interpretation of the provocation section[32] and it appears to have passed through Parliament without debate. The aspect of the provision which appears to set the Northern Territory apart from both, the common law, and from other Australian jurisdictions more generally, is section 34(2)(d). This part of the provision has provided scope for the Northern Territory judiciary to follow the case law developed by Kriewaldt J in the 1950s.

---

31 See the discussion in Stephen Gray, *Criminal Laws: Northern Territory* (2004) 26.

32 A Ministerial Statement on 24 August 1983 notes that the definition of provocation is the same for both fatal and non-fatal offences and that the Northern Territory provisions on provocation are broader that those under the Criminal Code Queensland because provocation in the Northern Territory Code can be in respect of property. See Northern Territory, *Parliamentary Debates*, Legislative Assembly, 24 August 1983, 753 (Mr. Robertson). I am indebted to Frieda Evans, librarian, Supreme Court Library, Northern Territory for her assistance with this matter.

In the earliest reported case on interpreting section 34(2)(d), Kearney J wrestled with its construction. In the 1989 case of *Jabarula*[33] a police officer had set off with a council member in a police vehicle to look for offenders breaching alcohol regulations. In the course of that chase, the police vehicle struck an Aboriginal person. The Defendants, who were all Aboriginal people, witnessed the collision and responded by assaulting both the police officer and council member who were travelling in the vehicle. Initially, before a Magistrate, the Defendants argued that they should be acquitted on the basis of the defence of provocation pursuant to section 34(1) of the *Criminal Code* (NT).[34] However, the Magistrate decided that the defence of provocation was not available and the Defendants subsequently appealed to the Supreme Court. The decision of the Supreme Court is important because, for the first time, it presents a reported discussion of the application of the codified defence of provocation to Aboriginal people in the Northern Territory. Kearney J, who heard the appeal, noted that the 'ordinary standards' of a community[35] were a matter for the court to decide upon. He further noted that this kind of assessment was made more difficult when those making the decision were not members of the community in question.[36] The case of *Jabarula*[37] required interpretation of the *Code* provision and presented an opportunity for the Northern Territory Supreme Court to move away from the application of Kriewaldt J's judgments. However, the Court purported to follow the precedent established by Kriewaldt J. Kearney J found that:

> [t]he Territory has developed its own jurisprudence in relation to the 'ordinary person' who constitutes the objective standard which an accused must meet, both for loss of self-control in the definition of provocation in s 1 and for the nature and degree of retaliation in s 34(1)(d). It stems from the path-breaking judgments of Kriewaldt J[38]

Kearney J then proceeded to list a number of Kriewaldt J's provocation judgments as precedents for the accepted jurisprudence in the Northern Territory.[39]

The other significant reported decision relating to Aboriginal people and the application of the provocation test in the Northern Territory is *Mungatopi v R.*[40]

---

33 *Jabarula v Poore* (1989) 42 A Crim R 479.

34 The language of *Criminal Code Act 1983* (NT) s 34(1) provides a defence of provocation applicable to non-fatal offences. *Criminal Code Act 1983* (NT) s 34(1) mirrors s 34(2) except that it allows a complete acquittal.

35 Referring to the language of the *Criminal Code Act 1983* (NT) s 34(1)(d).

36 *Jabarula v Poore* (1989) 42 A Crim R 479, 482.

37 Ibid 479.

38 *Jabarula v Poore* (1989) 42 A Crim R 479, 482.

39 Ibid 486-487.

40 *Mungatopi v R* (1991) 105 FLR 161. I note also the case of *Rostron v R* (1991) 1 NTLR 191, 208 which followed *Jabarula v Poore* and found that an ordinary person in the specific case was 'an ordinary male person living at the time of the offences in

This case was particularly important as it was decided pursuant to the *Criminal Code Act* (NT) immediately after the *Stingel* case.[41] The position developed in the *Stingel* case offered another opportunity for the Northern Territory Court to depart from Kriewaldt J's jurisprudence. However, again, this did not occur. The Northern Territory Court of Appeal in *Mungatopi's* case found that the ordinary person of section 34(2)(d) was, in the circumstances, the 'ordinary Aboriginal male person living today in the environment and culture of a fairly remote Aboriginal settlement such as Milikapiti'[42] or the 'ordinary 29 year old Aboriginal'.[43] The Court of Appeal noted that it was not argued that Kearney J had been incorrect in *Jaburula's* case, nor that *Stingel* was binding authority.[44] Further, the Court suggested that *Stingel* kept its focus on the Tasmanian *Criminal Code* provisions and the Northern Territory Court maintained that these were significantly different from the Northern Territory *Criminal Code* provisions.[45] As a result, a distinct provocation test operated for Aboriginal people accused in the Northern Territory and the test relied on Kriewaldt J's phrase 'ordinary Aboriginal'.

II CONSTRUCTING THE 'ORDINARY ABORIGINAL PERSON' IN THE *MUNGATOPI* CASE

A troubling question arises as to how the 'ordinary Aboriginal person' can be understood. In the following discussion of *Mungatopi's* case it is suggested that similar cues to those that Kriewaldt J used to identify a lack of civilisation are important in the analysis. However, instead of being a test that redresses any disadvantage experienced by Aboriginal people, it is argued that the 'ordinary Aboriginal person' came to be an artificial construction reflected in an idea of Aboriginal authenticity.[46] Wolfe has applied this concept in order to explain why

---

the environment and culture of a fairly remote Aboriginal settlement, such as Maningrida.'

41 *Stingel v R* (1990) 171 CLR 312.

42 *Mungatopi v R* (1991) 105 FLR 161, 166.

43 Ibid 168. At least one commentator has suggested that it is not clear whether the *Mungatopi* definition of the ordinary person was to be applied to both parts of the *Stingel* test. See Bronitt and McSherry, above n 9, 279.

44 *Mungatopi v R* (1991) 105 FLR 161, 166. I note that Stephen Gray agrees that the Court in *Mungatopi* clearly distinguished its approach to provocation from the High Court in *Stingel*. See Gray above n 31, 119.

45 *Mungatopi v R* (1991) 105 FLR 161, 167. Gray has suggested that the later High Court decisions of *Masciantonio v R* (1995) 183 CLR 58 and *Green v R* (1997) 191 CLR 334, which suggest that the *Stingel* test should not be read to apply narrowly to the Tasmanian provisions, may ultimately effect the position in the Northern Territory. Gray, ibid 120.

46 A term used in post-colonial studies literature. See for example Gareth Griffiths, 'The Myth of Authenticity' in Chris Tiffin and Alan Lawson (eds), *De-scribing Empire: Postcolonialism and Textuality* (1994) 70-85.

Aboriginal people frequently fail to satisfy the connection to land tests associated with Native Title claims.[47] He suggests that:

> authentic Aboriginality is everything that 'we' are not and vice versa. Thus inauthenticity results from straddling this dichotomy, a situation that can be expressed genetically, or culturally or both.[48]

Wolfe argues that authentic Aboriginality is always somewhere else. He points out, for example, that the authentic version of Aboriginality appears on the back of the Australian two dollar coin.[49] Some commentators have also noted that one of the central problems with this idea of cultural authenticity is that it often becomes caught up in attempts to essentialise culture,[50] by relying on cultural stereotypes.[51] The concept of Aboriginal authenticity is related to the idea of being uncivilised or unassimilated. However, for Kriewaldt J in the 1950s the lack of assimilation or civilisation was associated with nearly all Aboriginal people to varying degrees.[52] Whereas the concept of authenticity suggests a narrow, fixed and, ultimately, illusory position.[53] The application of the 'ordinary Aboriginal person' test established by Kriewaldt J now seems to require that Aboriginal Defendants demonstrate an unattainable status of authenticity. Factors such as drinking alcohol, speaking mixed forms of language and living in white towns suggest a devastated or 'buggered up' form of culture, and this tends to be translated as inauthentic.[54] Povinelli explains how this kind of approach to understanding Aboriginal cultural issues causes 'fringe', or in Wolfe's terms, 'straddling',[55] to increasingly become an

---

47 Patrick Wolfe, *Settler Colonialism and the Transformation of Anthropology* (1999) 10, 202-204. Povinelli suggests that land claim cases set up a test of 'legitimacy', Elizabeth Povinelli, 'The Cunning of Recognition in Settler Australia' (1998) 11 *The Australian Feminist Law Journal* 3, 9.

48 Wolfe, ibid 179.

49 Ibid 179, 182, 207 and more generally chapter 6.

50 See for example Uma Narayan, 'Essence of Culture and a Sense of History: A Feminist Critique of Cultural Essentialism' (1998) 13(2) *Hypatia* 86, 88. For a case-study which examines the risks of essentialism see Heather Douglas, '"She Knew What was Expected of her": The White Legal System's Encounter with Traditional Marriage' (2005) 13(2) *Feminist Legal Studies* 181.

51 Andrew Zimmerman, 'The Position of the Critic in Post-Colonial Studies: "In the Beginning The Relation"' in Tobias Doring, Mark Stein and Uwe Schäfer (eds), *Can the Sunaltern be Read? The Role of the Critic in Post-Colonial Studies* (1996) 72, 75.

52 See *Namatjira v Raabe* (1958) NTJ 608, 618.

53 Recall Kriewladt J's description of the 'types' of Aboriginal people in the 1950s; *Namatjira v Raabe* (1958) NTJ 608, 621 compared with the image on the Australian two dollar coin.

54 'Buggered up' is Povinelli's term, see Elizabeth Povinelli, 'Of Pleasure and Property: Sexuality and Sovereignty in Aboriginal Australia' in Pheng Cheah, David Fraser and Judith Grbich (eds), *Thinking Through the Body of the Law* (1996) 98.

55 Wolfe, above n 47, 179.

interior, or 'ordinary', position.[56] In this way, the application of the 'ordinary Aboriginal person' test continues to reflect ideas about assimilation but the 'ordinary Aboriginal person' no longer seems to exist.[57] Understanding the 'ordinary Aboriginal person' as an 'authentic' Aboriginal person involves an oppressive process of construction. For practical purposes, this process results in Defendants being judged simply in relation to the ordinary person, as they can never satisfy the threshold test of authenticity.

The example of the *Mungatopi* case is discussed below in order to explore this idea. In examining the transcript of the *Mungatopi* trial, it appears that the Defence attempted to elicit and/or stress evidence showing that: Mungatopi spoke Tiwi as a first language; he had a limited understanding of English; that he was poorly educated; that he lived in a remote community; that the assaults to the victim were part of an Aboriginal law response; and generally that European values could not be used to assess his behaviour. These signs of authenticity reflect the signs of lack of civilisation that Kriewaldt J articulated in the 1950s.[58] Meanwhile the Crown emphasised the contrary position. The Crown emphasised evidentiary material that suggested that Mungatopi spoke reasonable English, had been to school on the mainland (Darwin), worked in a job in his community and that the assault occurred in the context of European-introduced pastimes of drinking alcohol and gambling rather than Aboriginal law wife discipline. In summary, the Crown emphasised material that suggested Mungatopi was, in Wolfe's terms, 'straddling' cultures: that is, that he was inauthentic. After some brief background to the Mungatopi case, this article explores the relevance of customary law and language in approaching the construction of the 'ordinary Aboriginal person'.

III BACKGROUND

Gonzales Mungatopi was charged with murdering his wife, Thecla Tipungwuti, in 1989 at Milikapiti on Melville Island in the Northern Territory. The couple had two children and the care of the children was an important issue in the case. Mungatopi is an Indigenous man who speaks Tiwi as his first language. He was represented at trial by counsel and pleaded not guilty. The accepted facts of the case were that the victim had been drinking alcohol and was playing a card game with other relatives when her husband came to find her. In the presence of a number of the card players Mungatopi had punched her at least once and then had taken her away from the group. He had subsequently assaulted her with various instruments and the cause of

---

56 Povinelli refers to a number of examples to show how white culture sees things as 'buggered up' or inauthentic rather than as new but still authentic forms. Povinelli, above n 53, 82, 97, 98. Nonie Sharp reports on a similar debate in a land case, see Nonie Sharp, *No Ordinary Judgment* (1996) 89, 91 and *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

57 Wolfe above n 47, 34, 175-176, 212.

58 See especially Kriewaldt J's discussion in *Namatjira v Raabe* (1958) NTJ 608, 621.

death was found to be loss of blood as a result of numerous injuries.[59] The Defence case was run along several lines. Initially the Defence attempted to establish provocation but ultimately the trial judge, Chief Justice Ashe, refused to allow provocation to be put to the jury.[60] Finally, during his address to the jury, counsel for the Defendant suggested to the jury that an appropriate partial defence was diminished responsibility, or alternatively, that murder should fail because of a lack of intention. After a short absence of about one and a quarter hours the jury returned a verdict of guilty to murder and Mungatopi was sentenced to life imprisonment.[61] The case was subsequently appealed.[62] The basis of the appeal was that provocation should have been left to the jury. Although the Court of Appeal agreed that provocation should have been left to the jury, they determined that the jury would have found Mungatopi guilty of murder despite such a direction. Ultimately the Court did not quash the conviction for murder.[63]

At trial the Defence focussed on establishing provocation. In disproving the provocation defence[64] the Prosecution clearly played a role in rebutting matters that support the defence of provocation. An examination of the trial transcript suggests that the Defence depended on two main signs to construct Mungatopi as an 'ordinary (authentic) Aboriginal person'. These are Mungatopi's deference to Aboriginal Law and his reliance on Tiwi language. These issues are discussed below.

IV ABORIGINAL LAW

During the trial of Mungatopi, the Defence encouraged witnesses to articulate the connection between Aboriginal Law and the killing. The relevance of Aboriginal Law has a complicated relationship to the defence of provocation.[65] Even if it is accepted that the act that provoked Mungatopi was the victim's failure to look after their children,[66] and that Mungatopi responded with appropriate deference to Aboriginal Law by disciplining his wife, the response does not suggest a loss of

59 *Mungatopi* transcript, above n 6, [169].

60 Ibid [506-509].

61 The mandatory penalty for a conviction of murder in the Northern Territory. See *Criminal Code Act 1983* (NT) s 164.

62 The matter was appealed to the Northern Territory Court of Appeal, see *Mungatopi v R* (1991) 105 FLR 161.

63 And the mandatory life sentence was left in place. See *Mungatopi v R* (1991) 105 FLR 161, 167.

64 *Stingel v R* (1990) 171 CLR 312, 332-3, 334, 199, 200.

65 Kriewaldt J struggled with similar tensions in the 1950s. See for example *R v Muddarubba* (1956) NTJ 317, *R v Patipatu* (1951) NTJ 18.

66 Alternatively he believed (perhaps mistakenly) that the victim had had an affair or that she had failed to leave a card game when requested, see *Mungatopi v R* (1991) 105 FLR 161, 164.

self-control usually associated with the provocation defence.[67] Presumably, in suggesting the Defendant's behaviour was driven by Aboriginal Law, the Defence was making the same connections that Kriewaldt J made in the 1950s, using the observance of Aboriginal Law to define the behaviour of the 'ordinary Aboriginal person'. In contrast, the Crown avoided discussion of Aboriginal Law, focussing on the context of gambling and alcohol fuelled bad-temper. Their approach suggests that Mungatopi is culturally damaged, he is straddling cultures and is thus inauthentic.

For example, the Crown's examination of Mark Mungatopi, the brother of the accused, focussed on the accused's presence at the local beer club earlier in the evening of the killing. Mark Mungatopi stated that the Defendant had been looking for money for beer.[68] The Crown's examination-in-chief of Josephine Mungatopi, the accused's sister, and Anna-Lisa Maria Warlapinni, 'mother-cousin' of the accused, also helped to set the scene in the context of alcohol, and card playing.[69] Both Josephine Mungatopi and Warlapinni said they did not approve of the Defendant punching the victim at the card-playing circle. They said they 'growled' at the accused, told him that he should not 'do that to [his] missus'[70] and warned the accused not to hit his wife again.[71] The latter witnesses' comments about their warnings and reprimands to the accused suggest that the killing took place in the context of temper and fighting rather than as a result of any community condoned Aboriginal Law. Their comments suggest a context of social devastation rather than cultural authenticity.[72]

The Crown also called Gary Robinson. Robinson is a white man who was, at the time of the killing and trial, intimately involved with the Tiwi community. He was engaged in a de facto relationship with the accused's sister. At the time of the trial Robinson was employed as a visiting fellow at the University of New South Wales and was studying for a doctorate in social anthropology. Robinson was particularly at home in the courtroom. He was one of the few witnesses to the events surrounding the death who spoke English as a first language and who had a high level of formal education. Unlike many of the Aboriginal witnesses, who often answered with one word or in the briefest sentence, Robinson provided long

---

67 On its face this seems as if the Defence are pursuing a defence of Aboriginal Law; however there is still no defence available of Aboriginal Law recognised by white law, *Walker v New South Wales* (1995) 69 ALJR 111, 113.

68 *Mungatopi* transcript, above n 6, [174].

69 Ibid [184-5], [191-2].

70 Ibid [186].

71 Ibid [193]. The Crown ultimately used Warlapinni's testimony to rebut the Defence position that the behaviour was condoned by Aboriginal Law, ibid [495].

72 Deborah Bird Rose has discussed the lawlessness (in both a general law and Aboriginal Law sense) associated with substance abuse and other factors, Deborah Bird Rose 'Indigenous Customary Law and the Courts: Post-Modern Ethics and Legal Pluralism' (Discussion Paper, North Australian Research Unit, Australian National University, Canberra, 1996) 21.

narrative answers to the questions put to him. His answers frequently ran over four or five lines of the transcript. In examination-in-chief he told the court that on the night of the killing the accused was variously 'in a fairly angry mood', 'growling' at people and 'talking hard',[73] that the accused had 'been drinking' and that he was in a 'fairly loud and boisterous mood',[74] and that he was 'angry about his wife'.[75] As with previous witnesses, the Crown focused this witness' testimony on the link between alcohol and the offence, suggesting cultural straddling and thus inauthenticity.

In contrast to the Crown, with each new witness the Defence attempted to establish the links between the Defendant and Aboriginal Law. First, from Mark Mungatopi, the Defence attempted to adduce evidence that supported the position that Mungatopi's actions were related to wife discipline and were in some way condoned by Aboriginal Law:

Defence: … did you have a talk to him about his wife?

Mark Mungatopi: Well he told me that he was real upset to his wife you know.

Defence: Yes did he say why?

Mark Mungatopi: She should have looked after the kids.

Defence: Aboriginal way, if the wife sometimes drinks too much and doesn't look after the children properly, Aboriginal Law - does that say that the husband can do something to that wife?

Mark Mungatopi: Yes, well that's - that's an old custom- Aboriginal custom you know.

Defence: Yes. But Aboriginal ways, sometimes, if that wife drink too much and doesn't look after the children…is it all right for the man to hit that wife?

Judge: The witness nodded.

Mark Mungatopi: Say that again.

Defence: Is it the right thing, Aboriginal way, if that man hits his wife to punish her?

---

73 *Mungatopi* transcript, above n 6, [225].
74 Ibid [226].
75 Ibid [227].

Mark Mungatopi: Yes, should be.[76]

At each point the Defence urged the witness to make the link between the killing and Aboriginal Law.

Similarly, the Defence cross-examined Anna-Lisa Maria Warlapinni. The Defence attempted to demonstrate through this witness that Mungatopi's violent response to this behaviour was again one condoned by Aboriginal Law:

Defence: And is there Aboriginal Law if that wife sometimes gets drunk and not looking after the children, Aboriginal Law for that husband sometimes to punish her?

Warlapinni: Yes.

Defence: Well is it law sometimes for a husband to punish that lady if…

Warlapinni: Yeah.

Defence: Maybe hit her?

Warlapinni: Yeah.[77]

The Defence also asked Robinson about his research. Robinson informed the court that his research focussed specifically on Tiwi people.[78] The Defence then asked Robinson the following:

Defence: In the course of your time at Tiwi, and bearing in mind the purpose of your stay there, that is … writing up a PhD thesis … did you look at some Aboriginal customs, particularly as regards the way Aboriginal people administer punishment to each other?

Robinson: Yes I have.[79]

The Defence continued to ask Robinson his opinion on particular aspects of Tiwi culture:

Defence: Were you aware of a tendency, perhaps a custom, for a husband to physically punish a wife, if he felt that she was not properly looking after the children and attending to the

76 *Mungatopi* transcript, above n 6, [182-183].
77 Ibid [196].
78 Ibid [239].
79 Ibid [245].

> domestic sort of affairs that some wives are expected to attend to?
>
> Robinson: Yes. In general terms it's not considered illegitimate for a man to hit a wife if he believes she's either neglecting children - especially [sic] neglecting children, but also for other reasons, perhaps suspected infidelity … it depends on the relationship and so on …[80]

With each of these witnesses, the Defence pressed the witness to make the connection between Aboriginal Law and the Defendant's actions, thus strengthening Mungatopi's status as an 'authentic Aboriginal' person. When questioned by the Defence, all of the witnesses discussed above supported the existence of wife discipline in certain circumstances but appeared to do so with some reticence. These witnesses did not state that Aboriginal Law was applicable in the specific case;[81] rather they made generalised comments about the existence of such Aboriginal Law. The lack of connection between customary law and Mungatopi's actions was, I suggest, ultimately problematic in terms of constructing Mungatopi as an 'ordinary Aboriginal person' for the purposes of the provocation test. The approach of the Defence reflects Kriewaldt J's analysis in earlier provocation cases.[82] For Kriewaldt J, a deference to Aboriginal Law suggested a lack of civilisation, the connection between the Defendant and Aboriginal Law is now used to indicate authenticity.

V LANGUAGE AND IDENTITY

Gunew has noted that '[c]ulture and nationalism are not necessarily based solely on language but … language often has a sacred function and is certainly often a signifier for cultural authenticity.'[83]

The enquiry about the language spoken by Mungatopi, was significant throughout the trial. The issue was important both in relation to an initial voir dire about whether the defendant had understood the caution given at the police interview and thus whether the record of interview was admissible.[84] However the question of Mungatopi's facility with the English language was also important in relation to the provocation question.

---

80 Ibid [245].

81 I note Larissa Behrendt's call for scepticism of Aboriginal Law or traditional 'defences' and a balancing of the evidence in situations such as this, Larissa Behrendt, 'Aboriginal Women and the Criminal Justice System' (2002) 14(6) *Judicial Officers' Bulletin* 41, 44.

82 See especially *R v Patipatu* (1951) NTJ 18, *R v Muddarubba* (1956) NTJ 317 and *R v Balir Balir* (1959) NTJ 633.

83 Sneja Gunew 'Denaturalizing Cultural Nationalisms: Multicultural Readings of 'Australia'' in Homi Bhaba (ed), *Nation and Narration* (1990) 99, 112.

84 *Mungatopi* Transcript, above n 6, [63].

One obvious difference in the approach of the opposing counsel was the use of an interpreter. An important symbolic (and possibly practical) strategy of the Defence was to enlist the services of an interpreter throughout the trial. The Defence constantly relied on the interpreter when examining the Defendant. In contrast, the Crown avoided, almost entirely, the use of the interpreter throughout cross-examination of the Defendant. For almost all of the questioning relating to the period surrounding the death of the victim the Defence enlisted the assistance of the interpreter.[85] In contrast, throughout their cross-examination of the Defendant, the Crown avoided the interpreter although their avoidance was not systematic. On one occasion the Judge reminded the Crown and Defendant of the availability of the interpreter[86] but the Crown did not engage the services of the interpreter in response. At another point the Defendant answered a number of Crown questions with 'don't know' or 'don't remember'[87] and then, after a grammatically complex question, which was framed as a challenge to the defendant that he appeared to be 'pretending to forget'[88] (and with the encouragement of the Judge), the Crown requested the assistance of the interpreter. However, the Crown then employed the interpreter's services for only two questions before returning to directly questioning the Defendant[89]. The Crown later used the interpreter to ask some simple questions about internal injuries to the victim[90] but then, again, returned to managing the cross-examination without the interpreter.[91] The difference in approach between the two counsel is stark.

Arguably the use of an interpreter has a number of effects. It may assist the Defendant to be more involved in the trial process, it may emphasise the evidence elicited when the interpreter is used, and it may help to draw the jury's attention to the lack of English possessed by the Defendant. The use of the interpreter by both counsel was clearly selective. It is arguable that the Defence used the interpreter to ensure that Mungatopi understood the questions asked and that his answers were also understood. However, given that throughout the trial, the Defence was anxious to establish Mungatopi's cultural authenticity, and part of this authenticity related to establishing him as a Tiwi speaker, it is not surprising that the interpreter was used so frequently in the evidence-in-chief. Similarly, given that the Defence case was that Mungatopi's assault on the victim was motivated by Aboriginal Law, a preference for Tiwi (and a corresponding discomfort with English) would have been more consistent with the Defence suggestion of Mungatopi's deference to Aboriginal Law.

---

85 See *Mungatopi* Transcript, above n 6, [385-395], [398], [401-5], [407-8].

86 Ibid [420].

87 Ibid [423-426].

88 Ibid [426].

89 Ibid [416-432]

90 Ibid [439-440] I note that using an interpreter for these questions may serve to emphasise the evidence about the vicious and indecent nature of the Defendant's assaults upon the victim.

91 Ibid [445-450].

There is also more than one reason why the Crown may have chosen to avoid using an interpreter. One possibility was that the Crown believed that Mungatopi was able to understand the questions being asked and that the court would understand his answers. Perhaps the Crown decided it would be useful to use the interpreter when asking Mungatopi for a second time about the injuries he had inflicted on the victim and the jury heard the injuries repeated the second time through the interpreter. Alternatively, it may be that the Crown avoided the interpreter in order to emphasise to the Court that Mungatopi was generally comfortable conversing in English. That is, that Mungatopi 'straddled' cultures and thus lacked cultural authenticity. For both counsel the use, or lack of use, of the interpreter can be seen as important in terms of the kind of 'ordinary person' they were attempting to construct.

Discussion of Mungatopi's Tiwi and English proficiency during the trial suggests that the analysis of authenticity can filter into the trial in various ways. For example, during the voir dire the Crown asked Robinson what kind of Tiwi Mungatopi spoke. Robinson answered that he communicates with Mungatopi using 'English with quite a few Tiwi words … but mostly English'.[92] Robinson noted, in response to Crown questions, that Mungatopi spoke 'full Tiwi' to his elders, a mixture of Tiwi and English to younger people and English to Europeans.[93] The Defence had also called Mungatopi on the voir dire. Mungatopi maintained throughout questioning that he spoke Tiwi as his first language.[94] The Crown approached the question of authenticity head-on, asking Mungatopi whether the language he spoke was a 'pure' Tiwi language. Mungatopi responded simply that he spoke 'Tiwi language'.[95] These exchanges suggest that there is an attempt by the Crown to demonstrate that Mungatopi spoke an impure or 'buggered up' version of Tiwi. Again this would support the construction of Mungatopi as 'straddling' culture, and thus as inauthentic.

The divergent approaches of the Crown and Defence are encapsulated by their different explanations to the court regarding Mungatopi's inconsistency between his testimony in examination-in-chief and cross-examination. According to the Crown there were only two possibilities; that he had lied at some point or that by the time he was cross-examined he had forgotten.[96] In contrast, the Defence explained that the difference was a 'natural reaction that one sometimes observes in Aboriginal people'[97] and that they (the Defence) had attained a more complete testimony

92 *Mungatopi* Transcript, above n 6, [91].
93 *Mungatopi* Transcript, above n 6, [90].
94 Ibid [102].
95 Ibid [112].
96 Ibid [552].
97 Ibid [558].

because they used an interpreter.[98] While the Crown attempted to culturally neutralise any explanation, the Defence endeavoured to do the opposite.

The issue of whether or not Mungatopi spoke Tiwi or English was used to either bolster or destabilise cultural authenticity. The Defence, in various ways, constantly emphasised Mungatopi's preference for Tiwi. Meanwhile the Crown attempted to demonstrate Mungatopi's proficiency in speaking English. Establishing Mungatopi as a Tiwi-speaker would have helped to establish Mungatopi's cultural position as an 'authentic Aboriginal person', that is, an 'ordinary Aboriginal person'.

VI THE AUTHORITY TO SPEAK[99]

There are other concerns confronting the court in understanding how the 'ordinary (or authentic) Aboriginal person' is constructed. In Mungatopi's trial it appears that Robinson was assumed to possess authority in relation to the issue. The emphasis throughout the trial was on Robinson's testimony, that is from a non-Aboriginal person. Expert opinion evidence of the rules about Aboriginal Law in wife discipline or Tiwi language was not called in the case of Mungatopi.[100] Nevertheless, Robinson was treated like a quasi-expert witness in the field of local Aboriginal Law and linguistics.[101] Robinson's testimony ran for over twenty pages where the testimony of Aboriginal witnesses ran for, at most, three pages.[102] Robinson also spoke like an expert in the sense that he used general terms and came across as objective and at arms length from the community with which he was actually intimately involved.[103] Robinson spoke with great authority about the Tiwi

---

98 Ibid [559].

99 Goodrich has argued that the question of whose speech is to be heard within the institution 'is always the first question of law, that of authority and qualification for legitimate speech', Peter Goodrich, 'Modalities of Legal Annunciation: A Linguistics of Courtroom Speech' in *Languages of Law: From Logics of Memory to Nomadic Masks* (1990) 180, 181, 184 and generally chapter 6.

100 Although expert evidence could be given about the content of Customary law or linguistics, the question whether Mungatopi's response was that of the 'ordinary Aboriginal' could not be a subject of expert evidence; see *Jabarula v Poore* (1989) A Crim R 479, 482. Ian Leader-Elliott notes that '[e]xpert evidence is admissible … when the sensitivities are likely to be unknown or unfamiliar to courts', Leader-Elliott, above n 25, 81, 90.

101 *Clark v Ryan* (1960) 103 CLR 486, 491 (Dixon CJ), *Weal v Bottom* (1966) 40 ALJR 436, 438 (Barwick CJ).

102 The exception here is the accused whose testimony takes up close to fifty pages; I note that his testimony is partly longer than other Aboriginal witnesses because he gives most of his evidence through an interpreter.

103 Young CJ discussed the difference between expert witnesses of the *Clark v Ryan* (1960) 103 CLR 486 sense versus being qualified to give evidence about certain cultural mores in *R v Yildiz* (1983) 11 A Crim R 115, 119. Young CJ was prepared to admit evidence about the social customs of the Turkish community from a Turkish-

Island community, and information provided about his anthropological studies was used by both counsel to bolster his authority to speak.[104] Unlike the other lay witnesses, Robinson is not interrupted at any stage by questions seeking to clarify language terms. As a result his evidence is far less fragmented than all the other lay witnesses and probably adds to his impressiveness. The Crown recognised that Robinson was an articulate and compelling witness. In summing-up the Crown commented that:

> Mr. Robinson whose evidence - it was so much more articulate than many of the other witnesses that there is perhaps some danger of you being over-impressed with [him] … [s]o just because Mr Robinson has been so much more articulate is no reason not to test his evidence.[105]

As a result of his eloquence and university qualifications, whatever Robinson could say that was relevant to the case would be particularly influential to the Court in terms of defining the 'ordinary Aboriginal person'. Aboriginal people have expressed their frustration with this kind of privileging of non-Aboriginal people's 'expertise' in constructing Aboriginal people.[106]

VII CONCLUDING THE CASE

In his initial and brief address to the trial judge, the Crown submitted that there was no evidence that a jury could consider that amounted to provocation.[107] In the opinion of the Crown, Mungatopi had failed to satisfy the defence 'by a mile'.[108]

In contrast, the Defence suggested that it was a 'mixture'[109] of things that provoked the Defendant, including the victim's failure to look after the children and suspicions of adultery. The Defence drew together the 'battered women's syndrome' case of *R v R*,[110] Murphy J's judgment in *Moffa's* case[111] and the

---

speaking member of that community. This seems to be the approach taken by the Defence in Mungatopi's trial.

104 *Mungatopi* transcript, above n 6, [224], [238].

105 *Mungatopi* transcript, above n 6, [550].

106 See, for example, Mick Dodson, 'The End in the Beginning: Re(de)finding Aboriginality' Wentworth Lecture no. 10 1994, 3, available at http://www.humanrights.gov.au/speeches/social_justice/end_in_the_beginning.html (accessed 5 May 2007) Canberra.

107 Mungatopi transcript, above n 6, [458-459].

108 Ibid [459].

109 The provocative acts are noted as, see *Mungatopi* Transcript ibid: suspicions of adultery [466-467], neglecting children [472] and 'a mixture of things' [482], [484].

110 The Defence referred on a number of occasions to the judgment in *R v R* (1981) 28 SASR 321, *Mungatopi* Transcript ibid [467], [470], [475].

111 *Moffa v R* (1977) 138 CLR 601, especially 625, 626 (Murphy J). In referring to Murphy J's judgment in *Moffa* the Defence drew attention to, what the Defence described as, Murphy's approval of Kriewaldt J's decisions [477]. This is slightly

provocation cases of Kriewaldt J[112] to argue that the cooling off period should be extended considering the Aboriginality of the accused.[113] The Defence argued that the ordinary man in the case must be the ordinary Tiwi Aboriginal who had the same age, matrimonial relationship, who had children, and lived in 'that situation'.[114] He noted further, referring to Kriewaldt J's judgments, that the jury were 'entitled to use their knowledge of Aboriginals and to consider that although a white person might have cooled down, an Aboriginal person might not have'.[115] More specifically, the Defence suggested that perhaps although a white person may have cooled down, this may not be the case for a Tiwi Aboriginal person.[116] On the one hand the Defence argued that the accused's actions were precipitated by Aboriginal Law. On the other hand the Defence tried to attach the accused's actions to the rhetoric of the provocation defence, arguing that he was slower to 'cool down' than others. These inconsistencies are reflected in Kriewaldt J's provocation cases.[117]

In response to the Defence submissions the Crown suggested that:

> [t]he broadening of the definition, or the narrowing rather, of the definition of an ordinary person to the Tiwi islander of about his age, education, family circumstances … is a concept which has been imported from the common law in order to make some sense of that definition of the Code …[118]

---

misleading. In *Moffa's* case, Murphy J noted, when discussing the unsuitability of the objective test in the provocation defence, that '[i]n the Northern Territory Supreme Court, Kriewaldt J refused to apply the test to a tribal aborigine and used the standard of the accused's tribe' see *Moffa v R* (1977) 138 CLR 601 at 626.The Defence also referred to the judgment of Lush J in *R v Dincer* [1983] VR 460 [486-487]. I note that Lush J was, like Murphy J, highly sceptical about the objective test of the 'ordinary person' in the provocation defence.

112 Specifically he refers to *R v MacDonald* (1953) NTJ 186, *R v Muddarubba* (1956) NTJ 317 and *R v Balir Balir* (1959) NTJ 633.

113 In conflating Kriewaldt J's principles with those underlying the 'battered women's syndrome' case law (exemplified by the reference to *R v R* (1981) 28 SASR 321) the Defence are effectively harnessing the work of feminists to increase the availability of the defence to men who kill partners. Adrian Howe has noted the risk of this occurring, see Adrian Howe, 'Provoking Polemic-Provoked Killings and the Ethical Paradoxes of the Postmodern Feminist Condition' (2002) 10 *Feminist Legal Studies* 39, 41.

114 *Mungatopi* transcript, above n 6, [489]. The Defence also suggested that voluntary intoxication should be part of the qualities of the ordinary Tiwi Aboriginal as it was not excluded by the legislature but this was not strongly pursued.

115 Ibid [476].

116 Ibid [477].

117 See, for example, *R v Muddarubba* (1956) NTJ 317.

118 *Mungatopi* transcript, above n 6, [495]. The Crown also emphasised that the 'ordinary person' in the provocation test must be sober. This had been stated quite clearly by Kearney J in *Jaburula v Poore* (1989) 42 A Crim R 479, 488.

The verbal slip of the Crown with respect to the question of whether the formulation of the 'ordinary person' as 'Ordinary Tiwi Islander' narrows or broadens the definition is curious. Kriewaldt J believed that his 'ordinary Aboriginal person' test would expand the range of circumstances where Aboriginal people could successfully argue provocation.[119] The Defence attempted to press this expanded application in Mungatopi's case. However, the trial judge was succinct in responding to the issue of provocation. Although he accepted that the test related to an 'ordinary Tiwi Aboriginal'[120] he found that even the first hurdle of the test in section 34(2) of the *Code*, (relating to the requirement for a provocative act[121]) could not be satisfied because there was insufficient evidence of provocation.[122] Kriewaldt J's point had been that in cases involving Aboriginal Defendants, some things that may not have provoked a white person may have provoked an 'ordinary Aboriginal person'.[123] For Kriewaldt J the accused's Aboriginality (or level of civilisation) was important in conceptualising the whole of the provocation test. The view from the Crown and trial judge appeared to be that while Kriewaldt J's jurisprudence has been imported into the current provocation test generally, such cultural considerations did not extend to the defining of the provocative act.[124]

Throughout the trial the Defence aimed to 'culturalise' or racialise the accused,[125] while the Crown attempted to neutralise the question of culture and race.[126] In spite of the divergent aims of both counsel they were both involved in an oppressive project of construction. While the Crown attempts to construct Mungatopi as a

---

119 See, for example, *R v Patipatu* (1951) NTJ 18, 20 (a case where the 'provocative act' was a failure to care for children). Kriewaldt J believed that it was because of his more 'liberal' view about the application of the provocation defence that there were less verdicts of guilty to murder and more verdicts of guilty to manslaughter than there were when his predecessor, Wells J, was on the Northern Territory bench. See Kriewaldt, above n 16, 5.

120 *Mungatopi* transcript, above n 6, [508].

121 *Criminal Code Act 1983* (NT). .

122 *Mungatopi* transcript, above n 6, [506].

123 See, for example, *R v Muddarubba* (1956) NTJ 317, 322.

124 This position was not followed by the Court of Appeal: see *Mungatopi v R* (1991) 105 FLR 161, 165.

125 Daryle Rigney has discussed ways in which the legal system is racialised, see Daryle Rigney, 'Moving the Boundaries and Undoing the Restrictions' in Elliot Johnston, Martin Hinton, Daryle Rigney (eds), *Indigenous Australians and the Law* (1997) 31.

126 That is to place the accused in a category that is untouched by controversies surrounding race and culture, see Alastair Bonnett, 'Constructions of Whiteness in European and American Anti-Racism' in Pnina Werbner and Tariq Modood (eds), *Debating Cultural Hybridity: Multi-cultural Identities and the Politics of Anti-racism* (1997) 177.

'buggered up' version of civilised, the Defence attempt to show that Mungatopi's responses and actions reflect his authentic Aboriginality.[127]

Subsequently, the Defence appealed the matter to the Northern Territory Court of Appeal on the basis that provocation should have been left to the jury. The Judges of the Court of Appeal[128] were prepared to take into account cultural factors that they understood were related to the Defendant's Aboriginality in determining the nature of the provocative act. The Court accepted a number of submissions made by the Defence, and found that:

> refusing to come home and look after the children when called upon by her husband to do so, was an insult in the circumstances of the case. The refusal took place in front of three other female Aboriginals. There was evidence that under Aboriginal customary law an Aboriginal wife who fails to look after her children, by getting drunk and neglecting them, is liable to be punished by her husband, although the level of punishment admitted to by the Crown witnesses did not go beyond merely hitting such a wife.[129]

Ultimately the Judges of the Court of Appeal were prepared to assume (without making any finding) that there was evidence that might have amounted to an insult.[130] The Court of Appeal also accepted that in order to define provocation in relation to Mungatopi it was appropriate to take into account the way of life of his community:

> In our opinion, in determining whether the deceased's actions and words could have amounted to provocation in law, it is appropriate to consider those actions and words against the background of what is acceptable conduct in the Aboriginal community to which the appellant and the deceased belong.[131]

While the trial judge had simply noted that the ordinary person[132] was an 'ordinary Tiwi Aboriginal' or an 'ordinary Aboriginal person', the Court of Appeal explicitly reclaimed the question of place within the test.[133] The Court of Appeal referred to the 'ordinary Aboriginal male person living today in the environment and culture of

---

127 Perhaps the Defence were ineffective as after a short time the jury returned their guilty verdict, although it is impossible to say with any certainty whether they were influenced by counsel's efforts at constructions and why they decided as they did. I note that the Judge's directions were unavailable for perusal.

128 Martin CJ, Angel and Mildren JJ.

129 *Mungatopi v R* (1991) 105 FLR 161, 165.

130 Pusuant to s 34(2) of the *Criminal Code Act 1983* (NT): Ibid 161, 166.

131 Ibid 161, 165.

132 For the purpose of interpreting the *Criminal Code Act 1983* (NT) s 34(2)(d).

133 I note that the relevance of place was raised in *Mungatopi's* case. Recall that Kriewaldt J had frequently referred to the question of lived space in his provocation directions in order to assist in defining the level of civilisation of specific defendants. See for example *R v Patipatu* (1951) NTJ 18, 20, *R v Nelson* (1956) NTJ 327, 335.

a *fairly remote Aboriginal settlement* (emphasis added) such as Milikapiti.'[134] However, although the Court of Appeal were prepared to go further than the trial judge, and draw on cultural considerations to at least imagine the content of a (legally) recognisable provocative act, they were not prepared to find that a jury, properly instructed, would have found that an ordinary 29 year old Aboriginal would have responded to the provocation by killing the victim.[135] There is little indication from the Court of Appeal report to suggest the way in which this conclusion was reached.

VIII INTRACTABLE PROBLEMS

A *Defining the 'Ordinary Aboriginal person'*

Although Judges in the Northern Territory harnessed the rhetoric of Kriewaldt J's judgments, their approach to and application of the defence of provocation to Aboriginal people did not appear to deliver the advantages Kriewaldt J intended. The tactics used by Mungatopi's counsel at trial were to emphasise aspects of his lifestyle that helped construct an image of Aboriginal authenticity. In this way the Defence focussed on the same signs and symbols that Kriewaldt J drew on in the 1950s to indicate a lack of civilisation. Kriewaldt J applied his alternative version of the provocation defence against an ideological backdrop of wanting to encourage the civilisation of Aboriginal people so that they could be assimilated. More recent Judges do not appear to have followed this approach in the same way.

In the three cases reported in the Northern Territory since the *Criminal Code* was introduced, the Courts purported to follow Kriewaldt J's 'ordinary Aboriginal person' test, but this has not resulted in 'successful' outcomes for those Aboriginal Defendants.[136] In both *Mungatopi* and *Rostron,*[137] which were cases of unlawful killing, the Court of Appeal could identify a provocative act but found that it would be difficult to show that the 'ordinary Aboriginal person similarly circumstanced'

---

134 At another point, the Court also referred directly to his community in articulating the test: *Mungatopi v R* (1991) 105 FLR 161, 166, 167.

135 Ibid 161, 167-168.

136 *Jabarula v Poore* (1989) A Crim R 479, 488; *Mungatopi v R* (1991) 105 FLR 161, 167; *Rostron v R* (1991) 1 NTLR 191, 208. In each case, murder convictions and associated life sentences remained in place. I note there are a number of examples where Aboriginal Defendants have pleaded guilty to manslaughter on the basis of provocation, however these pleas have naturally not required an articulation of the provocation test by the court. See for example *Secretary v R* (1996) 5 NTLR 96 and *R v Morton* (unreported decision, Northern Territory Court of Appeal, (appeal against sentence), Martin CJ, Mildren and Riley JJ, 19 October 2001).

137 *Rostron v R* (1991) 1 NTLR 191, 208.

would lose self-control and kill.[138] The kind of assessment that is taking place here is highly problematic.[139]

In order to imagine this 'ordinary Aboriginal person', it is likely that the court will consider stereotypical images of authenticity. The problem is unlikely to be solved by the admission of expert evidence about how an 'ordinary Aboriginal person' usually responds to a particular situation. The Victorian Law Reform Commission suggested that 'culture is relative' and expressed difficulties with assessing the expertise of 'culture' experts.[140] So how do we understand the 'ordinary Aboriginal person'?[141] Many have written over the past few years of the cultural lives of Aboriginal people in various settings, including town camps[142] and in communities struggling with issues of violence and alcohol.[143] However, for the purposes of the provocation defence, a construction of an 'ordinary Aboriginal person' may be limited to images of authenticity collected from 'stories told by former colonists.'[144] The social devastation of many Aboriginal communities coupled with the intractable problems of definition may result in Aboriginal people, and their communities, being perceived as inauthentic. If this is the case they may well not be perceived as 'ordinary Aboriginal' people, rather they may simply be perceived as 'buggered up' versions of 'ordinary'.[145] This approach offers little benefit to

138 Recall the definition in the *Criminal Code Act 1983* (NT) s 34(2)(d); *Rostron v R* (1991) 1 NTLR 191, 208; *Mungatopi v R* (1991) 105 FLR 161, 165; *Jabarula v Poore* (1989) 42 A Crim R 479, 485. After studying a number of cases Ben Fitzpatrick and Alan Reed came to the conclusion that what is taking place in provocation cases is a 'judicial assessment of the moral rectitude of the behaviour of the defendants.', see Ben Fitzpatrick and Alan Reed, 'Sound of Mind and Body: Psychological Characteristics and the Reasonable man Test in Provocation' (1999) 63(4) *Journal of Criminal Law* 365, 368.

139 See William Torry, 'The Doctrine of Provocation and the Reasonable Person Test: An Essay on Culture Theory and the Criminal Law' (2001) 29 *International Journal of the Sociology of Law* 1,17.

140 Victorian Law Reform Commission, *Defences to Homicide*, Final Report (2004) [2.79], [6.26]. See also Leader-Elliott, above n 25, 89.

141 See *Jabarula v Poore* (1989) A Crim R 479, 482, where Kearney J noted that '[t]he question is particularly difficult when the fact-finder is not a member of the 'community' in question, and that community consists of persons whose backgrounds and cultural values are different to his and are recognised by the law as relevant matters. As I understand the law, the calling of evidence to assist the fact-finder to determine the community standards, is not permitted.'

142 For example Basil Sansom, *The Camp at Wallaby Cross* (1980).

143 For example David McKnight, *From Hunting to Drinking: The Devastating Effects of Alcohol on an Australian Aboriginal Community* (2002). Recall also the sociological evidence about violence on Palm Island offered in *Watson* (1986) 22 A Crim R 308.

144 Marcia Langton, *Well, I Heard it on the Radio and I saw it on the Television* (1993) 33.

145 Essentially this is what the trial judge in *Mungatopi's* case suggested in his assessment of language, see *Mungatopi* Transcript, above n 6, [145].

individual Defendants and may generally have caused some cultural harm to the Indigenous population.

IX AN ARGUMENT FOR ABOLITION

The problem of how to define the 'ordinary Aboriginal person' is a more complicated sub-issue of the on-going problem of how to define the 'ordinary person' in the provocation test. Although *Stingel*[146] provides the current authority for the provocation test throughout those jurisdictions which retain the defence, the test has been the subject of regular review and criticism, both in the courts[147] and more generally.[148] Yeo, for example, has waxed and waned on the question of how to understand the ordinary person of the provocation test. An early article of Yeo's[149] notably influenced McHugh J to dissent in *Masciantonio* and find that the 'ordinary person' had the same age, race and culture as the accused.[150] This is a view that would have encompassed the Northern Territory test applied to Aboriginal people until recently. However Yeo has since resiled from his former position and has lately criticised the Northern Territory line of cases on the basis that they have 'had the effect of promoting a great evil, namely a negative stereotype of Aborigines being at a lower order of the evolutionary scale than other ethnic groups.'[151] As Gray points out, there is 'a fine line between cultural sensitivity and cultural stereotyping',[152] however it is difficult to imagine how the law can construct the 'ordinary Aboriginal' benchmark without resorting to such stereotypes, and problematic markers of cultural authenticity. Despite the motivations of the Defence in the Mungatopi case, in his efforts to construct Mungatopi as closely as possible to a model of cultural authenticity, this was potentially a road to oppression 'paved with good intentions'.[153] The purportedly culturally sensitive approach to provocation developed by Kriewaldt J[154] was, in the hands of current lawyers and Judges, an oppressive tool. In the first place, the test

146 *Stingel v The Queen* (1990) 171 CLR 312. See also *Masciantonio v The Queen* (1995) 183 CLR 58 and Bronitt and McSherry's critique above n 9, 280-1.

147 See, for example, *Moffa* (1977) 138 CLR 601 and *Dincer* [1983] 1 VR 460.

148 See, for example, Stanley Yeo, 'Power of Self-control in Provocation and Automatism' (1992) 14 *Sydney Law Review* 3 and Michael Detmold, 'Provocation to Murder: Sovereignty and Multiculture' (1997) 19 *Sydney Law Review* 5.

149 Yeo, ibid 12-13.

150 *Masciantonio v R* (1995) 183 CLR 58*,* 73. McHugh J repeated this position in *Green v R* (1997) 191 CLR 334, 368.

151 Stanley Yeo, 'Sex, Ethnicity, Power of Self-Control and Provocation' (1996) 18 *Sydney Law Review* 304, 316. Although current judges may have been insulted by this idea it is likely that Kriewaldt J would have accepted the comment.

152 See Gray, above n 31, 121.

153 Wolfe, above n 47, 213. It is as a result of trying to gain the best result for Mungatopi that the Defence assists the law to perpetuate 'a long tradition of telling indigenous people who and what they are', Heather McRae, 'The Criminal Justice System and the Construction of Aboriginality' (2000) 17(1) *Law in Context* 149, 149.

154 As described by Australian Law Reform Commission, above n 4, 302.

not only demanded that the Aboriginal accused lives up to the white law's expectations of authenticity but, in the second place, when he can not, the law neutralised and assimilated him as a 'buggered up' version[155] of 'normal' and 'ordinary'[156] and as culturally devastated. In this way Kriewaldt J's jurisprudence continued to be the backdrop for what could be described as a new version of assimilation.

At the same time, it seems that Kriewaldt J's 'ordinary Aboriginal person' was, in a practical sense, interpreted out of existence in more recent judgments. However, in current settings, expanding the range of situations where Aboriginal people could succeed in a provocation argument would not address the conceptual problem. Rather, it could create more problems by producing results that are not considered to be in the best interests of justice.[157] Any expansion of the understanding of cultural authenticity could operate to enlarge the exculpatory context for men's violence against women. For example, Howe has pointed out that the provocation defence has operated as a 'frequently racist excuse for men who kill when they are "out of control"'.[158] Related to this, Morgan's research has noted that an often-recurring context in which men argue the provocation defence is when they kill their intimates.[159] The recent analysis of the provocation defence by various law reform commissions has identified many problems with the defence, including its failure to deal with the concept of culture,[160] gender bias, incoherence and

155 Povinelli, above n 53, 98.

156 See generally Wolfe, above n 47, 163. Further, applying Wolfe's analysis, there is perhaps a 'strategic transformation' taking place in the way that the law is applied, but the project of elimination remains, 204. Wolfe also discusses how Indigenous people may strategically acquiesce in relation to such transformations in order to achieve local goals, 210. It may be argued that Mungatopi strategically acquiesced in order to achieve a 'local goal' of reduced sentence; he used an interpreter and gave instructions about customary law to his counsel. However Wolfe points out that the danger of such acquiescence is 'in generating its own resistance, settler power also contains it', 210.

157 Stephen Gray suggests that increased awareness about Aboriginal women and violence may make it less likely to succeed in those contexts. Gray, above n 31,121. See also Susan Edwards 'Abolishing Provocation and Reframing Self-Defence – the Law Commissions Options for Reform' (2004) *Criminal Law Review* 181.

158 Adrian Howe 'Reforming Provocation (more or less)' (1999) 12 *Australian Feminist Law Journal* 127, 128. Horder asks whether provocation: '…under the cover of an alleged compassion for human frailty, simply reinforces the conditions in which men are perceived and perceive themselves as natural aggressors, and in particular women's natural aggressors.' See Jeremy Horder, *Provocation and Responsibility* (1992) 75-7; see also Peter Rush, *Criminal Law* (1997) 192-3.

159 Jenny Morgan, *Who Kills Whom and Why: Looking Beyond Legal Categories* (2002) 38-41. Both Mungatopi and Rostron killed their wives, Rostron also killed his parent-in-law and children.

160 Victorian Law Reform Commission, Final Report, above n 138, [2.34]. See also New Zealand Criminal Law Reform Committee, *Report on Culpable Homicide* (1976), 6-7

complexity.[161] In their report, the Victorian Law Reform Commission suggested that the reasons for the abolition of the provocation defence were 'compelling'.[162] The English Law Commission released its report on provocation in 2004 and identified the same problems with the defence as other commissions have identified.[163] The 'ordinary Aboriginal person' concept appears to be even more incoherent, complex and problematic than the 'ordinary person test'. The seemingly intractable difficulties associated with defining these concepts, in the context of the defence, support the abolition of the provocation defence in the Northern Territory. However despite the decision to reform and limit the provocation defence in the Northern Territory, there does not appear to be any intention to reform the penalty of mandatory life imprisonment associated with murder in the Northern Territory.[164] One solicitor noted in response to the Northern Territory reform that 'mandatory sentencing is a disaster' and a range of factors should be able to be taken into account in the case of murder, as is the case with all other offences.[165] Generally, it has been recognised that there are some situations where circumstances of provocation should mitigate sentence.[166] For example, the Northern Territory reforms attempt to exclude non-violent sexual advances.[167] Exactly what kinds of situations of provocation should mitigate sentence is uncertain. Dealing with provocation as a circumstance to be considered at the sentencing stage has encountered problems, especially where customary law is relied upon to mitigate sentence.[168] In spite of the problems associated with sentencing it seems appropriate to deal with murder in the same way that the criminal law deals with other offences.

---

which recommended abolition on the basis that the defence could not be framed so as to be fairly inclusive of Maori and Europeans who killed under provocation.

161 Victorian Law Reform Commission, ibid [2.98]. See also The Law Commission, *Partial Defences to Murder* (Report) *(2004)* http://www.lawcom.gov.uk (visited 7 January 2005) at [3.20, 3.21]. Arguably they have for the most part re-identified the issues raised by Horder; see Horder, above n 156.

162 Victorian Law Reform Commission, Final Report, above n 138, [2.92].

163 The English Law Commission did not recommend abolition of the defence. They were strongly influenced by the existence of the mandatory life penalty for murder in place in that jurisdiction, which does not exist in Tasmania or Victoria. See *The Law Commission,* above n 159, [3.15]. Note s 3 *Crimes Act 1958* (Vic) provides that a person convicted of murder is liable to a maximum term of life imprisonment. See also s 158 *Criminal Code Act 1924* (Tas) provides for similar maximum (rather than mandatory) penalty.

164 See *Criminal Code Act 1983 (NT*) ss 157(1), (2).

165 Glen Dooley, quoted by Barker, above n 2.

166 This was the recommendation made by the Victorian Law Reform Commission, above n 138, iv, recommendation 50, [7.53]. An example is where women kill their violent spouse after continued abuse. For a discussion of sentencing Indigenous people, see Heather Douglas 'Customary Law, Sentencing and the Limits of the State' (2005) 20(1) *Canadian Journal of Law and Society* 141.

167 *Criminal Reform Amendment Act (No. 2) 2006* (NT)) s 158 (assented to 3 November 2006).

168 See, for an example of consideration of customary law at the sentencing stage, the controversial case of *Hales v Jamilmira* (2003) 142 NTR 1.

Some murders are worse than others and therefore deserve higher penalties than others.