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Australian Aboriginality and Sociobiology

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AUSTRALIAN ABORIGINALITY AND SOCIOBIOLOGY

Allan Ardill*

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INTRODUCTION

It has been argued elsewhere that the colonization, dispossession, and oppression of indigenous Australians has a close nexus with biological determinism, scientific racism, and the ideology known as sociobiology.¹ In the United States similar arguments are made concerning the historic maltreatment

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¹ See generally Allan Ardill, *Sociobiology, Racism, and Australian Colonisation*, 18 GRIFFITH L. REV. 82 (2009) (sociobiology); Loretta De Plevitz & Larry Croft, *Aboriginality Under the Microscope: The Biological Descent Test in Australian Law*, 3 Q.U.T.L. & JUST. J. 1 (2003) (biology and scientific racism); Tony Barta, *Discourses of Genocide in Germany and Australia: A Linked History*, 25 ABORIGINAL HIST. 37 (2001) (biological determinism and scientific racism); RAYMOND EVANS, *FIGHTING WORDS: WRITING ABOUT RACE* (1999) (scientific racism).

meted out to African Americans.² Here, the concern is with the continuing colonial control over the identity of Australian Aboriginal people.

This is critical because identity has a reciprocal relationship with health, education, poverty, (loss of) language, native title, sovereignty and self-determination. It is argued below that the legal reasoning underpinning colonial control over Aboriginal identity is steeped in sociobiological ideology. That is to say, these ideas involve a hierarchy of race, and are further used to justify colonial control instead of embracing the principle of self-determination. This colonial rule fails to relinquish control in favour of self-determination in accord with international standards and instead applies a *descent test*. This descent test is sociobiological because it privileges biological criteria over the principle of self-determination.

The essay begins with an explanation of the term sociobiology as it is used in this paper. This is followed by an outline of the choice between the principle of self-determination and colonial rule through a regime of judicial tests. These judicial tests are then critically assessed by way of an analysis of the cases that have determined *Aboriginality*. The essay concludes that despite the plethora of international tropes, rhetoric, and measures to decolonize,³ Australia retains colonial control over indigenous people through legal processes that can be characterised as sociobiological. Among these is the colonial control over who can be *Aboriginal*.

I. SOCIOBIOLOGY AND COLONIZATION

The relevance of sociobiology to colonization in general and to Aboriginal identity in particular is that it provides a *justification* for colonial control. So, for example, the widespread policies of removing Aboriginal children from their families, which resulted infamously in the expression the Stolen Generations, were policies conceived and justified by sociobiological ideas such as polygenism, social Darwinism, phrenology and eugenics. Each of these systems of thought shares the view that human nature is innate, in the sense that people are the product of their heritage or physical composition or genes, without acknowledging social construction. The Stolen Generations⁴ were the result of a colonial culture

² See Keith E. Sealing, *Blood Will Tell: Scientific Racism and the Legal Prohibitions Against Miscegenation*, 5 MICH. J. RACE & L. 559 (2000).

³ UNITED NATIONS, <http://www.un.org/en/members/growth.shtml> (last visited May 7, 2012). According to the United Nations, when it was formed after the Second World War, there were just 51 members and today there are 192 member states, largely as a product of decolonization. Although World War II was the catalyst for decolonization, it was not until the passing of the U.N. General Assembly Resolution on the Granting of Independence to Colonial Territories and Peoples in 1960 that the principle of self-determination flourished alongside decolonization. MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW 146 (3rd ed., 1990).

⁴ See Australian Human Rights Comm'n, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, HREOC.GOV.AU (April 1997), http://www.hreoc.gov.au/social_justice/bth_report/report/index.html; Tom Calma, Aboriginal and Torres Strait Islander Social Justice Comm'r, Australian Human Rights and Equal Opportunity Comm'n, Response to Government to the National Apology to the Stolen Generations (Feb. 13, 2008), available at http://www.hreoc.gov.au/about/media/speeches/social_justice/2008/20080213let_the_healing_begin.html.

steeped in the polygenist, social-Darwinist, phrenology, and eugenic twin beliefs that Indigenous culture would inevitably be replaced by the more advanced European culture and that Indigenous people were a *doomed race*.⁵ For these reasons it can, and has, been argued that the colonisation, dispossession, and oppression of Indigenous Australians has been underwritten and justified by sociobiology.

Sociobiology is a modern science introduced to the world through the work of Edward O. Wilson⁶ and for present purposes it includes the systems of thought commencing with the theologically inspired polygenism and extending to the contemporary evolutionary psychology and new institutional economics.⁷ It is a family of theories which has consistently flown the flag of what is critiqued in other circles as *biological determinism* and is embodied by the idea that society and human nature are the products of genes.⁸ The sociobiological tradition is one that is continuously recycled over time and is used to assert that hierarchies on the basis of race, class, gender, and sexuality are collectively the result of genes, or to naturalise the products of human discretion as inevitable outcomes of laws of nature.

II. SELF-DETERMINATION AND ABORIGINALITY

Recognition, as it concerns the identity of people, should be by way of *self-determination* according to international law and not according to dubious systems of nomenclature imposed by a coloniser. The principle of *self-determination* has been expected by a body of international law which largely preceded the Australian cases on Aboriginal identity. Further, Australia has been a signatory to this body of international law which suggests it should have been applied to the cases discussed later in this essay. This body of international law included both the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), and today includes the 2007 United Nations Declaration on the Rights of Indigenous Peoples.⁹

Although Australia opposed the adoption of the United Nations Declaration on the Rights of Indigenous Peoples, it has since endorsed it. At the time many of the cases discussed below were being decided, the Declaration on the Rights of Indigenous Peoples was under negotiation and in draft form. Therefore, Australian courts were not under any legal obligation to respect its emerging principles, which included “[t]he right of indigenous peoples to belong to an indigenous community or nation in accordance with their own traditions and

⁵ EVANS, *supra* note 1, at 118; Barta, *supra* note 1, at 44.

⁶ See EDWARD O. WILSON, *SOCIOBIOLOGY: THE NEW SYNTHESIS* (1976)

⁷ See Allan Ardill, *Sociobiology and Law* 18-35 (Feb. 2008) (unpublished Ph.D. dissertation, Griffith University), available at <http://www4.gu.edu.au:8080/adt-root/public/adt-QGU20081103.141615/>.

⁸ *Id.*; see also Ardill, *supra* note 1, at 83-93.

⁹ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; S. Treaty Doc. 95-20, 6 I.L.M. 368 (1967); International Covenant on Economic, Social and Cultural Rights, Art., Dec. 16, 1966, 993 U.N.T.S. 3; S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967); United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), 46 I.L.M. 1013 (2007).

customs...recognised as a fundamental exercise of self-determination in Article 9 Draft Declaration on the Rights of Indigenous Peoples 1994.”¹⁰

On the other hand, most cases were decided after Australia had ratified the ICCPR and ICESCR, both of which treat self-determination as a fundamental principle of international law. They state, “[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”¹¹

In addition, as Castan has observed, Art. 27 of the ICCPR crucially seeks to preserve the culture, religion and language of persons belonging to ethnic, religious or linguistic minorities.¹² Article 27 is also aimed at ensuring the survival of these minority groups, “thus enriching the fabric of society as a whole.”¹³ Castan also notes:

The Human Rights Committee ... recognised the importance of land to culture and identity, and the interrelationship of land to the obligation to accord self-determination. ... The right of self determination requires, amongst other things, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (Art 1, para. 2). The Human Rights and Equal Opportunity Commission has also emphasized that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant.¹⁴

However, the Australian legal system has not applied self-determination and has instead applied sociobiological approaches to the question of *Aboriginality*. The Australian legal system has already received condemnation for choosing to depart from the principle of self determination by the United Nations Committee for the Elimination of All Forms of Racial Discrimination (CERD).¹⁵ This was recognized in the leading case on Aboriginal identity where Justice Merkel

¹⁰ De Plevitz & Croft, *supra* note 1, at 8.

¹¹ International Covenant on Civil and Political Rights, Art. 1, para. 1, Dec. 16, 1966, 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20, 6 I.L.M. 368 (1967); International Covenant on Economic, Social and Cultural Rights, Art. 1, para. 1, Dec. 16, 1966, 993 U.N.T.S. 3; S. Exec. Doc. D, 95-2 (1978); S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967).

¹² Melissa Castan, Senior Lecturer, Monash University, Address at the Castan Centre for Human Rights Law Conference, Human Rights 2003: The Year in Review (Dec. 4, 2003), *available at* <http://www.law.monash.edu.au/castancentre/events/2003/castan-paper.pdf> (citing Human Rights Committee General Comment 23, para. 9).

¹³ *Id.*

¹⁴ *Id.* at 3-4.

¹⁵ United Nations, Office of the High Comm’r for Human Rights, Comm. on the Elimination of Racial Discrimination, Decision 2 (54) on Australia, 54th Sess., A/54/18, para. 21 (2) (Mar. 18, 1999), *available at*

<http://www.unhcr.ch/tbs/doc.nsf/MasterFrameView/a2ba4bb337ca00498025686a005553d3?Opendocument>; United Nations, Office of the High Comm’r for Human Rights, Comm. on the Elimination of Racial Discrimination, Decision 2 (55) on Australia, 55th Sess., A/54/18, para. 23 (2) (Aug. 16, 1999), *available at*

<http://www.unhcr.ch/tbs/doc.nsf/MasterFrameView/05af60d57303bb948025686a00595371?Opendocument>.

commented, in less critical terms, but in no way shy of declaring the deficiency of the Australian legal approach:

It is unfortunate that the determination of a person's Aboriginal identity, a highly personal matter, has been left by a parliament that is not representative of Aboriginal people to be determined by a court which is also not representative of Aboriginal people. While many would say that this is an inevitable incident of political and legal life in Australia, I do not accept that that must always be necessarily so. It is to be hoped that one day if questions such as those that have arisen in the present case are again required to be determined that that determination might be made by independently constituted bodies or tribunals which are representative of Aboriginal people.¹⁶

For Indigenous people world-wide self-determination is one of the most important procedural legal and political objectives.¹⁷ While Indigenous sovereignties are invariably paramount, self-determination is often considered a more achievable goal because it is already an accepted principle of international law.¹⁸ In practical terms, self determination would mean that Indigenous Australians would determine *aboriginal identity* according to their own laws and institutions. As a generic concept, it means Indigenous people have the ability to "consent to the terms of their relationship with the hitherto dominant structures" so that they choose "from a variety of political structural arrangements and means of economic, social and cultural development."¹⁹ Of course, in specific terms, *self-determination* must be formulated by the Indigenous people themselves.

Despite international expectations and the fact that "Australian Aboriginal organisations have insisted on self-determination as the basis for Aboriginal aspirations, self-determination is yet to be the basis for a decision in Australia at law."²⁰ Ultimately, self determination can only be introduced into law by statutory law reform and this is unlikely given the declared policy of the previous federal government,²¹ and based on the performance of the current government to date.²²

¹⁶ *Shaw v Wolf* (1998) 163 ALR 205, 268 (Austl.) (referring to the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) (Austl.)).

¹⁷ See Frank Brennan, *Aboriginal Self-Determination: The "New Partnership" of the 1990s*, 17 ALTERNATIVE L.J. 53, 54 (1992); see generally Sarah Pritchard, *The Right of Indigenous Peoples to Self-Determination Under International Law*, ABORIGINAL L. BULL. 4 (April 1992).

¹⁸ This is certainly the situation in Australia because almost all contemporary Indigenous scholars have argued for varying degrees of Indigenous sovereignties to be recognised. In particular many note that Indigenous sovereignties are a way of life for Indigenous people. In other words, regardless of colonial claims to abstract legal sovereignty, Indigenous sovereignties refer to the way Indigenous culture continues to be practised. See SOVEREIGN SUBJECTS: INDIGENOUS SOVEREIGNTY MATTERS (Aileen Moreton-Robinson ed., 2007).

¹⁹ Pritchard, *supra* note 17, at 6.

²⁰ *Id.*

²¹ The former Howard Liberal/National Party coalition government declared its opposition to self-determination and took steps to dismantle the Aboriginal and Torres Strait Islander Commission originally set up to provide Indigenous people with a role in policy and administration. See Lyndon Murphy, *Who's Afraid of the Dark: Australia's Administration in Aboriginal Affairs* (June 2000)

Significantly, international law and in particular, Art. 1 of the ICCPR, is unable to support anything more than normative claims by Indigenous Australians because complaints are only possible under part three of the Optional Protocol of the ICCPR.²³ Therefore, self-determination is more an ideal than a mandatory requirement of law. The reason for this is straightforward. Self-determination

(unpublished M.Phil. dissertation, University of Queensland) (on file with author). The Howard government embraced assimilation in its approach to Indigenous affairs. In fact, as Prime Minister, Howard actively avoided using the term *self-determination* as well as expressly stating on the 11 May 2000 that his government was opposed to self-determination. See Media Release, John Howard, Prime Minister, Reconciliation Documents, (May 11, 2000), available at <http://pandora.nla.gov.au/nph-wb/20000731130000/http://www.pm.gov.au/index2.htm>. Short points out that the former government preferred the official approach of *practical reconciliation* which was code for *economic self-sufficiency*. See Damien Short, *Reconciliation, Assimilation, and the Indigenous Peoples of Australia*, 5 FOURTH WORLD J. 24, 24 (2002), available at http://www.cwis.org/fwj/51/d_short.html (particular attention to footnote no. 38). The Howard government policy received some support from the Chair of Cape York Land Council Noel Pearson who asked the former Prime Minister to consider legislation to convert native title into freehold to encourage economic freedom. Sceptics saw this as *wedge politics* and a cynical way to continue the dispossession of Indigenous people so that some community leaders might personally benefit together with powerful commercial interests such as mining, pastoral and tourism industry players. This issue received widespread media interest. See generally J.C. Altman, C. Linkhorn & J. Clarke, *Land Rights and Development Reform in Remote Australia*, AUSTL. NAT'L UNIV., CTR. FOR ABORIGINAL ECON. POLICY, Discussion Paper No 276/2005, (2005); *Insiders: Pearson Backs Howard's Approach to Indigenous Affairs* (Austl. Broad. Corp. television broadcast Jun. 5, 2005), transcript available at <http://www.abc.net.au/insiders/content/2005/s1384711.htm>; Interview by Catherine McGrath with John Howard, Prime Minister, (Aug. 4, 2003), transcript available at <http://pandora.nla.gov.au/pan/10052/20030821-0000/www.pm.gov.au/news/interviews/Interview399.html> (in terms of avoiding use of the term *self-determination* or the reluctance to use it and the use of variations such as *economic empowerment*, *economic individualism*, *self-sufficiency*, *self-empowerment*, *self-motivating*, and *self-improvement* so as to avoid a *culture of welfare dependency*); Interview by Alan Jones with John Howard, Prime Minister (2UE Radio broadcast May 29, 2000), transcript available at <http://pandora.nla.gov.au/nph-wb/20000731130000/http://www.pm.gov.au/news/interviews/2000/jones2905.htm>); Interview by John Laws with John Howard, Prime Minister (2UE Radio broadcast May 29, 2000), transcript available at <http://pandora.nla.gov.au/nph-wb/20000731130000/http://www.pm.gov.au/news/interviews/2000/laws2905.htm> .

²² Although the Rudd government has taken steps to restore the Racial Discrimination Act 1975 (Austl.) after it was suspended by the Howard government as part of its so-called *intervention* into Indigenous communities, there are no signs of any move toward the self-determination spoken by a former Labor Minister for Aboriginal Affairs in the Hawke/Keating era, Robert Tickner. The Hawke/Keating led government of the 1980s and 1990s was still in office during the *peak* of the political wave concerning Indigenous rights. For instance, 1992 was the year of the Mabo decision, and the United Nations International Year for the World's Indigenous Peoples. Despite this, self-determination only got as far as being enunciated as a *key concept* by then Aboriginal Affairs Minister, Mr Tickner. See Pritchard, *supra* note 17, at 7. At the time of writing, the Rudd government was set to establish a new Aboriginal governing body with no powers to implement policy or provide services. See Yuko Narushima, *Indigenous Body Won't Be Another ATSIC*, SYDNEY MORNING HERALD, Aug. 26, 2009, available at <http://www.smh.com.au/national/indigenous-body-wont-be-another-atsic-20090825-ey42.html>; Interview by Kerry O'Brien with Tom Calma, Aboriginal and Torres Strait Islander Soc. Justice Comm'r (Austl. Broad. Corp. Radio broadcast Aug. 27, 2009), transcript available at <http://www.abc.net.au/7.30/content/2009/s2669141.htm>.

²³ See Brennan, *supra* note 17, at 57. Although the Optional Protocol to the ICCPR became operative on 25 December 1991, complaints aimed at seeking redress are not possible for alleged breaches of Article 1.

would require altruistic action on the part of sovereign states to share power and resources with colonised indigenous peoples.²⁴

Furthermore, self-determination does not mean that indigenous people will be entitled to sovereignty. Instead, it effectively means the right of indigenous peoples to determine their relationship with a State and their political status within a sovereign nation.²⁵ For precisely this reason, it can never deliver restitution, in spite of the fact that in relation to key land masses within Australia's sovereign territory, "[t]here is no prior legal or philosophical reason why areas such as Torres Strait and Arnhem Land could not be constituted as States of the federation or even as separate nations sometime in the future."²⁶

It is likely that most states will adopt the *Brazilian position*²⁷ on this question and require a form of self-determination that is less than full separate statehood/sovereignty.²⁸ Within these parameters, which can be described as *intra-state-sovereign self-determination*, Canada, the United States and New Zealand provide lessons for Australian law.

Brennan, Gunn & Williams note that official Canadian government policy provides for Indigenous peoples' self-determination with overarching sovereignty retained in the Canadian state.²⁹ The Canadian Federal Policy Guide: Aboriginal Self-Government recognises the right of *self-government* as a protected right under § 35 of Canada's 1982 Constitution Act³⁰ As a consequence, Canadian courts have gone further than Australian courts recognizing a basic right to self-determination.³¹ In the United States, government policy has gone further than in

²⁴ For example, Brennan states that "[i]n international law, self-determination has come to have a technical meaning in the decolonisation process. When a colonial power is withdrawing from a territory, the people of the territory are to be assured a free choice in determining their political future." *Id.* at 54. However, attempts by Indigenous people to argue this should apply by analogy have been resisted by sovereign states fearing that it would lead to the break-up of their nation. Instead, governments tend "to concede only internal self-determination to allow indigenous groups more autonomy as of right in the domestic political arrangements of the nation. They are not prepared to recognise external self-determination which carries the right to separate nationhood and autonomous sovereignty." *Id.*

²⁵ *Id.* at 54.

²⁶ *Id.* at 55.

²⁷ The *Brazilian position* refers to the views expressed by the Brazilian Observer Delegation to the 1991 session of the Working Group on Indigenous Populations which was that "some articles of the Draft Declaration of Indigenous Rights would 'hardly be accepted by most governments if their present language is maintained: for instance, those provisions which tend to attribute to indigenous people the right to self-determination similar to that enjoyed by sovereign states under international law'." *Id.* at 55.

²⁸ *Id.* at 55.

²⁹ Sean Brennan, Brenda Gunn & George Williams, 'Sovereignty' and its Relevance to Treaty-Making Between Indigenous Peoples and Australian Governments, 26 SYDNEY L. REV. 307, 322 (2004).

³⁰ *Id.* at 331.

³¹ *Id.* at 335. As Brennan et al explain, in the British Columbia Supreme Court decision, *Campbell v British Columbia (Att'y Gen)*, "the Court held that self-government is a constitutionally protected right under s 35, stating that "the assertion of Crown sovereignty and the ability of the Crown to legislate in relation to lands held by Aboriginal groups does not lead to the conclusion that powers of self-government held by those groups were eliminated". The Court also found that "after the assertion of sovereignty by the British Crown ... the right of aboriginal people to govern themselves was diminished, it was not extinguished", and that "a right to self-government akin to a legislative power to make laws, survived as one of the unwritten 'underlying values' of the Constitution outside of the powers distributed to Parliament and the legislatures in 1867".' (2000) 189 D.L.R. 4th 333 (original references omitted).

Canada recognizing basic rights of self-government and extending a degree of internal sovereignty to Indian tribes.³²

In other words, the Clinton Presidency approach to Indian Tribal governments included the 'guiding principle' that the government 'recognizes the ongoing right of Indian tribes to self-government and supports tribal sovereignty and self-determination'.³³ During the time of George W. Bush's presidency there were '562 federally recognised American Indian Tribes and Alaska Native Villages' in the United States.³⁴ These communities enjoyed official tribal sovereignty in the sense that they possessed 'inherent governmental authority deriving from [their] original sovereignty'.³⁵ This approach to government policy is due to treaties between governments and Indian tribes, and despite abuses of the terms of treaties Indian nations still retain significant control over their internal affairs.³⁶ As Brennan et al. acknowledge the United States Supreme Court has recognized Indigenous sovereignty since the early 1800s in a series of cases before the court led by Chief Justice Marshall.³⁷ In essence, these cases recognised residual sovereignty in the form of domestic dependent nations.³⁸ Therefore, 'even though the Indian tribes have no specific constitutional protection of their right to self-government' they do enjoy self-government which is akin to self-determination.³⁹

New Zealand stands apart from Australia, Canada and the United States because it is not a federal system and it has a single treaty in place with Indigenous people: The Treaty of Waitangi.⁴⁰ However, the Treaty of Waitangi has three versions each with different expressions of the extent of Maori sovereignty.⁴¹ The position of the government to date has been to avoid references to Maori sovereignty and to use the expression 'self-determination' instead.⁴² Despite the rhetoric, self-determination is yet to be delivered and remains a matter of conjecture between Maori people and the government of New Zealand.⁴³ This approach to self-determination is mirrored in New Zealand courts which have clung to the proposition that sovereignty was ceded by treaty to the Parliament of New Zealand.⁴⁴ The practical effect is that the Treaty of Waitangi is more of a

³² *Id.* at 336.

For example, the Department of the Interior's Fiscal Year 1996 Interior Accountability Report states: 'Indian self-determination is the cornerstone of the Federal relationship with sovereign tribal governments.'

Id.

³³ *Id.* at 337.

³⁴ *Id.* at 336.

³⁵ Brennan, *supra* note 29, at 336.

³⁶ *Id.*

³⁷ *Id.* at 338. These cases include: Johnson v. M'Intosh 21 U.S. 543 (1823), Cherokee Nation v. Georgia 30 U.S. 1 (1831), Worcester v. Georgia 31 U.S. 515 (1832), and United States v. Kagama 118 U.S. 375 (1886).

³⁸ *Id.*

³⁹ *Id.* at 339.

⁴⁰ *Id.* at 340.

⁴¹ Brennan, *supra* note 29, at 340-341.

⁴² *Id.* at 341.

⁴³ *Id.* at 342.

⁴⁴ *Id.* at 342.

restriction on Parliamentary sovereignty than it is a vehicle for Maori self-determination. Still, New Zealand has gone further than the Australian rejection of self-determination and the Treaty of Waitangi at least ensures that New Zealand administration and law are shaped under its 'quasi-constitutional shadow'.⁴⁵

Australia is yet to move toward self-determination and instead has preferred the more limited concepts of *self-management* and *self-reliance*.⁴⁶ Compared with other jurisdictions there remains plenty of room for improvement and there are no good reasons why Aboriginal identity should not be subject to self-determination rather than colonial determination as it presently stands—in other words, self-determination subject to the Australian Constitution and laws of Australia. The closest Australia has come to self-determination was in *Shaw v Wolf*, where Justice Merkel applied a test involving *self-identification* which, though falling well short of self-determination, was a step in that direction.⁴⁷ *Shaw* followed a chain of Australian cases each of which turned their backs on self-determination preferring instead to apply what is now known as the *descent test* to determine *Aboriginality*.⁴⁸

Before moving to that discussion on the cases dealing with *Aboriginality* it is convenient to introduce the case law which has varied its approach to the *descent test*. Many statutes use the term *Aboriginal* but do not define that term other than to say it means *a person of the Aboriginal race of Australia*.⁴⁹ Absent any requirement to apply self-determination other than the normative force of international law, the term is left to be understood according to the common law. As such, courts have struggled to develop a coherent approach because they have ignored international law⁵⁰ and the secondary sources of legal literature⁵¹ urging the adoption of self-determination. Instead Australian courts have looked to dictionaries,⁵² to the history of the Constitutional race power in section 51(xxvi),⁵³ to the preamble and aims sections of statutes,⁵⁴ and to pseudo-science⁵⁵ and sociology for assistance.⁵⁶ This patchy approach in the cases dealing with *Aboriginality* is discussed next.

⁴⁵ *Id.* at 343.

⁴⁶ *Id.* at 318.

⁴⁷ *Shaw v Wolf* (1998) 163 ALR 205, 268 (Austl.). This is considered a step in the right direction because non-indigenous people and processes made the determination, as discussed below.

⁴⁸ *Id.* (holding that self identification and community recognition may be necessary to supplement descent and are probative of descent). The use of the term *tests* is a tad misleading because some of the topics discussed immediately below are better described as *elements*, or even *aspects*, of the Australian test which is in fact the *descent test* which comprises of three criteria: (1) descent, (2) self-identification, (3) community recognition. See also De Plevitz & Croft, *supra* note 1.

⁴⁹ See, e.g., Aboriginal and Torres Strait Islander Commission Act 1989 (Cth) s 4(1) (Austl.) (defines an *Aboriginal person* as "a person of the aboriginal race of Australia."); The Native Title Act 1993 (Cth.) s 253 (Austl.) (defines *Aboriginal peoples* to be "peoples of the Aboriginal race of Australia.").

⁵⁰ See De Plevitz & Croft, *supra* note 1, at 8.

⁵¹ See, e.g., AUSTRALIAN LAW REFORM COMM'N, REP. NO. 31, THE RECOGNITION OF ABORIGINAL CUSTOMARY LAWS (1986).

⁵² *Queensland v Wyvill* (1989) 90 ALR 611, 614-15 (Austl.).

⁵³ *Gibbs v Capewell* (1995) 128 ALR 577, 578 (Austl.).

⁵⁴ *Id.* at 579.

⁵⁵ See, e.g., De Plevitz & Croft, *supra* note 1, at 5, 7 & 14 (science is misguided if it looks for *rac*es).

⁵⁶ *Shaw v Wolf* (1998) 163 ALR 205, 210 (Austl.).

III. CASES ON IDENTITY

A. *Tasmania v Commonwealth* (1984) 158 CLR 1 (Austl.)

Both judges and commentators tend to commence their search for a definition of *Aboriginal* by referring to the Tasmanian Dams case,⁵⁷ even though it was not the first case to discuss the expression *Aboriginal race*.⁵⁸ Nor was the term *Aboriginal* a central issue in the case. The Tasmanian Dams case is important because it was decided in Australia's paramount court, the High Court. The main issue was the Commonwealth's Constitutional power to assert its World Heritage Properties Conservation Act (World Heritage P.C. Act)⁵⁹ to over-ride the Tasmanian State government's plan to flood the Franklin and Gordon river systems as part of that State's hydro-electricity scheme. One of the Constitutional bases⁶⁰ argued in the High Court for the operation of the World Heritage P.C. Act was the race power clause in section 51(xxvi) of the Constitution.⁶¹ All judges had to consider the significance of sections 8 (1) & 11 of the World Heritage P.C. Act which declared that several other substantive provisions in that Act were necessary as special laws for the people of the Aboriginal race. Four of the seven Judges determined that the provision was within the ambit of section 51(xxvi) of the Constitution and was therefore valid law.⁶² However, in the course of their deliberations only two of the seven Judges considered the meaning of *Aboriginal race*.⁶³

Justice Brennan recognised that the term *race* "is not a precise concept" but there is "of course, a biological element in the concept."⁶⁴ In reaching this conclusion, Justice Brennan considered similar cases in England and New Zealand after observing the consensus reached between experts assembled before a UNESCO

⁵⁷ See De Plevitz & Croft, *supra* note 1, at 2-3. All of the cases discussed later in this essay refer to the explanation of Deane J.

⁵⁸ See e.g., *Muramats v Commonwealth Electoral Officer (WA)* (1923) 32 CLR 500, 507 (Austl.) (*aboriginal* means people "who are of the stock that inhabited the land at the time Europeans came to it"); *Ofu-Koloi v Crown* (1956) 96 CLR 172, 175 ("The fact that at, so to speak, the edges of the racial classification there is an uncertainty of definition cannot make it difficult to apply it in the common run of cases"). These two earlier cases dealing with *race* both used what would be regarded today as racist language.

⁵⁹ World Heritage Properties Conservation Act, 1983, (Austl.).

⁶⁰ Under the Australian Constitution a State law is invalid to the extent it is inconsistent with a federal law under section 109. The main argument concerned the Commonwealth's *external affairs* power in section 51(xxix) of the Constitution and its responsibilities to implement international treaties, in this case The Convention for the Protection of the World Cultural and National Heritage. Other constitutional arguments were made under the *corporations* power section 51(xx), the *acquisition of property* power section 51(xxxi), and the prohibition on the Commonwealth from interfering with a State's right to water for irrigation, in section 100 of the Constitution. AUSTRALIAN CONSTITUTION S 51, 109.

⁶¹ The race power in section 51 (xxvi) of the Constitution provides that the federal parliament can enact laws for "The people of any race for whom it is deemed necessary to make special laws". AUSTRALIAN CONSTITUTION S 51. In short the argument here concerned whether the race power sustained the World Heritage P.C. Act because the latter was necessary to protect Indigenous cultural heritage.

⁶² See *Tasmania v Commonwealth* (1984) 158 CLR 1 (Austl.).

⁶³ *Id.* at 243-45 (Brennan J), 272-74 (Deane J).

⁶⁴ *Id.* at 243.

conference held in Moscow in 1964.⁶⁵ Justice Brennan quoted from a report of the Special Rapporteur, commenting on the conference as follows:

They stated inter alia that all men living today belong to a single species and are derived from a common stock (Art I); that pure races in the sense of genetically homogeneous populations do not exist in the human species (Art III); and that there is no national, religious, geographic, linguistic or cultural group which constitutes a race *ipso facto* (Art XII). The proposals concluded: “The biological data given above stand in open contradiction to the tenets of racism. Racist theories can in no way pretend to have any scientific foundation.” ... Popular notions of *race*, however, have frequently disregarded the scientific evidence. Prejudice and discrimination on the ground of race, color or ethnic origin occur in a number of societies, where physical appearance – notably skin color – and ethnic origin are accorded prime importance.⁶⁶

Aware that the consensus of the experts was that there is only one race – the human race, Justice Brennan considered the New Zealand case of *King-Ansell v Police* [1979] 2 NZLR 531. There, Justice Richardson commented on terms used in the Race Relations Act (NZ):

... all four expressions *race*, *color*, *national origins* and *ethnic origins* are concerned with antecedent rather than acquired characteristics. It does not follow that the identifying characteristics must be genetically determined at birth. The ultimate ancestry of any New Zealander is not susceptible to proof. Race is clearly used in its popular meaning.⁶⁷

However, reading these two passages together, and wanting to avoid “prejudice and discrimination” because the “popular notions of race” and “popular meaning” of race “have frequently disregarded the scientific evidence”, Justice Brennan treated this as a requirement “to identify the biological element of the concept” of race.⁶⁸ Justice Brennan considered the obiter of Justice Kerr in *Mandla v Dowell Lee*⁶⁹ and contrasted the New Zealand and English approaches in the following way:

[Justice Richardson] discounted the importance of, if not the necessity for, scientific proof of the biological element:

⁶⁵ *Id.* (citing Senor Hernan Santa Cruz, the Special Rapporteur on Racial Discrimination, report to the United Nations, *Special Study on Racial Discrimination in Political, Economic, Social and Cultural Spheres*, 12-13, U.N. Doc. E/CN/4/Sub2/307/Rev.1 (1971)).

⁶⁶ *Id.*

⁶⁷ *Id.* (citing *King-Ansell v Police* (1979) 2 NZLR 531, 542 (Austl.)).

⁶⁸ *Tasmania v Commonwealth* (1984) 158 CLR 1, 243 (Austl.).

⁶⁹ *Mandla v Dowell Lee* (1983) Q.B. 1..

The real test is whether the individuals or the group regard themselves and are regarded by others in the community as having a particular historical identity in terms of their color or their racial, national or ethnic origins.

In England in *Mandla v. Dowell Lee*, Kerr LJ in reference to the words “race or ethnic or national origins” said: “they clearly refer to human characteristics with which a person is born and which he or she cannot change, any more than the leopard can change his spots.”⁷⁰

With a fear that the ambiguity of a cultural test might be conducive to popular notions of racism, Justice Brennan put his faith in the ability of biology to avoid this pitfall not realizing that it too is ambiguous and political, and consequently the cultural test favored by Justice Richardson in *King-Ansell v Police* was dismissed as inconclusive.⁷¹ To the contrary, a cultural test can only ever be inconclusive where there is an intra-group dispute as discussed later in the case of *Shaw v Wolf*.⁷² This is because as others have pointed out race, nationality, ethnicity and community are socially constructed concepts.⁷³

Like Justice Brennan, but placing more emphasis on community recognition and self-identification, Justice Deane in the Tasmanian Dams case remarked in obiter that the words *people of any race* in s.51(xxvi) of the Constitution, “[p]lainly ... have a wide and non-technical meaning.”⁷⁴ Therefore, for Justice Deane:

The phrase is, in my view, apposite to refer to all Australian Aboriginals collectively. Any doubt, which might otherwise exist in this regard, is removed by reference to the wording of par. (xxvi) in its original form. The phrase is also apposite to refer to any identifiable racial sub-group among Australian Aboriginals. By “Australian Aboriginal” I mean, in accordance with what I understand to be the conventional meaning of that term, a person of Aboriginal descent, albeit mixed, who identifies himself as such and who is recognised by the Aboriginal community as an Aboriginal.⁷⁵

While this approach is a step removed from biological determinism, it still means that biological determinism can be used to circumvent both self-

⁷⁰ *Tasmania*, 158 CLR at 244 (citations omitted); *but cf. Mandla v Dowell Lee* [1983] Q.B. 1, at 19 (supporting the rejection of the biological test in favor of cultural criteria); *see also De Plevitz & Croft, supra note 1, at 14.*

⁷¹ De Plevitz & Croft, *supra note 1, at 2:*

Their genetic heritage is fixed at birth; the historic, religious, spiritual and cultural heritage are acquired and are susceptible to influences for which a law may provide.

Id.

⁷² (1999) 163 ALR 205 (Austl.), *See supra p. ____*, for discussion.

⁷³ *See* ETIENNE BALIBAR & IMMANUEL WALLERSTEIN, RACE, NATION, CLASS: AMBIGUOUS IDENTITIES, 96 ff. (1991); *King-Ansell v Police* [1979] 2 NZLR 531, 542 (Richardson, J., separately).

⁷⁴ *Tasmania*, 158 CLR at 273-74.

⁷⁵ *Id.* at 274.

identification and community recognition. This is in fact what has happened in subsequent cases discussed below.⁷⁶

B. Queensland v. Wyvill (1989) 90 ALR 611 (Austl.) & *Att'y-Gen. (Cth.) v. Queensland* (1990) 94 ALR 515 (Austl.).

In this case heard initially in the Federal Court before Justice Pincus and later on appeal before three judges of the Full Federal Court, the Queensland government sought to reduce the number of indigenous deaths in custody attributed to its *criminal justice* system in the tally of the 1991 Royal Commission into Aboriginal Deaths in Custody [hereinafter *Inquiry into Aboriginal Deaths*].⁷⁷ The Queensland government sought to have the death of Darren Wouters excluded from the tally. It did so by challenging the *Aboriginality* of Wouters who was born to an Aboriginal mother with a Dutch father. Wouters died in a Brisbane watch-house. The Letters Patent conferring power on Wyvill, the Royal Commissioner, to

⁷⁶ *Id.* at 274-75. Interestingly, the future judicial view to be taken by a majority of Judges in the High Court, tending to water down the then unrecognised concept of native title, is indicated by the submission of senior counsel for Tasmania in this case, Mr Gleeson. Mr Gleeson was appointed as the Chief Justice of the High Court many years later. In the *Tasmanian Dams* case, he submitted that the relevant provisions (ss. 8 & 11 of the World Heritage PC Act) were not a *special law* for the benefit of people of the Aboriginal race. I reproduce here the response of Justice Deane to that submission in full because the views of these two men (putting aside the extreme views of Justice Callinan, discussed below) reflect the shape of the two opposing judicial approaches taken on native title in cases such as *Yorta Yorta*, *supra* note 234. In the *Tasmanian Dams* case, Justice Deane condemned Mr Gleeson's submission after summarising it as follows:

...“that their character was not that of a law with respect to the people of that race” and also that by “definition, an ‘Aboriginal site’ must be ‘identified property’ and, therefore, it must be of outstanding universal significance: a law for the protection and conservation of sites if, and only if, they are of significance to the whole of mankind” is the antithesis of a special law for the people of a particular race. In so far as the character of the law is concerned, it was submitted that a law which addresses no command either to Aboriginals as such or to other people cannot be properly characterized as a law with respect to the people of the Aboriginal race. The relationship between the Aboriginal people and the lands which they occupy lies at the heart of traditional Aboriginal culture and traditional Aboriginal life. Past violations of Aboriginal culture and Aboriginal life, both traditional and otherwise, have not obliterated the fundamental importance to the Aboriginal people of Australia of their ancient sites. To the contrary, one effect of the years since 1788 and of the emergence of Australia as a nation has been that Aboriginal sites which would once have been of particular significance only to the members of a particular tribe are now regarded, by those Australian Aboriginals who have moved, or been born, away from ancient tribal grounds, as part of a general heritage of their race. The dual requirement that a declaration can only be made in respect of a site if it is both ‘of outstanding universal value’ and ‘of particular significance to the people of the Aboriginal race’ means that only those Aboriginal sites which are of extraordinary significance qualify for protection and conservation under ss. 8 and 11. A law protecting such sites is, in the one sense, a law for all Australians. It appears to me, however, on any approach to language, that a law whose operation is to protect and preserve sites of universal value which are of particular importance to the Aboriginal people is also a special law for those people.

Tasmania, 158 CLR at 274-75.

⁷⁷ ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY NATIONAL REPORT (last updated Apr. 29, 1998), available at <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/>.

investigate deaths in custody did not contain a definition of the word *Aboriginal*. The Queensland government contended that Wyvill was acting ultra vires by including Wouters' death within the ambit of the Inquiry because he was allegedly of "distinctly European appearance."⁷⁸

Justice Pincus framed the case before the court by asking the question, "is every person who is part-Aboriginal within the terms of reference [of the Inquiry into Aboriginal Deaths]?"⁷⁹ The Justice reviewed earlier cases and consulted dictionaries before following the characterisation given to *Aboriginal* in passing by two judges of the High Court in the Tasmanian Dams Case.⁸⁰ In doing so Justice Pincus rejected an expansive and beneficial interpretation for the purposes of the Inquiry preferring a stricter notion of *Aboriginal* by applying what was to become the *descent test*. As noted above, the *descent test* is applied by understanding the term *Aboriginal* according to its *ordinary usage* in the sense that a person must have both genetic and social factors.⁸¹ The submission of the Queensland Government that the Inquiry into Aboriginal Deaths had erred "on the basis that a proportion of Aboriginal genes is enough in itself to justify classifying their possessor as an Aboriginal" was preferred.⁸² Justice Pincus, perhaps seeking to avoid the problem of biological determinism by relying solely on genes, considered that social factors were just as important in cases involving a person with limited genetic heritage. He distinguished between "part-Aboriginals" and Aboriginals in the "strictest sense" commenting:

There must be many people in Australia with, say, 1/64th or 1/32nd Aboriginal genes, the presence of which is unknown to them and undetected by others. Even if such a trace of Aboriginal ancestry were proved, in my opinion the person concerned would not ordinarily be called an *Aboriginal*. It is important to keep in mind that the respondent's authority does not expressly include, as it might have done, investigating deaths of part-Aboriginals.⁸³

Justice Pincus held that Wouters had some limited proportion of Aboriginal genes and was aware of his Aboriginal ancestry. However this did not make him an Aboriginal at law. He was according to law "distinctly of European appearance" and raised in institutions and foster care from the time he was six years of age until his premature death prior to his eighteenth birthday.⁸⁴ Limited genetic Aboriginal heritage coupled with a European appearance, and little social contact with other Aboriginals meant that the deceased Darren Wouters was not within the terms of the Inquiry.

⁷⁸ *Queensland v Wyvill* (1989) 90 ALR 611, 612 (Austl.).

⁷⁹ *Id.*

⁸⁰ *Tasmania*, 158 CLR at 243-44, 273-74.

⁸¹ *Contra Gerhardy v Brown* (1985) 159 CLR 70, 145 (Justice Deane shifts the emphasis from descent and social factors, self and community identification, to "descent or ethnic origin") (emphasis added).

⁸² *Queensland*, 90 ALR at 614.

⁸³ *Id.* at 615.

⁸⁴ *Queensland v Wyvill* (1989) 90 ALR 611, 619-90 (Austl.).

Therefore, the use of the word *descent* as it appeared in obiter in the earlier High Court Tasmanian Dams case had become the basis for this decision.⁸⁵ Justice Pincus had turned a definition developed in passing in another case from mere obiter dicta to become the definitive test for Aboriginality – the ratio decidendi. In this way, Justice Pincus had inadvertently made it more difficult to meet an objective of the Inquiry into Aboriginal Deaths, which was to consider the socio-economic and cultural issues surrounding the disproportionate rate of deaths of Indigenous people in custody. By excluding persons such as Darren Wouters, crucial social factors leading to deaths in custody would not be considered. Justice Pincus chose to exclude Wouters on the basis that any advantages to the effectiveness of the Inquiry were outweighed by the need to test for *Aboriginality* according to law.⁸⁶

The descent test had been misconstrued for at least three reasons. First, because Justice Pincus erroneously assumed that it is possible to grade race according to biology.⁸⁷ The justice presumed that there was some minimal non-specific genetic threshold which had to be met before someone could be Indigenous in the absence of evidence of solid social factors such as self-identification and community recognition. Second, in determining that Wouters did not meet the social criteria to be Aboriginal Justice Pincus discounted the self-identification evidence before him:

There is certainly evidence that Mr Wouters, a few years before he died, became aware that he had Aboriginal blood and no doubt that influenced his view of himself, but it did not do so to the extent of making him in any sense part of the Aboriginal community. As far as is known, the only time he lived in an Aboriginal household after infancy was during the few days he spent with [his Indigenous uncle] Mr Wally Adams and his wife.⁸⁸

In other words, even though his extended family - comprising of people who regarded themselves as part of an Indigenous community – recognized Wouters as part of their community, because he had not been raised in an Indigenous household, he was not *Aboriginal*.

⁸⁵ *Tasmania v Commonwealth* (1984) 158 CLR 1, 273-74 (Austl.).

⁸⁶ *Queensland*, 90 ALR at 620 (Justice Pincus states “I have received submissions (not from counsel) which appeared to me not to invite an objective approach to the question posed. No-one could fail to be moved by the fate of the people the respondent is concerned with, nor by the sad life-story of the young man in issue in this case. It does not appear to me, however, that anything is gained by entertaining propositions which cannot be defended in law, such as that anyone is an *Aboriginal*, for the purposes of the respondent’s inquiry, who is thought by some representatives of the Aboriginal community to be one.”).

⁸⁷ *Id.* “The remaining question is the genetic one. There is no doubt that despite having light skin and blond hair, Mr Wouters had a significant infusion of Aboriginal genes, but what proportion is unclear.” *Id.* Justice Pincus continues commenting that only one of the three grand-parents was “full blooded Aboriginal” the other three “only partly so,” therefore, “so far as one can judge from the photograph of Mrs Carol Wouters [Darren’s mother], and indeed that of Mr Wouters deceased” the “inference is they were or are only partly” Aboriginal. *Id.*

⁸⁸ *Id.*

Third, the reasoning contains vestiges of the *doomed race* ideology – the idea that Indigenous people would die out in the competition for survival of the fittest or have their blood diluted by marriage to the point of absolute assimilation.⁸⁹ This is important because Justice Pincus had remarked earlier in the judgement that:

There was a finding that he identified himself to a number of people as being of aboriginal descent but that does not necessarily mean that he was an “Aboriginal” under the ordinary understanding of that term. Mr Rose argued that it would be absurd to hold Mr Wouters not to have been an Aboriginal because his mother was one. If that principle is correct, then there will never come a point at which, as generations pass and Aboriginal blood is diluted, one can postulate of a particular individual that he is not an Aboriginal.⁹⁰

Self-recognition was also minimized in favor of a concern that assimilation might mean that one day in the future all Australian people might potentially claim to be part of a colonial underclass.

The point is that no biological category⁹¹ is capable of deciding questions whose essence is about politics and power, and judicial attempts to deny this fact verge on ridiculous as the case of Darren Wouters shows.⁹² There the judicial

⁸⁹ De Plevitz & Croft, *supra* note 1, n.7.

⁹⁰ *Queensland v Wyvill* (1989) 90 ALR 611, 619 (Austl.).

⁹¹ i.e. - race, genes, blood, ethnicity etc.

⁹² *Queensland*, 90 ALR at 617-18. In the course of reaching the decision to exclude *part-blood* Aboriginals from the Inquiry unless they identified with and were identified by an Indigenous community, Justice Pincus made some extraordinary observations. Among the more notorious were: (1) The comments concerning Justice Toohey sitting as Aboriginal Land Commissioner, where Justice Toohey held s. 3(1) of the Aboriginal Land Rights Act 1976 (Cth), which included the expression *Aboriginal race of Australia*, concerned the descendants of those people inhabiting Australia prior to 1788, and were explained by saying, “[Justice Toohey] took the definition, presumably because of the presence of the word *race* to be ‘genetic rather than social’.” *Id.* at 616. Justice French later explained (on appeal) that Justice Toohey was merely seeking to expand the pool of potential beneficiaries by referring to a genetic test in the context of land rights using a purposive and beneficial approach to the issue. *Att’y Gen. (Cth) v Queensland* (1990) 94 ALR 515, 538 (Austl.); (2) The argument that there was no good reason to move away from the *golden rule* of statutory interpretation (*viz.*, that statutes be given *prima facie* their plain and ordinary meaning) ignored Article 1 of the ICCPR. *Queensland*, 90 ALR at 616; (3) A rejection of the pure social approach (*viz.*, that the law requires some Aboriginal descent because self-identification and community recognition will not be sufficient by themselves) renders the principle of self-determination subordinate to a biological test, and ignores relevant legal literature ((e.g. AUSTRALIAN LAW REFORM COMMISSION REPORT NO 31, THE RECOGNITION OF ABORIGINAL CUSTOMARY LAWS (1986) (on the inclusive nature of indigenous culture and kinship. *See also* Martin Flynn & Sue Stanton, *Trial By Ordeal: The Stolen Generation In Court*, 25(2) ALT. L.J. 75, 77 (2000)) *Id.*; and (4) Justice Pincus held that it was better to have a definition with some precision than to concern the Inquiry and courts with a potentially open-ended class of people:

The majority of people who identify themselves as Aboriginal are, at least in the Eastern States, only partly so. For example, the 1961 census figures included 1488 full blood and 13,228 “half blood” Aboriginals in New South Wales. ... there has been a substantial decline in the number of New South Wales pure blooded Aboriginals over 100 years and a considerable rise in the number of part-

choice was really whether the Queensland government should be able to avoid its accountability and responsibilities by reducing the numbers of deaths in its custody or whether the Commissioner should be permitted to inquire freely and frankly into the issue.⁹³ This choice was *dressed up* as a question of law informed by science to allow a decision in favor of a government over and above the victims of continuing colonialism.

The decision means that it is now necessary for all elements to be made out or that some of the elements need to be so strong that an absence of another will not be fatal. Stated another way, after *Queensland v Wyvill* it is necessary that a person has both genetic evidence of Aboriginal ancestry and strong evidence of social factors such as community recognition or self-identification to qualify as Aboriginal. A purposive test would instead afford a greater capacity for Indigenous people to benefit.⁹⁴ This should not be taken to suggest that Justice Pincus was aiming to maintain colonial control or hierarchy. Still, although, his Honour expressed an awareness of biological determinism,⁹⁵ he nevertheless *naturalized* hierarchy by under-privileging self-recognition.

On appeal, two of the three Full Federal Court Judges were just as confounded as Justice Pincus at first instance even though the court unanimously overturned the earlier decision.⁹⁶ Justices Jenkinson and Spender held that the issue was a question of fact and that the Commissioner's original determination should only be interfered with if it was not one reasonably open to him or beyond his jurisdiction, and in this case there was no such legal error made.⁹⁷

However, in reaching their decisions, Justices Jenkinson and Spender required at least *non-trivial* Aboriginal descent to be established in accord with an "ordinary meaning".⁹⁸ For Justice Spender "neither the attribute of self recognition, nor recognition by 'the Aboriginal community' is a necessary integer in the ordinary meaning" of Aboriginal, and "the presence of either attribute, or even both, is not sufficient to constitute a person an Aboriginal".⁹⁹ Instead "[i]t seems to me that this aspect of the matter can be put no higher than recognition as

Aboriginals in that State ... It does not seem practicable, nor is it in accordance with the requirement that the ordinary [at 617] meaning of the word "Aboriginal" be used, to proceed on the basis that every part-Aboriginal is intended to be included in unqualified statutory references to "Aboriginals".

Id. at 617 - 18.

⁹³ *Id.* at 618 - 19. As Justice Pincus noted in this case, there is an administrative law and broader legal tradition in favour of leaving such questions to the inquisitor (original fact-finder) and only over-turning them where it can be proven on appeal that the original finding was 'not merely dubious but wrong' according to law.

⁹⁴ *Att'y Gen. (Cth) v Queensland* (1990) 94 ALR 515, 536, 538-39 (Austl.) (French J., dissenting).

⁹⁵ *Queensland v Wyvill*, 90 ALR at 617. Justice Pincus explained the earlier views expressed by Justice Higgins in *Muramats*, *supra* note 58, as anachronistic, stating "[i]f 'of the stock' in the passage means 'having any genetic trace,' then that is not the meaning which common usage attributes to *Aboriginal* now, if it ever was." *Id.*

⁹⁶ *Att'y Gen. (Cth)*, 94 ALR at 519, 522 (contrast Jenkinson & Spender JJ., with French J., who left open the possibility that self-determination should be the appropriate test).

⁹⁷ *Id.*

⁹⁸ *Id.* at 521, 524.

⁹⁹ *Id.*, 523.

Aboriginal by persons who are accepted by the person making the classification as being of Aboriginal descent.”¹⁰⁰

In privileging the descent test, Justice Spender was careful not to exclude altogether the social elements of the test pointing out that they are not irrelevant considerations, and that self-identification and community recognition are appropriate considerations in “cases at the margin”.¹⁰¹ Similarly, for Justice Jenkinson, “[t]he closer to the boundary the person’s genetic history – or, more accurately, the speaker’s belief about that history – places him, the greater the influence of his conduct and of conduct of the Aboriginal community.”¹⁰²

Both Justices Jenkinson and Spender persisted with the language of racism throughout their judgments drawing on sociobiological terms such as *Aboriginal blood*, *Aboriginal genes*, *genetic history*, *mixed-race*, *racial sub-group*, and *significant infusion of Aboriginal genes*. In contrast, Justice French held that the meaning of *Aboriginal* ought to be left open for the benefit of the Inquiry.¹⁰³ For precisely this reason, Justice French made specific reference to the purpose of the inquiry and the “public concern” leading up to the Inquiry:

Public concern over the High incidence of Aboriginal persons dying in police lock-ups and prisons led to the establishment in October 1987 of the Royal Commission ... As already noted, the terms of the *head* commissions now held by Mr Johnstone QC require consideration of the social, cultural and legal factors which appear to have a bearing on the deaths under investigation.

The general subject matter of the inquiry and the specific reference to social, cultural and legal factors are not consistent with the establishment of rigid definitional boundaries within the terms of reference. In particular the characteristics, including social, cultural and legal circumstances, of persons who are said to answer the description *Aboriginal* will need to be considered. And that consideration could well involve some reflection upon characteristics by which membership of the Aboriginal people of

¹⁰⁰ *Att’y Gen. (Cth) v Queensland* (1990) 94 ALR 515, 523 (Austl.).

¹⁰¹ *Id.*

¹⁰² *Id.* at 518. Jenkinson J., held:

In a case where the proportion of Aboriginal blood in a person of mixed race is thought to be small, or where uncertainty exists as to whether a person is in any degree of Aboriginal descent, the word may be used or eschewed in reference to that person under the influence of what may be called cultural circumstances.

Id. at 517.

¹⁰³ *Id.* at 539.

When there is added to that factor [significant genetic heritage], as in this case, a history apparently devoid of opportunity for development within the normal range of parent/child relationships, then confusion as to identity and the absence of a sense of belonging to a particular community is not surprising. These observations are not made by way of speculation on the facts of this case, but as illustrative of the issues which might properly arise for consideration in the inquiry. To pre-empt as “jurisdictional facts” the issues of self identification and communal acceptance or affiliation is to impose restrictions on the inquiry which its evident purpose and, in that context, the language of the Letters Patent, will not support. *Id.*

Id.

Australia can be defined or recognized. It is not overstating the position to say that, in a sense, the idea of what it is to be an Aborigine in contemporary Australia may be under inquiry.¹⁰⁴

The purpose of the Inquiry necessitated the Commissioner have the discretion to determine either way whether to exclude on the basis that “genetic heritage” was too trivial, or of no real significance, or to include where a person has no Aboriginal genetic heritage but is regarded as Aboriginal because of self-identification and communal affiliation.¹⁰⁵

Justice French therefore rejected the approach of Justice Pincus because it narrowed the “concept of Aboriginal by adding two necessary conditions to that of descent” and because the trial judge had interfered with the Commissioner’s decision to include Wouters in the Inquiry.¹⁰⁶ The self-identification and community recognition elements of the test were not intended to restrict the scope of this Inquiry, nor statutes, where the purpose was beneficial. Instead:

[T]he better view is that Aboriginal descent is a sufficient criterion for classification as Aboriginal. That proposition must be read subject to the right of the Commissioner to decline to inquire into a case where the Aboriginal genetic heritage is so small as to be trivial or of no real significance in relation to the overall purpose of the Commission. It also leaves open the question whether a person with no Aboriginal genetic heritage may be regarded as Aboriginal by reason of self-identification and communal affiliation.¹⁰⁷

Regrettably, although Justices Jenkinson and Spender agreed with the orders made by Justice French, they reached that conclusion in such a way as to leave self-determination as a subordinate concern to the issue of descent. Again, this result is ironic because both Justices were conscious of the need to avoid biological determinism and the need for deference to the Inquiry on questions of fact. Therefore all three elements (self-identification, communal recognition, and descent) remained significant for future disputes.¹⁰⁸ On a more positive note, Justice French was recently appointed as the Chief Justice of the High Court and so his approach may be afforded more deference than that of his predecessors in future cases.

C. Mabo v. Queensland (1992) 107 A.L.R. 1.(Austl.)

Unfortunately, the facts of Australia’s leading native title case did not permit the High Court to develop or change the judicial understanding of

¹⁰⁴ *Id.* at 536.

¹⁰⁵ *Id.* at 536 & 539.

¹⁰⁶ *Att’y Gen. (Cth) v Queensland* (1990) 94 ALR 515, 539 (Austl.).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 539.

Aboriginality.¹⁰⁹ The facts of the *Mabo* case did not require any determination about Aboriginal identity because the claim for native title involved the inhabitants of small islands in the Torres Strait on the Murray Islands. There was no doubt as to the identity or heritage of the inhabitants.¹¹⁰ Therefore identity was not in question. What was in question was whether or not native title was part of the common law of Australia and for this reason the High Court only mentions Aboriginal identity in obiter.

The *Mabo* case referred to “indigenous inhabitants and their descendants”,¹¹¹ and referred to a community in terms of a “group”, “clan”, “band” or “society”.¹¹² Although, the Court expressed some interest in self-determination, it still required a biological heritage.¹¹³ For Justice Brennan, with whom Chief Justice Mason and Justice McHugh concurred, “native title can be possessed only by the indigenous inhabitants and their descendants”,¹¹⁴ and so long as they “remain an identifiable community, the members of whom are identified by one another as members of that community,”¹¹⁵ and “membership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person’s membership by that person and by the elders or other persons enjoying traditional authority among those people.”¹¹⁶

Other judges were less prescriptive, including Justices Deane and Gaudron, stating “...the contents of the rights and the identity of those entitled to enjoy them must be ascertained by reference to that traditional law or custom.”¹¹⁷ And for Justice Toohey, the identity of potential claimants was a question of “social” grouping, “... since occupancy is a question of fact, the ‘society’ in occupation need not correspond to the most significant social group among the indigenous people.”¹¹⁸ The *Mabo* case therefore maintained the notion of a descent test according to biology and social factors such as self-identification and community recognition.

Soon after the *Mabo* case was heard and in the context of heated political controversy surrounding the decision, the federal government enacted the Native Title Act 1993 [hereinafter NTA]. The NTA was introduced as a measure aimed at placating the media controversy and political hysteria surrounding the *Mabo*

¹⁰⁹ *Mabo v Queensland* (1992) 107 ALR 1 (Austl.). The High Court held by a majority that native title was recognised by the common law and was part of Australian law (Mason CJ, Brennan, Toohey, McHugh, Deane and Gaudron JJ, with Dawson J dissenting). The main judgement is considered to be that of Brennan J., with Mason CJ. and McHugh J. concurring. This does not mean that the other judges forming the majority can be treated lightly. Toohey J. was considered a judge with expertise in land rights, and the judgement of Deane and Gaudron JJ. is authoritative because it was a joint judgement.

¹¹⁰ *Id.* at 43.

¹¹¹ *Id.* at 42-45.

¹¹² *Id.* at 43-44 (Brennan J), 62-64 (Deane & Gaudron JJ). These terms were used throughout the various judgements in the *Mabo* case. It is also noteworthy that Justice Brennan, along with Justices Deane and Gaudron, were of the view that an individual may be a potential claimant.

¹¹³ *Id.* at 65, 146-47. In particular, Justice Toohey favoured self-determination, while Justices Deane & Gaudron implied as much.

¹¹⁴ *Mabo*, 107 ALR at 42.

¹¹⁵ *Id.* at 44.

¹¹⁶ *Id.* at 51.

¹¹⁷ *Mabo v Queensland* (1992) 107 ALR 1, 83 (Austl.).

¹¹⁸ *Id.* at 148.

decision.¹¹⁹ It was also introduced to address some of the technical legal questions left unanswered by the court. It has as its main objects:

- (a) to provide for the recognition and protection of native title; and
- (b) to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings; and
- (c) to establish a mechanism for determining claims to native title; and
- (d) to provide for, or permit, the validation of past acts, and intermediate period acts, invalidated because of the existence of native title.¹²⁰

The NTA does not shed light on the judicial notion of *Aboriginality* and in §§ 24CD and 24DE refers to *native title group* as this phrase is defined by § 253. Section 223 defines *native title* and refers to *Aboriginal peoples* or *Torres Strait Islanders*. Section 253 provides definitions for many terms used in the NTA including *Aboriginal peoples*, stating “‘Aboriginal peoples’ means peoples of the Aboriginal race of Australia”. For this reason the question of Aboriginality remains a matter of judicial discretion.

D. Mason v. Tritton [1994] 34 N.S.W.L.R. 572 (Austl.)

One of the first cases dealing with both the term *Aboriginal* and the concept of native title was *Mason v Tritton*.¹²¹ In *Mason*, the appellant argued a native title right to fish abalone as a defense to a breach of the Fisheries and Oyster Farms Act.¹²² This case may be contrasted with the similar but later case of *Yanner v Eaton*, which stands as somewhat of an anomaly, and is beyond the scope of this paper.¹²³

¹¹⁹ See Melissa Castan & Sue Kee, *The jurisprudence of denial: The political devolution of the concept of native title*, 28 ALT. L.J. 83-84 (2003). The amendments were subsequently condemned by the United Nations. See CERD Decision 2 (54) on Australia; Australia 18/03/99; A/54/18, para. 21(2); CERD Decision 2 (55) on Australia; Australia 16/08/99; A/54/18, para. 23(2). Since the amendments, Australian courts made a series of decisions, ultimately culminating in the *Yorta Yorta* decision, which has arguably returned the common law position on native title to pre-*Mabo* days. It is difficult to find any commentators who have disagreed with this assertion, while there are many who have agreed. See also Mark Gregory, *Absent Owners: Should Native Title Require Continuing Physical Occupation of the Land?*, 20 ALT. L. J. 20 (1995); Bryan Keon-Cohen, *Ten Years after Mabo* 27 ALT. L.J. 136 (2002); Neil Lofgren, *Common Law Aboriginal Knowledge* 3 ABORIGINAL L. BULL. 10 (1995); and Peter Seidel, *Native Title: The Struggle for Justice for the Yorta Yorta Nation* 29 ALT. L.J. 70 (2004).

¹²⁰ *Native Title Act 1993* (Cth.) s 3 (Austl.).

¹²¹ *Mason v Tritton* (1994) 34 NSWLR 572 (Austl.).

¹²² *Fisheries and Oyster Farms Act 1935* (NSW) (Austl.).

¹²³ *Yanner v Eaton* (1999) 201 CLR 351 (Austl.). This case is anomalous in the sense that few have been won by Indigenous people since *Mabo* in 1992. Here the Court found in favour of Mr. Yanner, who succeeded under s 211 of the Native Title Act 1993 to avoid prosecution under Queensland law for hunting crocodiles. Section 211 provided immunity to those people who might otherwise be prosecuted or required to obtain a licence under other laws where the activity is a traditional aspect of their native title rights.

Because the Native Title Act is silent on the question of the potential class of claimants other than the § 253 definition, “‘Aboriginal peoples’ means peoples of the Aboriginal race of Australia”,¹²⁴ it is necessary to look to the general law. Judicial opinion in this respect has varied from purely biological definitions to definitions seeking to avoid biological determinism. Among the biological definitions was the decision in *Pareroultja v Tickner*.¹²⁵ There the Court had to determine the compatibility or otherwise of a situation where native title overlapped with a proposed grant of land under a Land Rights statute.¹²⁶ The court held that the two concepts were not incompatible after considering the beneficial nature of the laws in question and the absence of any inconsistency between the classes of persons meant to benefit under them. “Membership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person’s membership by that person and by elders or other persons enjoying traditional authority among those people.”¹²⁷ In other words the court used a biological and social test to give effect to a statute aimed at benefiting those who had suffered from the colonisation of Australia. However, a purposive reading is not necessarily a guarantee that justice will be done in cases where the statute aimed at benefiting Indigenous Australians meets another statute aimed at allocating the commercial interests of non-Indigenous Australians. In this situation the beneficial interest under the statute is subordinated to commercial interests. This result was the essence of the decision in *Mason*.¹²⁸ There the court imposed a strict requirement that potential Indigenous beneficiaries have biological proof of their connection to the traditional right. In this respect the reasoning was sociobiological.

In *Mason*, the competing commercial interest was that of a non-indigenous abalone fishing industry.¹²⁹ The appellant argued a native title right to fish abalone as a defense to a breach of the 1935 Fisheries and Oyster Farms Act (NSW) prohibiting fishing except under license. All three Judges found against the appellant on the basis that he had not discharged an onus of proof, which included a biological test. “There must be evidence that the claimant is an indigenous person and biological descendant of the indigenous clan or group who exercised traditional customary rights in respect of the land when the Crown first asserted its sovereignty.”¹³⁰

Despite a finding by the Magistrate at first instance that this element had been satisfied relying on a genealogy reaching back to the 1880s the NSW Court of Appeal regarded this as “far from compelling” because it fell short of the threshold date of 1788.¹³¹ For Justice Priestley (with whom Chief Judge Gleeson agreed) the rule was clear:

¹²⁴ *Native Title Act 1993* (Cth) s 253 (Austl.).

¹²⁵ *Pareroultja v Tickner* (1993) 117 ALR 206 (Austl.).

¹²⁶ Land rights are grants made under statute to Indigenous people while native title stems from traditional rights and responsibilities to land as recognised by common law.

¹²⁷ *Pareroultja*, 117 ALR at 209–10 (Lockhart J., with O’Loughlin & Whitlam JJ., concurring).

¹²⁸ *Mason*, 34 NSWLR at 575-95.

¹²⁹ *Mason v Tritton* (1994) 34 NSWLR 572, 589, 600-01 (Austl.).

¹³⁰ *Id.* at 586.

¹³¹ *Id.*

A person asserting entitlement to enjoyment of the interest at the present day, must show biological descent from the group which was observing the system of rules which the interest was part; that is show biological descent dating back to just before the establishment of the common law. ... A person asserting such entitlement must also show that the biological descendants of the pre-common law group have continued and are continuing to observe the system at the time the claim is asserted.¹³²

Consequently, this meant that despite the obviousness of the claimant's case both in terms of the fact that he was indigenous to the area and that his descendants had a tradition of fishing in the waters, his defense to a prosecution for breaching the Fisheries and Oyster Farms Act failed. It failed for want of establishing a biological chain of descent and for want of satisfying an evidentiary burden that taking abalone was according to tradition.¹³³

However, for President of the Court of Appeal Kirby, the law would not impose a strict biological genealogy because this would be an unreasonable evidentiary burden on people who had been subject to colonial policies of segregation and relocation.¹³⁴ Questions about biological descent were not necessarily insurmountable provided there were no other obstacles. Here there were other obstacles:

Fixed as we are with the magistrate's findings of fact, the appellant was required, somehow, to overcome the finding that he had failed to bring himself within the traditional claim which he had claimed and which I would hold was proved in law, viz, the right to fish for food for himself and his family or exchanging the same for other food. The magistrate regarded it as fatal that the appellant had failed, by evidence, to bring himself within that use — and to exclude other uses which were equally possible, viz, sale to an open commercial market which it was the very object of the Regulation to control.¹³⁵

Clearly, the possibility that the taking of abalone might be opportunistic rather than a traditional practice was the decisive factor in this case at first instance and before the NSW Court of Appeal. The fear that an interloper might be able to exploit native title laws to circumvent the highly regulated abalone fishing industry which grants privileges to certain people via a licensing system was at the forefront

¹³² *Id.* at 598 (references omitted).

¹³³ *Id.* at 594 (Kirby P):

The outcome of this appeal can be simply stated. Mr Mason, in my view, established the ingredients necessary *in law* to succeed in a claim for a native title in respect of a right to fish. But he failed to provide sufficient *evidence* to *prove* that he actually had been exercising such a native title.

Id.

¹³⁴ *Id.* at 588-89.

¹³⁵ *Mason v Tritton* (1994) 34 NSWLR 572, 588-89 (Austl.).

of the minds of both the Magistrate and President Kirby. Similarly, Justice Priestley expressed his concerns about competition between licensed and unlicensed abalone fishing by concerning himself with “the type of fishing” undertaken by the appellant.¹³⁶ In a statement denying there was any scope for judicial discretion, Justice Priestley (with whom Chief Justice Gleeson agreed), considered that it was not the common law that destroyed native title rights but rather the effect of time and European settlement.¹³⁷

This is a theme that runs through the reasoning of the later Chief Justice Gleeson led High Court, curtailing native title rights as initially advanced in *Mabo*.¹³⁸ In these later cases on native title the High Court adopted a similar vein of sociobiological reasoning in the sense that it sought to naturalise the extinguishment of native title as the inevitable result of evolutionary change. In other words native title would inevitable be washed away by a tide of history as a superior colonial culture out-competed Indigenous culture in the struggle for existence. This reasoning obscures not only the choices made by colonial decision-makers of the past but also the continuing colonial role played by courts as they exercise discretion depicted as beyond their control.

Justice Priestley reasoned that while fishing was indeed a presumed incidence of native title, citing section 223(2) of the Native Title Act,¹³⁹ it remained for the claimant to prove that the type of fishing in dispute was within the ambit of two basic legal propositions:

Proposition (1) was that the magistrate had made findings, or to the extent that he had not made such findings, had been bound to do so on the evidence before him, which showed that the claimed native fishing right was part of a recognizable system, in existence immediately before the common law became the law of the colony of New South Wales, observed by an identifiable group of people connected with a locality of which Dalmeny was a part, and that the appellant was a member of a group both biologically descended from the pre-common law group and still connected with the same particular locality, and that the present day group and the appellant himself were continuing to observe the system, at least so far as it related to the fishing right. Proposition (2) was that any land in relation to which the fishing right was being claimed was unalienated Crown land in regard to which there had been no act of the Crown extinguishing the native right.¹⁴⁰

¹³⁶ *Id.* at 601.

¹³⁷ *Id.* at 600:

... the coming of the common law to Australia did not of itself extinguish the systems of rules acknowledged and observed by Aboriginal groups and communities related to land, the time that has passed since then and European settlement of the country have caused the foundation of native title to disappear in many places.

Id.

¹³⁸ See *Western Australia v Ward* (2000) 170 ALR 159 (Austl.), and the *Yorta Yorta* cases, *infra* note 222.

¹³⁹ *Native Title Act 1993* (Cth) s 223(2) (Austl.).

¹⁴⁰ *Mason*, 34 NSWLR at 601.

Justice Priestley did not need to deal with the second of these, finding instead that the first proposition had not been satisfied. This was despite the evidence of two experts supporting the claimant's case. The first expert's evidence was dismissed with the sentence: "The evidence from this witness consisted entirely of her report. She gave no oral evidence and was not cross-examined."¹⁴¹

The second expert, Dr. S. Colley, had reviewed the literature concerning archaeological evidence for the collection and consumption of abalone by Aboriginal people on the NSW South Coast, and had concluded:

A variety of archaeological studies and information derived from the NSW NPWS Aboriginal Sites Register confirm that abalone shells are commonly found in small quantities in Aboriginal shell middens along the NSW south coast. None of these archaeological studies were undertaken to establish the presence of abalone and the recording of abalone in all cases was incidental to the main aims of the research. Because abalone occurs in most middens in small quantities it is likely that some studies have overlooked or under-emphasized its presence and that the occurrence of abalone is under-stated in the archaeological literature.

Abalone has been documented from sites of different ages between 3700 years ago (at Currarong) and after the time of European contact (at Durras North). The archaeological evidence presented here supports the argument that taking of abalone has been a widespread customary practice of Aboriginal people on the NSW south coast for at least the last 3-4000 years and this practice continued, at least in some places, after European contact.¹⁴²

General evidence, therefore, rather than specific evidence will be regarded as insufficient. In his opinion, and using a strict interpretation, Justice Priestley considered that neither expert had satisfied the basic test to be applied that was discerned from the various judgments in the *Mabo* case.¹⁴³ The test to be applied was as follows:

1. Because, if the native interest did not exist at the time when the common law became the law of the colony, the radical title, the legal estate and the beneficial estate in the relevant land all vested together and undivided at that time in the Crown, any claimed native interest can not now be recognised by the common law unless it was in existence immediately before the common law became the law of the colony: Brennan J (at 59-60, 69-70); Deane J and Gaudron J (at 86); Toohey J (at 184-187).

¹⁴¹ *Id.* at 602.

¹⁴² *Mason v Tritton* (1994) 34 NSWLR 572, 601-02 (Austl.).

¹⁴³ *Id.* at 602.

2. The native interest must be a recognizable part of a system of rules observed by an identifiable group of people connected with a particular locality: Brennan J (at 58, 70); Deane J and Gaudron J (at 86, 88, 108); Toohey J (at 186-187, 188).
3. A person asserting entitlement to enjoyment of the interest at the present day, must show biological descent from the group which was observing the system of rules which the interest was part; that is show biological descent dating back to just before the establishment of the common law: Brennan J (at 70); implicit in Deane, Gaudron and Toohey JJ in the references given in 2 above.
4. A person asserting such entitlement must also show that the biological descendants of the pre-common law group have continued and are continuing to observe the system at the time the claim is asserted. (References as for 3 above.)¹⁴⁴

Applying this test to the evidence of the second expert, Dr. S. Cane, Justice Priestley held that although the report could be accepted as proving the claimant was a member of a family with a “genuine historical association with the south coast of NSW”¹⁴⁵ with a consistent family tradition of fishing, and that this tradition was “an important ingredient in the socio-economic life”¹⁴⁶ of those indigenous people:

it seems plain that much more needed to be proved to comply with the requirements. This seems to me to be clear enough simply taking Dr Cane’s two reports at their full face value. There was nothing in them to show that the appellant was biologically descended from any Aboriginal group dating back to just before the establishment of the common law which observed a system of rules relating either to fishing generally or to abalone in particular on any specific part of the New South Wales South Coast.¹⁴⁷

As a practical matter, it will be virtually impossible after such a strict reading of *Mabo* (or section 211 of the Native Title Act), for Indigenous people to raise a defense to an alleged breach of law on the basis of a native title right.¹⁴⁸ The

¹⁴⁴ *Id.* at 598.

¹⁴⁵ *Id.* at 602

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Contra Yanner v Eaton* (1999) 201 CLR 351 (Austl.). This assertion is valid despite the decision in *Yanner*. There the facts were so overwhelmingly within the biological limits and the claim for native title had already received recognition of basic title. In other situations claimants are less likely to be so fortunate given the catastrophic effects of colonisation. Paradoxically, the need to redress past wrongs was recognised in the preamble to the Native Title Act 1993 and so many other statutes (*e.g.* Aboriginal

detail of evidence required in such a short time frame and the costs involved render the likelihood of success extremely remote.¹⁴⁹ For example, the cross-examination of one expert witness in *Mason* reveals the impossibility of Indigenous people proving a traditional system of rules without the aid of *white* experts:

HALL: Yes, I am talking about the period prior to colonisation. Firstly there is no evidence prior to colonisation of Aboriginal tribal communities claiming any right to specific areas of coastal waters for fishing purposes.

CANE: No, but I have said that there could have been totemic association with those areas as implied by the evidence of Tindale, and the totemic association of people with specific coastal animals. (undecipherable)

HALL: Could you just deal with the question I am putting to you that prior to colonisation there is no evidence from the material you have gathered of the exercise by Aboriginal communities of rights to fish in particular coastal areas.

CANE: No.

...

HALL: Well, apart from the fact of fishing by Aboriginal people in the coastal waters are you aware of any Aboriginal law that deals with the fishing rights or fishing practices?

CANE: No.¹⁵⁰

In particular, Justice Priestley held that there was insufficient evidence of the calibre provided in *Milirrpum*, *Walden*, and *Mabo*, of a system of rules, whether by elders or other community members, which meant the present case could be distinguished as one where the “tide of history had washed away any real acknowledgement of traditional law and ... of traditional customs”.¹⁵¹ Therefore, the violence of colonisation cannot be undone by law demonstrating that the legacy of colonisation is very much contemporary and, possibly, perpetual. The judgement was therefore implicitly sociobiological. It was implicitly sociobiological because it implied that the denial of Indigenous rights is inevitable. That is to say the outcome of laws of nature. It was explicitly sociobiological to the extent the court held:

There was nothing in them [evidence of traditions] to show that the appellant was biologically descended from any Aboriginal group

and Torres Straight Islander Commission Act 1989 (Cth)) which were intended by the legislature to facilitate a material change in the circumstances of Indigenous Australians.

¹⁴⁹ See *Mason*, 34 NSWLR at 602-03. The cross examination of Dr. Cane appears selectively extracted in the judgment. The degree of detail required will not necessarily be readily available for presentation as *evidence* to be recognized by a court.

¹⁵⁰ *Mason v Tritton* (1994) 34 NSWLR 572, 603 (Austl.).

¹⁵¹ *Id.* at 604 (citing *Milirrpum v Nabalco* 17 FLR 141 (Austl.), *Walden v Hensler* 163 CLR 561 (Austl.), and *Mabo v Queensland* 175 CLR 1 (Austl.)). His Honour did not rule out the possibility of an appropriate claim being brought under the Native Title Act if the relevant evidence could be mounted.

dating back to just before the establishment of the common law which observed a system of rules relating either to fishing generally or to abalone in particular on any specific part of the New South Wales South Coast.¹⁵²

The evidence of Dr. Cane showed connections between the claimant's activities and the traditions of Aboriginal people but not to the biological standard expected:

the material in his reports could support conclusions that the men in relation to whom the questions were asked were members of families elements of which could be traced back to the 1880s or thereabouts, some of whom were Aboriginal, some of whom were European, some of whom at the 1880s' period seem to have been born in or not far from Narooma and some of whom came from well away from Narooma, as for example, La Perouse, the far South Coast of New South Wales and Victoria. So far as the origins of the appellant's own family can be made out from the genealogical evidence, they appear mostly to have come from La Perouse. The material in the report also showed that some members of the particular families on whom Dr Cane focused were accustomed to fish the sea near Narooma and that fishing was a significant part of the socio-economic life of Aboriginal people generally (including families of the mixed kind I have mentioned) all along the South Coast of New South Wales.¹⁵³

Had the court decided in favour of the appellant in *Mason*, there would have been an issue about over-exploitation of a limited resource that would otherwise require a license to be taken in commercial quantities. Any reservations about this issue ought to have been left to the legislature to determine in consultation with the Indigenous people concerned. Instead, *Mason* stands as one of the first cases to narrow down the *advances* made in *Mabo* using a strict and legalistic approach naturalised through the use of biological criteria rendering native title virtually unattainable.¹⁵⁴

In *Mason*, the descent test was applied requiring biological criteria in such a way that it operated to exclude beneficial native title interests¹⁵⁵, whereas in *Gibbs*, the descent test was applied so as to give a more inclusive effect.¹⁵⁶

¹⁵² *Id.* at 602.

¹⁵³ *Id.* at 603-04.

¹⁵⁴ The word *advances* is italicized for the reasons discussed in Michael Mansell, *Perspectives on Mabo: The High Court Gives an Inch but Takes a Mile*, 2 ABORIGINAL L. BULL. 4 (1992).

¹⁵⁵ *Mason*, 34 NSWLR at 572.

¹⁵⁶ *Gibbs v Capewell* (1995) 128 ALR 577, 584-85 (Austl.). In this case no conclusions were drawn applying the stated legal principles to the facts, at the request of the protagonists.

E. Gibbs v Capewell (1995) 128 ALR 577 (Austl.)

In *Gibbs v. Capewell*, the court was asked to declare the true meaning of the expression *Aboriginal person* as it was used in sections 101 & 102 of the Aboriginal and Torres Strait Islander Commission Act.¹⁵⁷ There, the petitioner (Gibbs) was contesting the validity of recent elections and the capacity of certain candidates and electors to be eligible to stand and vote for office on the basis that they were not Indigenous. The first respondent (Capewell) had stood as a candidate and was joined by the Australian Electoral Commission (second respondent) and the then Commonwealth Minister for Aboriginal and Islander Affairs, Senator Herron (third respondent).

The petitioner submitted that the relevant test was that where there was only minimal Aboriginal genetic material present in a person they would not be able to participate in elections unless they had community recognition. An absence of genetic material would preclude participation.

Counsel for Capewell submitted that the expression *Aboriginal persons* included those who may have no descent but self-identify as Aboriginal and have community recognition. In other words, this interpretation would include people adopted by the Indigenous community. The Minister submitted that any amount of genetic material would suffice and that this would be sufficient preferring not to recognize the concept of self-determination.¹⁵⁸ The Australian Electoral Commission did not make a substantive submission other than a commitment to abide by any determination made by the court.

Justice Drummond noted that *Aboriginal person* was defined in section 4 of the Aboriginal and Torres Strait Islander Commission Act to mean, “a person of the Aboriginal race of Australia”. The Justice reflected on the earlier cases and commented the term *race* is “hopelessly imprecise”¹⁵⁹ and proceeded to analyze the expression as a product of the statute under consideration by reference to the preamble and objects in section 3. Significantly, the preamble mentioned among other things:

... of the consequences of past injustices and to ensure that the Aboriginal persons and Torres Strait Islanders receive that full recognition within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire ...¹⁶⁰

Sub-section 3(a) states an object of the statute is “to ensure maximum participation of Aboriginal persons and Torres Strait Islanders in the formulation and implementation of government policies that affect them ...”¹⁶¹

¹⁵⁷ *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) ss 101-102 (Austl.).

¹⁵⁸ See *supra* notes 21 & 22, and accompanying text. Though not expressly stated, this official attitude towards self-determination survives to the present day.

¹⁵⁹ *Gibbs v Capewell* (1995) 128 ALR 577, 579 (Austl.).

¹⁶⁰ *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) pmb. (Austl.).

¹⁶¹ *Id.* at s 3.

Based on a reading of the preamble and objects sections of the Act, Justice Drummond determined that the intention of Parliament was to benefit *descendants* of pre-European inhabitants as understood in “ordinary speech”.¹⁶² Accordingly, it followed that participants in the election must have “Aboriginal genes” and that the social criteria¹⁶³ could never be sufficient in the absence of some “Aboriginal genes”. Further, this determination excluded those people who had been adopted by the Indigenous community. “It follows that adoption by Aboriginals of a person without Aboriginal descent and the raising of that person as an Aboriginal ... will not, because of the statutory requirement for descent, bring that person within the description ‘Aboriginal person’”.¹⁶⁴

Not only is this reasoning sociobiological because it holds that genes override environment and is therefore an extreme example of biological determinism, it is a conclusion hostile to Indigenous culture and the concept of self-determination at international law.¹⁶⁵ It also assumes an anachronistic view of science – a view no longer accepted within social theory, or the philosophy of science.¹⁶⁶ Wallerstein notes that where race has been *fixed* it has been by statute rather than science.¹⁶⁷ Justice Drummond went further and contemplated whether the *Act* was intended to benefit persons of “mixed descent” or just “full blood descendants”.¹⁶⁸ In the course of this excursion into the sociobiological abyss, Justice Drummond remarked:

I can take judicial notice of the fact that there are few, if any, full blood descendants of the pre-settlement inhabitants of the continent living in any of these five regions [the five regions spanned the State capitals Adelaide, Brisbane, Hobart, Perth and Sydney]: 20 years ago judicial notice was taken that “for a long time it has been widely known that there remain very few [Aboriginal] persons of the full blood” in the whole continent...¹⁶⁹

¹⁶² *Gibbs*, 128 ALR at 580. The alternative “ordinary parlance” was also used. *Id.* at 583.

¹⁶³ Meaning self-identification and community recognition.

¹⁶⁴ *Gibbs*, 128 ALR at 580.

¹⁶⁵ See Flynn & Stanton, *supra* note 92, at 77. As the authors have observed during their analysis of the Stolen Generations case, Indigenous culture has a broader understanding of family and community.

At an early point in the strike-out application, the Commonwealth confidently submitted that Lorna Cubillo’s allegation of removal without the consent of her mother must be false because Lorna Cubillo’s mother had died before the date of removal. It soon transpired that Lorna Cubillo’s use of the term “mother” in the court proceedings was not a reference to her birth mother but to the woman who, in accordance with Aboriginal culture, had assumed care of her following the death of her birth mother.

Id. See also AUSTRALIAN LAW REFORM COMMISSION REPORT NO 31, THE RECOGNITION OF ABORIGINAL CUSTOMARY LAWS (1986).

¹⁶⁶ See PAUL FEYERABEND, AGAINST METHOD (1978); see also PAUL FEYERABEND, FAREWELL TO REASON (1990); Thomas Kuhn, *Logic of Discovery or Psychology of Research?* in CRITICISM AND THE GROWTH OF KNOWLEDGE 1-23 (Imre Lakotas & Alan Musgrave eds., 1976).

¹⁶⁷ BALIBAR & WALLERSTEIN, *supra* note 73, at 71 (“People shoot each other every day over the question of labels. And yet, the very people who do so tend to deny that the issue is complex or puzzling or indeed anything but self-evident.”)

¹⁶⁸ *Id.* at 580.

¹⁶⁹ *Id.* at 581, citing *Re Byrning* [1976] VR 100 at 103 (Austl.).

Put another way, because colonialism and the policies of assimilation have left very few potential “full blood” beneficiaries, the expression “aboriginal person” should be comprehended to mean all people including those with “mixed blood” or those with “limited Aboriginal genetic heritage”.¹⁷⁰

One consolation from the judgment was the rejection of Senator Herron’s submission that the genetic test was the only “necessary” test. Counsel for the Minister had argued that the presence of a cultural test would be an additional barrier to participation particularly for those people who had been removed from their families under earlier policies. While this submission had the appearance of concern for those people, the Minister was more concerned to ensure that the then government policy of resisting self-determination was left intact, and this was expressed publicly by the Minister at that time¹⁷¹ as well as being implicit in his submissions via counsel that:

... the statutory definition of “Aboriginal person” operates by reference to genetic factors, not social ones, so it is irrelevant to have regard to cultural considerations; race is determined at birth and cannot subsequently be acquired or relinquished, while culture is acquired from a person’s upbringing and environment and is not a necessary element of a person’s race.¹⁷²

Justice Drummond rejected this submission noting that in the “absence of clear proof of Aboriginal descent”, either self-identification or communal recognition would be necessary.¹⁷³ In other words the so-called cultural factors

¹⁷⁰ *Id.* at 581.

¹⁷¹ See ATSIIC, “*ATSIIC to be strengthened*” says Minister, ATSIIC News, Aboriginal and Torres Strait Islander Commission, August 1998, p. 9, available at http://pandora.nla.gov.au/pan/41037/20050516-0000/www.atsic.gov.au/news_room/atsic_news/August_1998/page9.html

The former federal government ultimately abolished the Aboriginal & Torres Strait Islander Commission. But at the time the Minister impressed that he supported the organisation. As the following quote explains, the Minister, Senator Herron, preferred the expression “self-empowerment” to “self-determination”:

Australia was one of the earliest advocates for inclusion of self-determination in the Draft Declaration, but the Government has recently changed this position. Following a series of leaks to the Melbourne Age, it was confirmed that Cabinet had agreed in July to alter the Australian Government’s draft text on the Declaration to substitute “self-management” or “self-empowerment” for the principle of self-determination. “Self-empowerment” has been the guiding principle of the current Minister, Senator John Herron. He launched the term at his Lyons Lecture in November 1996, saying that it “varies from self-determination in that it is a means to an end — ultimately social and economic equality — rather than merely an end in itself”. He has more colloquially described the Government’s aims as helping Indigenous people “to carry their own swags”. Arguably, self-empowerment has a more individual than collective focus. In justifying the Cabinet decision, the Minister for Foreign Affairs, Alexander Downer, told the Age that the term “self-determination” might be used to justify the establishment of a separate state for Indigenous peoples. He denied that the decision was a move to appease Federal backbencher Pauline Hanson who had recently described the Draft Declaration as a “treacherous sell out of the Australian people”.

Id.

¹⁷² *Gibbs v Capewell* (1995) 128 ALR 577, 581 (Austl.).

¹⁷³ *Id.* at 584-5.

become relevant where proof of Aboriginal descent is insubstantial and where proof of descent is substantial that will suffice. Factors indicative of a “substantial degree of Aboriginal descent” will be genetic, or “that the person possesses what would be regarded by the generality of the Australian community as clear physical characteristics associated with Aboriginals”, even though “a person’s external appearance may be deceptive of his or her racial origins”.¹⁷⁴

In terms of the cultural criteria:

The less the degree of Aboriginal descent, the more important cultural circumstances become in determining whether a person is “Aboriginal”. A person with a small degree of Aboriginal descent who genuinely identifies as an Aboriginal and who has Aboriginal communal recognition as such would I think be described in current ordinary usage as an “Aboriginal person” and would be so regarded for the purposes of the Act. But where a person has only a small degree of Aboriginal descent, either genuine self-identification as an Aboriginal alone or Aboriginal communal recognition as such by itself may suffice, according to the circumstances.¹⁷⁵

Clearly the approach taken by Justice Drummond is the opposite of the intention of Article 1 of the ICCPR because it removes any possibility for people to be identified as *Aboriginal* according to customary law. It reflects continuing colonial practice in the sense that the colonial authority is exercising power of the Indigenous people by retaining control over their identity. Further, this exercise of power is by way of a system of science that has been hostile to the culture of the Indigenous people concerned who place little or no emphasis in their culture on *genes* and *biology*, and instead have their own systems for understanding who is recognized in their community.¹⁷⁶ In fact, Justice Drummond had some understanding of the importance of community recognition and expressly mentioned that it may “be the best evidence available” for establishing descent after relegating it as subordinate to the descent test.¹⁷⁷

¹⁷⁴ *Id.* at 584.

¹⁷⁵ *Id.* at 584-85.

¹⁷⁶ De Plevitz & Croft, *supra* note 1, at 8.

While Aboriginal people may generally be direct descendants of the original inhabitants of their particular part of Australia, their lines of descent are not necessarily biological. Indigenous customary law does not rely on linear proof of descent in the Judeo-Christian genealogical form ... An indigenous person from Central Australia, for example, will have many fathers and mothers. A person may have been adopted into a Kinship group where there is no direct or suitable offspring to carry out ceremonial obligations.

Id.

¹⁷⁷ *Id.* at 585.

Proof of communal recognition as an Aboriginal may, given the difficulties of proof of Aboriginal descent flowing from, among other things, the lack of written family records, be the best evidence available of proof of Aboriginal descent.

Id.

Defenders of the sociobiological judicial approaches discussed above might contend there needs to be an objective way to sort out disputes where an Indigenous community rejects a person claiming to be indigenous.¹⁷⁸ This point can be conceded provided the starting point is self-determination together with an understanding that biological criteria (genes, blood, DNA, etc) are not determinative of descent.¹⁷⁹ Still, any suggestion that there may be opportunistic claims in the absence of an objective test must be rejected on at least three grounds. First, this view incorrectly assumes that cultural criteria are necessarily subjective, and instead, it is more likely cultural approaches will be the closest one might get to any objectivity. Second, it is, as already noted contrary to international law, which expects self-determination in the absence of counter-justifications (mere speculation of opportunism is not a counter-justification). Third, it is highly unlikely that opportunistic claims have been or would ever be made – there is no evidence to support the speculation.¹⁸⁰

F. Shaw v. Wolf (1999) 163 A.L.R. 205 (Austl.)

This was another case where the past impacts of colonialism (this time Tasmanian genocide and the forced break-up of families) had to be confronted in the course of settling a dispute between people asserting, and others denying community recognition for the purposes of ATSIC elections.¹⁸¹

In *Shaw*, Justice Merkel tried to move beyond the biological approach used in the earlier cases while retaining the emphasis on all three of the usual elements: (1) Descent – family history, (2) Self-identification, and (3) Community recognition. Descent was treated as the key criterion. Alone it would not necessarily be sufficient and hence all three should be considered with the other two elements merely probative of descent. Therefore, the descent test is still capable of outweighing the other criteria and did so in this case.¹⁸² Consequently this means that by virtue of the doctrine of precedent the biological approach is likely to remain the central feature in future cases despite Justice Merkel's rejection of the "scientific" approach and his observation that race is a "social rather than genetic construct" and his emphasis on self-identification.¹⁸³

¹⁷⁸ It must be understood that such questions of contested identity are a legacy of colonisation because indigenous people were physically removed from their communities and dispossessed from their land by whites. Tasmania, the place in question here, provides one of the worst examples of colonial murder and family break-up, facts recognised by the Court later in *Shaw v Wolf*. (1999) 163 ALR 205, 217 (Austl.).

¹⁷⁹ This is in accord with the findings of the U.N. Special Rapporteur, *supra* note 65, and quoted by Justice Brennan in *Tasmania v Commonwealth* (1984) 158 CLR 1 (Austl.).

¹⁸⁰ *Contra Gibbs v Capewell* (1995) 128 ALR 577, 584 (Austl.). The only risk might be for fraud and in these situations community recognition would prevent that possibility. See De Plevitz & Croft, *supra* note 1, at 9.

¹⁸¹ *Shaw* concerned a dispute about whether certain people were indigenous Tasmanians for the purposes of the Aboriginal and Torres Strait Islander Commission Act 1989 (Cth) because they were not recognised by other Indigenous people.

¹⁸² Two of the eleven respondents were held not to be Aboriginal on the basis of descent alone. Though one of these people made no appearance and did not furnish evidence to support his version of descent.

¹⁸³ *Shaw v Wolf* (1999) 163 ALR 205, 209, 268 (Austl.).

Arguably, this case “while painstaking and sympathetic, still falls short of a test of Aboriginality defined by its own cultural traditions.”¹⁸⁴ This is because, in the case of Ms. Oakford, the primary basis for rejecting her Aboriginality was that her documentary evidence of her descent was outweighed by the probative value of the documentary evidence presented against her. Yet Ms. Oakford had identified as Indigenous from the age of 12 and had community recognition as an Aboriginal. In fact, she had been duly elected to ATSIC office in the course of these elections. Justice Merkel was conscious of this unfortunate outcome commenting that the legislature was the appropriate authority to ensure that in future disputes Aboriginal identity was determined by Indigenous organisations using their powers of self-determination rather than through a statute enacted “by a parliament that is not representative of Aboriginal people to be determined by a court which is also not representative of Aboriginal people”.¹⁸⁵

Justice Merkel’s approach to this litigation marked a considerable leap forward for this area of law for many reasons. First, Justice Merkel sought to achieve fairness for the litigants given the significance of *identity* to peoples’ lives. This was the Justice’s primary objective within the unfortunate sociobiological parameters of the legislation, the common law and the expectations of colonial legal institutions without effective Indigenous participation and self-determination.¹⁸⁶

Second, within the limits of the doctrine of precedent requiring Judge Merkel to test for descent – which, until this case had been approached in sociobiological terms given the preceding analysis on these cases – greater weight was accorded to self-identification as probative of descent rather than the usual approach privileging biological genealogy as virtually determinative of descent. This is evident in that six of the eleven respondents, on the element of descent, were initially found to have an *open* finding either way on the balance of probabilities, yet in the final analysis were regarded as Aboriginal because their self-identification tipped the balance in their favour on the question of descent.¹⁸⁷

Third, Justice Merkel emphasised the purpose of the statute’s remedial and beneficial aims, along with clause 23 of schedule 4 to the Act, requiring that the court, “shall be guided by the substantial merits and good conscience of each case without regard to legal forms or technicalities, or whether the evidence before it is in accordance with the law of evidence or not.”¹⁸⁸

Fourth, the devastating impact of colonisation was specifically mentioned as a reason to move beyond an over-emphasis on the descent test. Two reasons for this were that the colonial records were problematic and inconclusive, and the consequences of forced family dislocation due to murder, disease and colonial policies of assimilation would render those effects an inevitable and perpetual problem for future generations. Both reasons were reiterated throughout the judgement.¹⁸⁹

¹⁸⁴ De Plevitz & Croft, *supra* note 1, at 15.

¹⁸⁵ *Shaw*, 163 ALR at 268.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 215-16 (citing *Briginshaw v Briginshaw* (1938) 60 CLR 336 (Austl.)) (discussed below).

¹⁸⁸ *Id.* at 208.

¹⁸⁹ *Shaw v Wolf* (1999) 163 ALR 205, 208, 211, 217-22 (Austl.).

Fifth, it followed that for these reasons, it needed to be accepted that descent, self identification, and community recognition are socially constructed and interdependent concepts.¹⁹⁰

Sixth, greater weight should be granted to oral histories given the problematic and inconsistent nature of archival and historical evidence.¹⁹¹

Seventh, each personal case was treated as unique.¹⁹²

Finally, although the decision falls short of self determination, Judge Merkel went as far as possible in this case to uphold the spirit of the principle. It fell short because international law expects self-determination to be the key criterion unless there are grounds for abandoning that approach.¹⁹³

The Australian approach remains preoccupied with a descent test, which will need legislative reform in order to satisfy international expectations. Therefore, a legacy of *Shaw* is likely to be the continued use of sociobiological reasoning in questions about Aboriginal identity in the absence of law reform. This will not only ensure that self-determination is ignored it will exacerbate the effects of colonial rule. For instance, Justice Merkel approached the element of self-identification on the basis that what mattered more were the reasons why a person identified as Aboriginal rather than the fact that there might be objective evidence to that effect.¹⁹⁴ While this did not disadvantage any of the respondents in *Shaw*, it may do so in future cases where a judge accentuates that aspect.

Also of concern was the continued emphasis and concern with “opportunism” and “genuineness”.¹⁹⁵ Justice Merkel stressed that like “genuineness”, “opportunism” is an inherently difficult criterion to apply to self-identification of aboriginality.¹⁹⁶ The door is therefore open as to the place of these Trojan horses in the test for self-identification, viz., “...the Act mandates, and there is a public interest in ensuring, that only “Aboriginal persons” as defined, vote and stand as candidates under the Act.”¹⁹⁷

Yet, on his own reasoning, Justice Merkel observed that there was very little to be lost by the public or gained by an individual falsely asserting to be Aboriginal:

The Act and other legislative schemes for the benefit of Aboriginal persons are designed to provide benefits to remove past and present disadvantage by creating special opportunities

¹⁹⁰ *Id.* at 210-11.

¹⁹¹ *Id.* at 212-13.

¹⁹² *Id.* at 211 (“In my view the current Australian community accepts that the widely divergent and differing histories and experiences of the process by which an Aboriginal person acquires and develops an Aboriginal identity is, inherently, a process personal to and discrete for each individual.”).

¹⁹³ Instead, in *Shaw*, self-identification was treated as probative of descent. As mentioned above, international standards expect self-determination to be applied except where there are compelling grounds not to use that approach. *Shaw* discusses the concept of self-identification, and applies it to each respondent in the judgment, along with “descent” and “community recognition”. *Id.* at 210-13.

¹⁹⁴ *Id.* at 212 (“...it is the genuineness of the identification, rather than its content, that is the critical issue. To be genuine it is sufficient that the self-identification is bona fide and that the grounds for it are real and not hypothetical or spurious.”).

¹⁹⁵ *Shaw v Wolf* (1999) 163 ALR 205, 212 (Austl.).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 215.

for Aboriginal persons. In that context opportunism may be no more than taking advantage of the opportunities specifically created for such persons. Once the court is satisfied as to the genuineness of self-identification there is no need to consider the motives for it.¹⁹⁸

This was a question of balance for Justice Merkel, using the *Briginshaw* principle, but later judges may not be so cautious tempering a fear of opportunism on that basis or with due regard for fairness.¹⁹⁹

In addition, because Justice Merkel stated unequivocally that he agreed with the conclusions of Justice Drummond in *Gibbs*, this will add weight to that decision when instead the paths taken in each case to reach those conclusions was very different. In *Gibbs*, there was a sociobiological narrative underlying the reasoning of Justice Drummond. In contrast, Justice Merkel's decision went to great lengths to avoid sociobiological reasoning and although it remains problematic for the foregoing reasons and notably falls short of the international standard of self-identification it represents a step in the right direction.

IV. ABORIGINALITY AT LAW

Despite the variety of approaches taken to determine descent it is possible to discern the various elements and tests that have been used in the cases. The *descent test* has added many elements since it developed and these are discussed below.²⁰⁰

A. Descent

Typically, in litigation concerning the term *Aboriginal*, the issues in dispute will concern the ability to obtain statutory benefits or participate in statutory schemes designed to address injustices of the past. Resource access and inclusion are among the reasons given by *white* Australians for their need to measure or determine the *Aboriginality* of indigenous people.²⁰¹ De Plevitz and

¹⁹⁸ *Id.* at 212.

¹⁹⁹ The respondents were given the benefit of the doubt that the petitioners had not discharged their burden of proof that the respondents were not of Aboriginal descent according to the *Briginshaw* principle (viz, in cases with serious or grave consequences for the accused, evidence against them should not be treated lightly). *Supra* note 187. *Briginshaw* was followed by *G v H* (1994) 124 ALR 353, 362 (Deane & Gaudron, JJ) (“...if there is an issue of ‘importance and gravity’ ... due regard must be had to its important and grave nature.”). This was also cited with approval as the correct approach to be taken in *Shaw*, 163 ALR at 215-216.

²⁰⁰ All the recent cases, from *Queensland v Wyvill* to *Shaw v Wolf*, applied this test with varying emphases on the many aspects applicable to it.

²⁰¹ De Plevitz & Croft, *supra* note 1, at 1:

In the era of colonial and post-colonial government, access to basic human rights depended upon your race. If you were a “full blooded Aboriginal native...[or] any person apparently having an admixture of Aboriginal blood”, a half-caste being the “offspring of an Aboriginal mother and other than Aboriginal father” (but not of an Aboriginal father and other than Aboriginal mother), a “quadroon”, or had a “strain” of Aboriginal blood you were forced to live on Reserves or Missions, work for

Croft observe that, “[t]he test has three elements, all of which must be proved by the person claiming to be Aboriginal: the person must identify as Aboriginal, the Aboriginal community must recognize the person as Aboriginal, and the person is Aboriginal by way of descent.”²⁰²

The third element, ‘the person is Aboriginal by way of descent’ can be determined according to biological criteria or according to cultural criteria and constitutes the descent test. However, in Australian courts, both sets of criteria whether biological or cultural, are ultimately sociobiological. This is because the cultural criteria are regarded as evidence of biological descent. Quite correctly De Plevitz and Croft condemn this test because *descent* has been judicially interpreted to mean “quantum of genes”.²⁰³ For De Plevitz and Croft this biological reasoning is a “misunderstanding of the scope of genetic science.”²⁰⁴ Without suggesting anything more than misunderstanding on the part of the judges concerned, this assessment does not go far enough. It treats this legal error as though it occurs in a vacuum when it is instead inextricably linked to relations of power even though the judges themselves may not realize as such.²⁰⁵ At one level subconscious thought is informed by prejudice justified according to metaphysical beliefs thereby allowing values associated with hierarchy and domination to inform the decision.²⁰⁶ At another level the indeterminacy of law and science provide an avenue for values associated with the reproduction and maintenance of power to be incorporated into the decision. This occurs because “The validity or truth-content of a theory cannot be resolved unequivocally on empirical grounds alone and, in this sense, all theories are empirically indeterminate or “factually underdetermined”.”²⁰⁷

In other words empiricism is not an objective, non-political schema able to be applied by either scientists or lawyers and judges to determine identity and categories of any sort. In practice, empiricism is often a veil for the exercise of

rations, given minimal education, and needed governmental approval to marry, visit relatives or use electrical appliances. The legacy of denial of education, self-government and dignity is omnipresent today.

Id. (original footnotes omitted).

²⁰² *Id.* at 2.

²⁰³ *Id.*

This test reflects a misunderstanding of the scope of genetic science. Though science can show a person is descended from particular ancestors it cannot prove that that descent is Aboriginal. A test of eligibility for benefits based on proof of Aboriginality according to Aboriginal laws and customs and administered by Aboriginal people would serve the same purpose as the biological descent test without its potentially divisive effects.

Id.

²⁰⁴ *Id.*

²⁰⁵ Peggy McIntosh, *White Privilege and Male Privilege*, in RACE, CLASS, AND GENDER: AN ANTHOLOGY 94 –105 (Margaret Andersen & Patricia Hill Collins eds., 1992) (explaining that often, white prejudice is completely unconscious yet so devastating in its effect).

²⁰⁶ For example, the theory of evolution is often the source for associated beliefs about human institutions in terms of “competition” and the “struggle for survival”, etc.

²⁰⁷ Tony Tinker, *Panglossian Accounting Theories: The Science of Apologising in Style*, 13 ACCT. ORGS. & SOC’Y 165, 173 (1988) (citing A. Giddens, 1979). Tinker elaborates on the problem of indeterminacy providing three specific limitations as follows: (1) The lack of prior independence between observational variables and theoretical variables; (2) The absence of satisfactory rules of correspondence for linking observational variables and theoretical variables; and (3) The conservative value biases inherent in empirical approaches that impede theoretical creativity and innovation. *Id.*

power under the guise that empirical classifications are scientific and hence *politically-neutral*. However, “[t]he factual indeterminacy of theories opens a vent through which individual scientists inevitably interject their social values. In this context, it becomes important to analyze how scientific discretion is deployed and exercised.”²⁰⁸

In terms of ascertaining *Aboriginal* the application of biological tests are ultimately a mechanism for mystifying²⁰⁹ an Indigenous reality which should be determined according to principles of self determination illustrated above.²¹⁰ In other words, the use of biological criteria to mystify social reality naturalizes the status quo in terms of social conflict and deprives Indigenous people of their identity and rights.²¹¹ Because classification is always indeterminate and political, legal categories will necessarily be flexible so as to afford judicial discretion to include or exclude depending on the personalities, power, nation, and capital involved.²¹² Justice Merkel implicitly recognised this relationship in *Shaw* by placing importance on the consequences of the classification for the adversaries in the case.²¹³

In calculating *descent*, the range of criteria used by courts can be loosely categorised into two sub-categories: (1) descent according to biological criteria or (2) descent according to cultural criteria. Both sub-categories are considered in turn. This is followed by a brief consideration of the remaining elements which have been variously applied to supplement the decent test, namely *self-identification*, *community recognition*, and legal jargon such as *ordinary parlance*.

B. Descent according to biological criteria (phenotypes, genes, and blood)

Before the law turned to modern biological criteria such as phenotypes and genes it previously classified race according to discredited scientific theories such as phrenology. Modern tools of biology do not improve the accuracy of classification and are just as political as their predecessor terms were decades before.²¹⁴ Neither *race*, nor *blood* nor *genes* nor *DNA* are conclusive criteria for the classification of a group of people and are, whether intended or not, in effect mechanisms for political objectives or justifications for oppression, domination and hierarchy.²¹⁵ As De Plevitz and Croft explain:

²⁰⁸ *Id.* at 176.

²⁰⁹ Reality is mystified in a process that presumes some variables to be immutable and other variables to be dynamic or dependent. As Tinker explains, “[a] theory may convey ideological biases in its immanent structure; particularly through its initial assumptions about what it takes as variable and susceptible to manipulation and what it treats as fixed and thus not open to question. ... The axioms for theories frequently serve as conduits for bias.” *Id.*

²¹⁰ See De Plevitz & Croft, *supra* note 1.

²¹¹ Tinker, *supra* note 207, at 176–77.

²¹² See generally SANDRA BERNS, TO SPEAK AS A JUDGE: DIFFERENCE VOICE AND POWER (1999); Duncan Kennedy, *Freedom and Constraint in Adjudication*, 36 J. LEGAL EDUC. 518 (1986). Both authors assert that these forces are not necessarily the only ones acting on a judge.

²¹³ *Shaw v Wolf* (1999) 163 ALR 205, 215-16 (Austl.).

²¹⁴ Jennifer Clarke, *Law and Race: The Position of Indigenous People*, in LAW IN CONTEXT 238 (Stephen Bottomley & Stephen Parker eds., 1997). In other words, genetic or DNA analyses are no better than methods involving terms such as *half-caste*, *full-blood* and *pure Aboriginal*.

²¹⁵ RICHARD LEWONTIN, THE DOCTRINE OF DNA: BIOLOGY AS IDEOLOGY, 36-37 & 77 ff. (2001).

The genesis of the test of descent lies in outdated scientific method that has no place in twenty-first century law. It is a *throw-back* to perceptions of race where the peoples of the world were defined as sub-species of humans according to their physical characteristics rather than their cultural differences. Furthermore, the test is in direct contravention of international human rights instruments which hold that one of the most basic human rights of any group is the right to define themselves according to their own customs and laws. International conventions to which Australia is a signatory utterly reject racial classification of humans according to genetics.²¹⁶

Yet biological terms appear in cases where the legal issue is the meaning of the word *Aboriginal*, and these terms are used to decide these cases.²¹⁷ Even when the bench is conscious of social-Darwinism and the politics of race and science, this is no guarantee that the resulting decision will be free of these sociobiological ideas.²¹⁸ Nor does the use of cultural criteria necessarily quarantine the judgment from sociobiological ideas.

C. Descent according to culture (culture, ethnicity, language, archaeology, sociology, historical records, and genealogy)

Courts also turn to many non-biological forms of evidence to determine *descent* such as archaeology, genealogy, history, linguistics, and sociology. These criteria are never determinate and this is expressly judicially recognised.²¹⁹ For some, they are juridical devices, reinforced through other state apparatuses for the maintenance and reproduction of nation and capitalism.²²⁰ However, these forms of evidence also tend to be sociobiological, not so much because of their methods,²²¹ but because of the question being asked. The question being asked is

²¹⁶ De Plevitz & Croft, *supra* note 1, at 5 (The original footnote 33 reads: “For example Article 9 Draft Declaration on the Rights of Indigenous Peoples, 1994”).

²¹⁷ See, e.g., *Queensland v Wyvill* (1989) 90 ALR 611 (Austl.); *Att’y Gen. (Cth) v Queensland* (1990) 94 ALR 515 (Austl.); *Gibbs v Capewell* (1995) 128 ALR 577 (Austl.). See also De Plevitz & Croft, *supra* note 1.

²¹⁸ *Shaw v Wolf* (1998) 163 ALR 205, 212 (Austl.) (pointing out that this will be inherent in a system of law that is not based on *self-determination* since it does not include Indigenous people at any level of the determination of the issue of *Aboriginality*).

²¹⁹ See *id.* at 219-22 (commenting on the unreliability of colonial documents as evidence in the context of *Aboriginality*); *Feio v Northern Territory* (1998) 195 CLR 96, 128 (Austl.) (recognizing expressly this indeterminacy stating in the context of native title, “[t]he underlying existence of the traditional laws and customs is a *necessary* pre-requisite for native title but their existence is not a *sufficient* basis for recognising native title.”).

²²⁰ BALIBAR & WALLERSTEIN, *supra* note 73, at 104.

²²¹ To some extent all disciplines will assume sociobiological ideas as a direct consequence of the process of theory construction, which provides a conduit for metaphysical beliefs to be assumed in the theory or in its application. See generally ANTHONY GIDDENS, *CENTRAL PROBLEMS IN SOCIAL THEORY: ACTION, STRUCTURE, AND CONTRADICTION IN SOCIAL ANALYSIS* (1979) (naturalising ideology). See also H.G. Hunt & R. Hogler, *Agency Theory as Ideology: A Comparative Analysis Based*

based on a fiction – the fiction that nations of people are natural phenomena (having evolved that way over time) rather than States created through violence (usually sudden acts of invasion, revolution, or war, and sometimes a process drawn over hundreds of years of violence as in the case of England). There are no natural *nations* only those constructed by force, by law and by ideology.²²² Therefore nations need to naturalise their existence as nations and sociobiology provides the necessary ideology as the ultimate source of naturalising justification.

Sociobiological justifications are ones that justify according to biology, nature or science in such a way as to imply or express *naturalness*. Balibar explains that there are two ideological elements maintaining the nation, and they are patriotism, which impresses the ideal *nature* of the nation, and *fictive ethnicity*, which makes the ideal nation a living reality.²²³ *Fictive ethnicity* is the process of constructing ethnic identity so the individual is born into a pre-existing unified national identity ordered (among other things) by race and language so that it appears natural and at the same time this natural national identity is stratified into further *natural* status-groups.²²⁴ The *Aboriginal race of Australia* is one of these status-groups. Like other status groups within a nation its identity will be linked to its relative place in the national hierarchy and this *rank* is *explained* according to naturalising phenomena, which is necessarily sociobiological.²²⁵

In other words the disciplines drawn upon by courts to identify *Aboriginality* will construct identity according to this model. Balibar and Wallerstein point out that ethnicity (or in this case *Aboriginality*) requires the construction and naturalisation of a fiction (the fiction of a natural nation).²²⁶ According to Balibar, this process of naturalisation occurs through the vehicles of language and race.²²⁷ Descent according to race was considered immediately above and typically means identity constructed through biological criteria.²²⁸

Similarly, language can also be a vehicle for the naturalisation of nationalism. The inculcation of language is something that is taught through the

on *Critical Legal Theory and Radical Accounting*, 15 ACCT. ORGS. & SOC'Y 437 (1990); Fahrettin Okcabol & Tony Tinker, *The Market for Positive Theory: Deconstructing the Theory for Excuses*, 3 ADVANCES IN PUB. INT. ACCT. 71 (1990); Tinker et al., *supra* note 207 at 167. It is also a mistake to consider science as more objective than social science. See, e.g., STEPHEN ROTHMAN, LESSONS FROM THE LIVING CELL: THE LIMITS OF REDUCTIONISM, 26-27 (2002); RICHARD P. FEYNMAN, THE MEANING OF IT ALL: THOUGHTS OF A CITIZEN SCIENTIST 20 (1998) (describing the uncertainty of science).

²²² BALIBAR & WALLERSTEIN, *supra* note 73, at 96 ff.

²²³ *Id.* (likening *fictive ethnicity* to a legal fiction).

²²⁴ *Id.* at 195–196 (discussing *status-groups*).

²²⁵ See generally Ardill, *supra* note 7 (Chapter 2). Within the Australian nation it is necessary to justify and naturalise national unity on the one hand (e.g. a single *white* Australian identity) while naturalising a hierarchal order on the other (the non-contested inferior social and economic position of Indigenous Australians). Sociobiology is an ideology sufficiently malleable to maintain this antagonism. Within sociobiology there are many irreconcilable dichotomies (e.g. competition and cooperation, selfishness and altruism, natural and artificial, etc.) suitable for the purposes of maintaining and justifying the antagonism between unity and hierarchy.

²²⁶ BALIBAR & WALLERSTEIN, *supra* note 73, at 96. (“[H]ow can [ethnicity] be produced in such a way that it does not appear as fiction, but as the most natural of origins?”)

²²⁷ *Id.* at 96-97.

²²⁸ *Id.* at 99 (“All kinds of somatic or psychological features, both visible and invisible, may lend themselves to creating the fiction of a racial identity and therefore to representing natural and hereditary differences between social groups either within the same nation or outside its frontiers.”)

education system, the family and the class in which people find themselves.²²⁹ Language as a vehicle for difference was once used to differentiate between *them* and *us*, and more recently within nations to order hierarchy.²³⁰ However, as a means of categorization, its malleability is also its weakness because by itself the language community is unable to produce or sustain ethnicity. Language can transcend the nation and be shared by many.²³¹ Like race, language is not fixed (or closed) as a means of categorisation, since although language is often fixed at birth the individual is capable of learning other languages, and is “constantly self-renewing” through time.²³²

In other words, by analogy, cultural criteria are also indeterminate and this facilitates additional judicial discretion in the determination of Aboriginality. The judge can declare that *descent* is not purely a biological question and is instead a question to be ascertained according to *ordinary parlance*. This means a judge can turn to equally indeterminate social and cultural evidence, which although not biological is nevertheless sociobiological at least at the conceptual level discussed above.²³³

To be more precise, in the *Yorta Yorta* cases,²³⁴ courts preferred colonial documentary evidence written by a squatter who dispossessed Indigenous people and a missionary determined to destroy Yorta Yorta culture to impose Christianity to hold that Yorta Yorta culture had been broken and *washed away by the tide of history*, over the oral evidence of the Yorta Yorta people and the fact that they still practiced their culture.²³⁵ The court imposed an impossible evidentiary burden that the Yorta Yorta people must prove their culture forward from 1788 to the present. It did this by demanding cultural proof of a bio-cultural lineage.²³⁶ In the language

²²⁹ *Id.* at 98.

²³⁰ *Id.* at 97.

²³¹ *Id.* at 99 (i.e. *Ancient Greek and Latin or literary Arabic*)

²³² BALIBAR & WALLERSTEIN, *supra* note 73, at 97. Although the language community seems to be more abstract than race:

... in reality it is the more concrete since it connects individuals up with an origin which may at any moment be actualised and which has as its content the common act of their own exchanges, of their discursive communication, using the instruments of spoken language and the whole, constantly self-renewing mass of written and recorded texts.

Id.

²³³ *Id.* at 56-60 (noting that racism remains connected to biological stories even though it is often expressed in cultural terms).

²³⁴ *Yorta Yorta v Victoria* [1998] FCA 1606 (Austl.); (2001) 180 ALR 655 (Austl.); (2002) 194 ALR 538 (Austl.).

²³⁵ See, e.g., *Yorta Yorta*, 180 ALR at 700-701 (“The tide of history has indeed washed away any real acknowledgement of their traditional laws and any real observance of their traditional customs.”).

²³⁶ De Plevitz & Croft, *supra* note 1, at 8:

While Aboriginal people may generally be direct descendants of the original inhabitants of their particular part of Australia, their lines of descent are not necessarily biological. Indigenous customary law does not rely on linear proof of descent in the Judeo-Christian genealogical form *Seth begat Enosh begat Kenan*. An indigenous person from Central Australia, for example, will have many fathers and mothers. A person may have been adopted into a Kinship group where there is no direct or suitable offspring to carry out ceremonial obligations. The place where a woman was when she first felt the quickening of her child within her womb: “links a person not only with a Dreaming and its track, but also

of sociobiology, Yorta Yorta culture had become extinct having lost the struggle for survival with the more competitive and dominant Western culture - an inevitable consequence of the forces of evolution.²³⁷

Biology and culture tend to supplement each other because neither can provide determinate results alone. This is apparent in the case analysis that follows. The fact that a legal system that is said to prefer individual autonomy, more-often avoids self-determination in favour of equally ambiguous testing, using the discretionary criteria of culture and biology suggests the mystification of power and domination. For this reason it is not possible to ignore the nexus between naturalising according to cultural or biological criteria, both of which are sociobiological, and relations of power which structure access to resources and order and maintain hierarchy. The only way to avoid indeterminacy is to embrace the international law standard of *self-determination*.²³⁸ Instead, this has not happened and courts have turned to other criteria such as self-identification, community recognition, and legal jargon.

D. Self-identification

Self-identification has gradually become more prominent in the cases concerning *Aboriginality*. The expression *self-identification* is not amenable to definition, and in the leading case of *Shaw*, Justice Merkel used it in the sense that "... it encompasses the process by which a person comes to recognise that he or she is an Aboriginal person."²³⁹

Initially it was dismissed as only relevant in *borderline* situations where some biological evidence (usually *blood*) was present but the amount was *insignificant* and it could also be shown that there was community recognition of that person. As a sole criterion, self-identification has never been sufficient.²⁴⁰ In explaining why it has not been acceptable, Justice Pincus reveals a basic contradiction in legal and liberal theory. After pointing out earlier cases had

with a place on the track where a particular ancestral event took place. This place is often referred to as the 'conception site'. A person retains a life-long association with his or her conception site and Dreaming" (*Hayes v Northern Territory* (1999) 97 FCR 32, 43-44). United Nations General recommendations on the interpretation of international instruments state the way in which members of a particular racial or ethnic group or groups are to be defined shall be based upon self-identification by the individual concerned if no justification exists to the contrary.

Id.

²³⁷ James F. Weiner, *Diaspora, Materialism, Tradition: Anthropological Issues in the Recent High Court Appeal of the Yorta Yorta*, in 2-18, LAND, RIGHTS, LAWS: ISSUES OF NATIVE TITLE 3 (Grace Koch ed., 2002), available at <http://www.aiatsis.gov.au/ntru/docs/publications/issues/ip02v2n18.pdf> (arguing this is a naïve view of culture as much as it is sociobiological. "[W]e can draw a contrast between what is consciously avowed as a principle of membership, self-identification or prescription for behaviour in a community ... and what is passed on below the level of consciousness and cannot be expressed from within the community as a 'principle'. Discussions of 'tradition' that have so far been proffered by legalists and other experts who are not anthropologists in regard to Aboriginal societies have concerned themselves exclusively with the first register of culture.").

²³⁸ See *supra* note 12, and accompanying text.

²³⁹ *Shaw v Wolf* (1998) 163 ALR 205, 212 (Austl.).

²⁴⁰ See *Queensland v Wyvill* (1989) 90 ALR 611, (Austl.).

interpreted the term *Aboriginal* to have its ordinary meaning, according to the *golden rule* of statutory interpretation,²⁴¹ Justice Pincus suggested “the ordinary meaning of *Aboriginal*, as used in the community, is a broad one. Ordinary usage would not apply the term to a person believed to have no Aboriginal ancestry, however closely associated with Aboriginals.”²⁴²

Individuals may be able to self-identify in a market through the choices they make as purchasers or consumers, but are not free to self-identify their status as people of one group or another. Implicit in this legal preference for biological descent over the autonomy of the individual is a respect for the State’s desire to control citizenship and to maintain the appearance that the law decides according to criteria rather than caprice. However, the choice reveals that the law is capricious to the extent that it applies biological tests that are as vague as individual self-identification might be. In other words biology provides discretion for the judicial classification of *Aboriginal* thereby maintaining colonial power and control over Indigenous people, as opposed to self-determination. It would be less capricious to contemplate self-identification according to liberal theory, Article 1 of the ICCPR, and the legal literature on adoption in customary law as part of the search for a *plain and ordinary meaning* of Aboriginal.²⁴³

Where self-identification has been used it is on the basis that it is either probative of *descent*, or a mere supplement to it. So for example, after taking judicial notice that there were few *full bloods* left on the eastern seaboard of Australia, Justice Drummond held that in borderline cases, where the indigenous person has only *limited* rather than *substantial* descent, either self-identification or communal recognition might tip the balance sufficiently “to result in the person in question being described in ordinary speech as an Aboriginal.”²⁴⁴ Before *Shaw*, it was unclear whether the test for self-identification was subjective or objective. After that case, the test for self-identification is clearly subjective.²⁴⁵ Even though a subjective test is welcome it remains unsatisfactory because the judicial approach is clouded by an evaluation of *genuineness* and *opportunism*.²⁴⁶ Any alleged opportunism or absence of genuineness, if it is an issue at all, is surely a question for the relevant indigenous community itself in accord with the principle of self-determination. Unfortunately, community recognition is an accepted judicial element for reasons other than the facilitation of self-determination as the following analysis reveals.

²⁴¹ See ALASTAIR MACADAM & TOM M. SMITH, STATUTES: RULES AND EXAMPLES 240-41 (2nd ed. 1985).

²⁴² *Queensland*, 90 ALR at 616.

²⁴³ Liberal theory privileges “individualism” as does Article 1 of the ICCPR. For literature on the customary law of adoption: See generally AUSTRALIAN LAW REFORM COMM’N *supra* note 51; Flynn & Stanton, *supra* note 92, at 75.

²⁴⁴ *Gibbs v Capewell* (1995) 128 ALR 577, 581, 583 (Austl.).

²⁴⁵ See *Shaw v Wolf* (1998) 163 ALR 205, 211 (Austl.).

²⁴⁶ *Id.* at 212 (Justice Merkel remarked, “[i]t is the genuineness of the identification, rather than its content, that is the critical issue.”); see also *Gibbs*, 128 ALR at 584.

E. Community Recognition

Unlike the Victorian and liberal view of individuality, the weight of opinion today is that identity is socially constructed in the sense that it is a two-way dialectical process.²⁴⁷ Yet until *Shaw*, self-identification and community recognition were taken as entirely separate concerns – as supplements to the descent test.²⁴⁸ As an element in the descent test, Justice Pincus explained that community recognition would exist where an individual had “received recognition as an Aboriginal by Aboriginal organizations”²⁴⁹

Community recognition did not become part of the test for Aboriginality because the judiciary was determined to honour self-determination. It was introduced, as was the case with self-identification above, as a filter for situations where a person might have Aboriginal *blood* but was otherwise morphologically *European* and had not been raised in an Aboriginal *environment*.²⁵⁰ To be sure this was the approach of Justice Pincus at first instance in *Queensland v Wyvill*, an approach endorsed on appeal in the Full Federal Court albeit with a slightly different emphasis and different result.²⁵¹ The Full Court expressed concern about the *precision* of community recognition, which was accepted in the later case of *Shaw v. Wolf* as a legitimate concern but not one that precluded its operation.²⁵²

Taken together self-identification and community recognition could and should constitute the basis for *self-determination* provided they are processes controlled by Indigenous people.²⁵³ However, while the descent test remains dominant and indigenous people are not the actual decision-makers in the process, community recognition will continue as a mechanism for the exercise of judicial discretion and therefore colonial control over Aboriginal identity.

²⁴⁷ See, e.g., LOUIS ALTHUSSER, *Ideology and Ideological State Apparatuses*, in LENIN AND PHILOSOPHY AND OTHER ESSAYS 127-86 (Ben Brewster trans., Monthly Review Press 1971); NICK MANSFIELD, *SUBJECTIVITY: THEORIES OF THE SELF FROM FREUD TO HARAWAY* (2000).

²⁴⁸ Compare *Gibbs*, 128 ALR at 585 (holding that either self-identification or community recognition (rather than both) could supplement the descent test where the person had insufficient (rather than *substantial*) Aboriginal *blood*), with *Shaw*, 163 ALR at 211 (Justice Merkel remarking that “[t]hese observations serve to emphasise the extent to which self-identification, although superficially discrete from the existence of community recognition, interacts with and is indeed a product of the social and communal framework surrounding an individual.”).

²⁴⁹ See *Queensland v Wyvill* (1989) 90 ALR 611, 617 (Austl.).

²⁵⁰ *Id.*

²⁵¹ Compare *Queensland v Wyvill* 90 ALR at 614-15, with *Att’y Gen. (Cth) v Queensland* (1990) 94 ALR 515, 523-24 (Austl.). On appeal, Justice Spender held:

“In my respectful opinion, neither the attribute of self recognition, nor recognition by ‘the Aboriginal community’ is a necessary integer in the ordinary meaning of an Aborigine. ... I am not to be taken as saying that, when a person has to decide whether a person is an Aborigine, the factors of self recognition, or recognition by persons who are accepted as being Aborigines, are irrelevant. In cases at the margin, where Aboriginal descent is uncertain, or where the extent of Aboriginal descent might, on one view, be regarded as insignificant, each of those factors may have an evidentiary value in the resolution of the question.”

Att’y Gen. (Cth), 94 ALR at 523-24.

²⁵² See *Shaw v Wolf* (1998) 163 ALR 205, 214 (Austl.) (Justice Merkel found in a few instances dealing with eleven individuals that there was mixed community recognition. This was then weighed up along with the evidence of descent and self identification.).

²⁵³ *Id.* at 268.

F. Legal jargon (ordinary parlance)

Various legal tropes are used in the cases to obscure the indeterminate nature of law and the associated discretion available to judges. Judicial discretion is possible through the invocation of the fact versus law dichotomy and through selective use of the many approaches to statutory interpretation. The effect of the exercise of judicial discretion through these tropes has been to restrict rather than enhance Indigenous self-determination.

Judges frequently invoke the fact versus law dichotomy, a distinction common in cases concerning identity and native title.²⁵⁴ This false dichotomy separating matters of fact and matters of law is a rhetorical trope which obscures judicial discretion and shifts the possibility for error to questions of fact rather than law.²⁵⁵ In this way the law can maintain integrity and authority.²⁵⁶ If the fact-law dichotomy was genuine then it could be expected that the law would not be decided according to Victorian notions of race based on crude biology, because the law decides legal questions according to legal principles, whether as a matter of legal positivism or the declaratory theory of justice.²⁵⁷ However, as the case analysis that follows will show, contrary to this assertion, the law elects to determine *Aboriginality* according to biological criteria where there is no legal requirement to do so, and even where it ought not to apply biological tests because it is contrary to international law.²⁵⁸

Another discretionary judicial device arises as a consequence of statutory interpretation. All judgments used in the following analysis made a point of stating that the expression *Aboriginal race of Australia* as it is used in statutes is to be

²⁵⁴ See, e.g., *Yorta Yorta v Victoria* (2002) 194 ALR 538, 564 (Austl.):

The critical question is whether the errors of law which were made at trial bore, in any relevant way, upon the primary judge's critical findings of fact that the evidence did not demonstrate that the claimants and their ancestors had continued to acknowledge and observe, throughout the period from the assertion of sovereignty in 1788 to the date of their claim, the traditional laws and customs in relation to land of their forebears, and that "before the end of the 19th century, the ancestors through whom the claimants claim title had ceased to occupy their traditional lands in accordance with their traditional laws and customs." If those findings of fact stand unaffected by error of law, the claimants' claim to native title fails and their appeal should be dismissed.

Id.

²⁵⁵ See *Att'y Gen. (Cth) v Queensland* (1990) 94 ALR 515, 519, 522 (Austl.).

²⁵⁶ The hollowness of this fact/law dichotomy is illustrated by the fiction of the doctrine of *terra nullius* embraced by Australian law between 1788 until 1992. It was overturned in 1992 as a matter of fact and law in *Mabo v Queensland* (1992) 107 ALR 1 (Austl.), where the High Court held that the common law had been based on an incorrect understanding of fact. As a result of the *Mabo* decision, a new fiction of Crown sovereignty has been applied according to *fact* and *law*. Crown sovereignty applies as a matter of law despite the myth of *terra nullius* because sovereignty is an international law issue and cannot be challenged in an Australian court, *Mabo*, 170 ALR at 20. The legacy of this fiction of *terra nullius* continues to apply as a matter of fact because in subsequent cases such as *Yorta Yorta*, the High Court accepted that the *tide of history had washed away* the rights of the Yorta Yorta people. *Yorta Yorta*, 194 ALR at 567, 570-71, 584-85.

²⁵⁷ See *Yorta Yorta v Victoria* [1998] FCA 1606 para 21 (Austl.); *Yorta Yorta v Victoria* (2002) 194 ALR 538, 564 (Austl.). At trial and on final appeal, the case was said to be determined according to law not according to righting the wrongs of the past or on notions of justice.

²⁵⁸ See *supra* notes 11 & 12, and accompanying text (contrary to the principle of self-determination).

understood according to its *plain and ordinary meaning* or according to *ordinary parlance*. This approach to statutory interpretation affords the judge discretion to ascertain meaning according to their opinion of contemporary views attributable to *society*. If it were possible to approach the problem objectively in this way, it stands to reason that whatever hierarchy exists in a society would be replicated in the attributed meaning of the words in question. In other words, if the society held racist views to justify a hierarchy based on sociobiological ideology then this approach (*viz., ordinary parlance*), if applied objectively, would inevitably reproduce those views in the judgement. Because there is no identifiable *community parlance* other than the judges' subjective speculation (usually by turning to dictionaries, which can often be tainted by subtle prejudice anyway)²⁵⁹ the absence of sociobiological reasoning will ultimately depend on the particular judicial officer's understanding of the literature on this topic because sociobiology is so ubiquitous and fundamental to Western hegemony and ontology.

Other approaches to statutory interpretation more likely to benefit Indigenous people are rarely contemplated. Judges might avoid the less beneficial results by turning to *extrinsic materials* such as Law Reform Reports, International Law, Explanatory Memoranda, and Parliamentary debates. These extrinsic materials provide an *indirect* means of interpretation in accord with the *rule* of interpretation that extrinsic material can be used to ascertain *mischief*.²⁶⁰ Reference to extrinsic materials would also be compatible with an approach to statutory interpretation according to the *rule* that a beneficial statute should be liberally construed in favour of the class of persons meant to benefit, or alternatively to apply the *mischief rule* so as to give the statute a purposive interpretation.²⁶¹ In addition, international law prefers self-determination, and where possible greater effect should be given to self-identification and community recognition than *descent*, in the absence of a system of self-determination. Of the several cases that have considered *Aboriginality* to date, only one case approached the issues in this way.²⁶² Finally, the international law principle of self-determination is exhorted by way of standpoint theory²⁶³ as the surest way to proceed in this area of law. In other words, these issues are best approached by starting with the standpoint of the most oppressed. In the context of *Aboriginality* this means self-determination according to Aboriginal laws, customs and traditions, and not according to colonial authority.

²⁵⁹ See, e.g., *Gibbs v Capewell* (1995) 128 ALR 577, 580 (Austl.) (Judge Drummond consulted the Macquarie Dictionary 2nd ed. which gave as the meaning of *Aborigine* the following anachronistic and racist definition: "one of a **race of tribal** peoples, the earliest inhabitants of Australia.") (emphasis added).

²⁶⁰ ALASTAIR MACADAM & TOM M. SMITH, *supra* note 241, at 8-10. In other words, to understand the *mischief* the legislation was meant to address.

²⁶¹ *Id.* at 243-45.

²⁶² *Shaw v Wolf* (1998) 163 ALR 205 (Austl.). In other cases only some, rather than all, of these considerations were entertained.

²⁶³ See Sandra Harding, *Comment on Walby's "Against Epistemological Chasms: The Science Question in Feminism Revisited": Can Democratic Values and Interests Ever Play a Rationally Justifiable Role in the Evaluation of Scientific Work?* 26 SIGNS 511 (2001) available at <http://www.jstor.org/stable/3175451>.

CONCLUSION

Australia has yet to apply self-determination to Australian Aboriginals despite its ratification of a significant body of international law. Yet other comparable jurisdictions, Canada, New Zealand and the United States have either implemented self-determination or they have embraced it in principle. That is to say, unlike Australia which is found wanting on the question of self-determination, these other jurisdictions 'all recognise the power and authority of Indigenous people to make decisions affecting their lives'.²⁶⁴

An analysis of the cases deciding *Aboriginal* identity has provided direct evidence of sociobiology in Australian law. This is because Australian cases apply anachronistic conceptions of biology such as blood, genes, DNA, etc., to sustain colonial control on the basis of *race*. Yet science has moved well beyond the Victorian view of a hierarchy of races. Instead science now accepts there is only one race – the human race. Even where judges seek to avoid overt sociobiology by turning to social and cultural evidence they necessarily fail because the question they asked was one presuming multiple human races.

This will continue to be the approach until Australia embraces the concept of self-determination and shares power with Indigenous people on that basis. It follows that sociobiology is present in law because Australia refuses to relinquish control over Indigenous people by agreeing to self-determination. The nexus between race, power, oppression, colonialism, nation, and sociobiology is clear in this area of law. There is direct evidence that the law uses sociobiology to determine Aboriginal identity.

²⁶⁴ Brennan et al., *supra* note 29, at 343.

