

# defining **'indigenous'**

*Between Culture and Biology*  
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This essay considers a range of discourses on identity and the definition of culture. I have little doubt that, generally speaking, Indigenous people are quite capable of defining the meaning of 'Indigenous person' or 'culture' in a way that satisfies their specific immediate needs and interests. My concern here is with the definition of 'Aboriginal or Indigenous person' in Australian law and legislation and with the critical response, by members of the scientific community as well as cultural theorists, to references to a biological basis of identity.

There is a considerable difference, I shall argue, between biology or genetics and what we understand to be identity, but this does not mean that identity can be reduced to an interpersonal or cultural construct. Since it isn't simply the case that culture has a biological, physical or material basis, but that any such representation is also cultural, a sense of a cultural-representational politics and its relationship to the question of self-determination are critical to these types of definitional questions. This would not only include the conceptualisation and definition of identity, but also the way culture, physiology or materiality is understood to relate. To adapt the insights of Michel Foucault, we might say that it is important, for political and ethical reasons, to highlight the relationship between knowledge, as a representational system, as traditions and discourses of what is held to be 'known', and power, as a type of enabling, capacity or determination of what can be or what is considered legitimate or recognised.<sup>1</sup>

The definition of who and what an Indigenous or Aboriginal Australian is determines who is eligible to claim Indigenous rights and entitlements under Commonwealth and state law and legislation. But, in addition, by establishing a relationship between a certain subject and

their attributes or properties, such definitions also determine what kind of things can fall under the scope of or can 'belong' to these terms.<sup>2</sup>

The relationship between a subject and what is considered to 'belong' to or characterise it is not simply determined through a descriptive process, since what is described is presumed to be an instantiation of what is to be defined. Meaning or definition is established by drawing on terms within an already established discourse or register. It may not be surprising to find, therefore, that definitions in legislation and law have tended to be rather circular, taking a form like 'Aboriginal person means a person who is an Indigenous person of Australia' (for specific examples, see below).

Legal historian John McCorquodale has noted that since the time of 'settlement' in Australia, Commonwealth and state governments have used at least sixty-seven classifications, descriptions or definitions of an Aboriginal person.<sup>3</sup> A range of cases has highlighted problems with the current definitions in use. For example, in *The State of Tasmania v. The Commonwealth* (1983), the High Court considered the definition of an 'Aborigine' for the purposes of s51(xxvi) of the constitution, in relation to the phrase 'laws with respect to the people of any race for whom it is deemed necessary to make special laws'. Deane J developed a three-part 'test' to determine the right to identify as an Indigenous person:

By 'Australian Aboriginal' I mean, in accordance with what I understand to be the conventional meaning of the term, a person of Aboriginal descent, albeit mixed, who identifies himself as such and who is recognized by the Aboriginal community as an Aboriginal.<sup>4</sup>

In *Mabo v. The State of Queensland* (1992) Brennan J adopted virtually the same test in relation to Native title:

Membership of the Indigenous people depends on biological descent from 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.<sup>5</sup>

This definition was adopted in the *Native Title Act 1993* and other federal legislation that allows for Indigenous rights and benefits.

In *Attorney-General (Cwlth) v. Queensland* (1990), the Federal Court considered this definitional matter in relation to letters patent, authorising the royal commission to inquire into the deaths in custody of 'Aboriginal and Torres Strait Islanders'. The Queensland government had argued that the royal commission could not inquire into the death of a seventeen-year-old boy in custody because he did not identify as Aboriginal and was not recognised by the Aboriginal community. The Federal Court, however, decided that Aboriginal descent was sufficient proof of Aboriginality.

In *Gibbs v. Capewell* (1995), the Federal Court considered the meaning of the statutory definition of an Aboriginal person in the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cwlth). The ATSIC Act defines an Aboriginal person as ‘a member of an Aboriginal race of Australia’. Drummond J held that parliament’s intention was ‘to refer to the group of persons in the modern Australian population who are descended from the inhabitants of Australia immediately prior to European settlement’.<sup>6</sup>

Recently, Mick Dodson, the Aboriginal and Torres Strait Islander Social Justice Commissioner, noted that judges have tended to define descent by reference to ‘pseudo-scientific concepts such as “genetic inheritance”, “quantum of Aboriginal genes” and “one sixty-fourth or one thirty-second Aboriginal genes”’. They have held that “Aboriginal genes” are a necessary, but not sufficient, element of Aboriginality.<sup>7</sup>

In *Shaw v. Wolfe* (1998), the Federal Court again considered the meaning of ‘Aboriginal person’ for the purposes of the *ATSIC Act 1989*, in particular, insofar as that Act provides that a person is entitled to vote in a regional council ward election as an Aboriginal or Torres Strait Islander person.<sup>8</sup> In a finding that echoed that of Drummond J, Merkel J held that descent was the cornerstone of Aboriginality. In this particular case some of those alleged not to be Aboriginal identified as Aboriginal, were acknowledged by the relevant Aboriginal communities as Aboriginal, but had difficulty verifying this by way of documentary or ‘archival’ evidence. This is hardly surprising due to the inadequacies of colonial archive-keeping, and past policies of removal, discrimination, dispossession and persecution that would have undoubtedly given reason for individuals and groups to ‘conceal’ their identity or ‘assume’ another. Tasmania was the site of a concerted effort to completely eradicate all Indigenous inhabitants, an effort that led to a widely held belief that Tasmania’s Indigenous population ceased to exist. For some the dispute brought back traumatic memories of the past. Some went as far as to seek genetic tests to verify their Aboriginality, while others felt that, in attempting to prove their identity to the satisfaction of the court, they had much to lose and little to gain and that the process was too upsetting. Conflicting or ambiguous historical records, for example, may leave the answer to the question of descent unclear.

These approaches, I argue, set up a problematic separation of the ‘cultural’ and the ‘biological’ conditions of identification that reflects a particular understanding of identification. Presenting the test as objective masks the assumption and consolidation of non-Indigenous authority with respect to the definition of culture and identity. This form of naturalisation derives its authority from its assumption of objectivity, so that the genetic construction of cultural or racial identity is taken to be a description of certain ‘real’ characteristics and not a conceptualisation or representation.

Thus, apparently descriptive acts are in fact both normative and performative. As Mick Dodson has argued, while these definitions are presented as if they are objective fact, they are ‘infinitely elastic’:

the definitions have served to meet the various and changing interests and aspirations of those who constructed them, the colonizing or ‘modern’ state. Where there was a need to create a boundary between ‘primitive’ and ‘modern man’, to legitimise ‘progress’, to justify particular economic and political developments, to promote a national identity for a colonial nation, or more specifically to control, manage or assimilate Indigenous cultures, Aboriginality has been made to fit the bill.<sup>9</sup>

When looking for an answer to the meaning of the term ‘Aboriginal person’, judges often refer to ‘conventional usage’ (to recall the words of Deane J in *Commonwealth v. Tasmania*). ‘Convention’ led the judges to the three-part test and the emphasis on descent as genetic or biological descent. Of course, convention is not universal or consensual. There are Indigenous conventions that differ greatly from those accepted by the judges.<sup>10</sup> Indeed, in scientific circles, as we will see, it is likely to be *unconventional* to associate cultural, ethnic or racial identity with genetics.

#### — RACE AND GENETICS

Let us stop for a moment and consider the description of descent referred to by Mick Dodson above, that of ‘one sixty-fourth or one thirty-second Aboriginal genes’. Putting aside our understanding of descent in terms of ancestry, how could a person have genes differentiated or fractionalised in this manner? Geneticists have recently intervened in the debate concerning the genetic or biological basis for racial or ethnic categories. *Science Magazine*’s Eliot Marshall, following the argument of Yale University geneticist Kenneth Kidd, states ‘there’s no such thing as race in [modern] *Homo sapiens*’ and recommends, along with the American Anthropological Association, that governments ‘do away with racial categories and, in political matters, let people define their own ethnicity’.<sup>11</sup> Somewhat in keeping with this, the Australian Law Reform Commission and Australian Health Ethics Committee have suggested that the meaning of Aboriginality should rely upon ‘a social construct of identity’.<sup>12</sup>

These observations are important; nevertheless, significant problems arise from the idea that Indigenous cultural identity can be reduced to political or personal or social matter. While the suggestion that differences would be better understood as cultural is drawn from the simple scientific fact that DNA and genetics provide no basis for this type of differentiation and is motivated by anti-racist sentiment, it could have the effect of undermining ‘special’ rights provided to groups based on certain forms of identity or cultural

membership. Indeed, part of the difficulty with this approach stems from the way it assumes a common ground in terms of which identification is understood. This position tends to posit humanity as a general category, which assumes varying forms according to differing social, historical, physical, material and environmental conditions. Culture, society and belief systems are built on top of basic physical, biological facts. Indigenous cultures are thus understood as *types* of culture, Indigenous identities as *types* of identity. My point is not to dispute this project, but rather to argue that it is not politically or culturally neutral either.

Consider, for example, the claim that Indigenous cultural identity can be understood as a self-perception, as a social identification and set of experiences associated with that identification. Identity is thus reduced to social and psychological conditions, which, for example, urban, dispossessed Indigenous persons may find themselves unable to satisfy. This highlights how moving or shifting the basis of identification from physical or biological conditions to social and environmental conditions is not less naturalising, normalising or objectifying. Instead such a shift may perpetuate new ‘conditions of identification’ as if they are objective events in the ‘real world’ rather than a form or system of representation. It may even be that such an approach seems to make identification more contingent and therefore fragile.

As Paul Rabinow has noted of the biologicalisation of identity that he associates with the modern geneticist’s approach to humanity:

the identification of DNA with ‘the human person’[is] ... a self evident synecdochial relationship—the part literally stands for the whole ... To equate ‘the human person’ with body parts or with DNA is to provide a solution to a problem that has not yet been adequately posed.<sup>13</sup>

The ideology of colonialism has been historically tied to the promotion of a certain notion of ‘the human’. Indeed, as critics such as Franz Fanon have argued, the notion of the human has been used to justify and legitimise all sorts of dehumanising activities: the persecution of those deemed less human; the implementation of policies aimed at humanising those less ‘civilised’ or ‘advanced’; as well as murder, displacement and destruction. From the perspective of the colonised the rhetoric of humanism, humanity and mankind is not so convincing. As Fanon has argued, the colonisers ‘[l]eave this Europe where they are never done talking of Man, yet murder men everywhere they find them ... today we know with what sufferings humanity has paid for every one of their triumphs of the mind’.<sup>14</sup>

These criticisms highlight the link between the devastating legacy of colonialism and the ideology of humanism and humanity, where the universalisation of a particular understanding of humanity was not only used to justify the imposition of European ideals and

mores, but also frequently defined aspects of non-European society and culture as inhuman. As Fanon has observed, the ontology of 'Man', once recognised as a notion that emerges from a specific political, cultural and geographic understanding,

does not permit us to understand the being of the black man ... His metaphysics, or, less pretentiously, his customs and the sources on which they were based, were wiped out because they were in with a civilization that he did not know and that imposed itself on him.<sup>15</sup>

Within the economy of this discourse, both difference and similarity are read in terms of an already presupposed generalised notion. The 'black' person is like the 'white' person insofar as they are seen to conform to certain normative ideals and different insofar as they do not.

#### — DIFFERENCE AND SIMILARITY

In the observations of early 'explorers' the differences between European traveller and the Indigenous peoples of Australia were typically represented in physical and bodily terms, or rather they took physical attributes to indicate broad social and cultural characteristics. In this way, skin pigmentation, physique, manner and clothing were taken to measure their distance from their 'civilised' and 'modern' visitors. In 1699, William Dampier put considerable emphasis on two adjectives in his descriptions of 'the Australian Aborigines' he encountered: 'black' and 'naked'.<sup>16</sup> In the later writings of Joseph Banks (1796), James Cook (1784) and Charles Sturt (1833), these two points of reference were expanded into a network of attributes and characteristics that centred on 'primitive-ness' and an apparent absence of 'civilised' technologies.<sup>17</sup> Aboriginal Australians became one of the most studied peoples in the world, their value as objects and subjects of inquiry tied to their perceived temporal location in the development of human society, civilisation, spirituality and biology.

Thus, descriptions of Aboriginal persons described not only Aboriginal culture, society, anatomy, physiology or biology, but also, by extension, their relation to the non-Indigenous subject, read against the backdrop of a notion of humanity in general. Each point of reference—the shape of the skull, skin pigmentation, implements and technology, forms of subsistence, religious systems and beliefs—more or less marked out the presumed place of Aborigines and Aboriginal society in relation to some postulated system, historical model or form.

But, of course, as Michel Foucault has observed in his account of the emergence of the human sciences, these various discourses that located, categorised and described the characteristics of various 'human types' did not simply represent what was encountered, 'discovered' or observed. The idea of humanity is inseparably tied to a set of interests and concerns; it both produces a certain way of conceiving and understanding the world and is produced by

a particular and historically specific cultural, political and philosophical configuration. As Foucault notes:

There can be no doubt, certainly, that the historical emergence of each one of the human sciences was occasioned by a problem, a requirement, an obstacle or practical order [within a particular social, cultural and political context.]<sup>18</sup>

In other words, the truth of the human is not taken to be tied to any particular empirical subject or historical or cultural event or context; its generalisation beyond such contexts or instantiations depends upon this. However, the idea itself is inseparably marked by its historical genesis. Indeed, as critical philosophy has long been aware, the study of humanity often fails to consider its own conditions of possibility.

We imagine that we can properly delineate between what is cultural and what is biological, genetic or physiological, as distinct and different ways of describing or understanding humanity. Nevertheless, in a sense, such postulation itself belongs to and emerges from culture in the broad sense. Similarly, it is possible to conceive of a basis of Indigenous identification that is more substantial than what we understand to belong to 'the cultural' or 'the social'. To reiterate, my point here is not to deny the usefulness and importance of the notion of 'human', but rather to highlight the dangers implicit in the conflation of identity with genetic or biological representations of human beings.

In some ways, the problem is more to do with the assumption that, since genetics and biology do not support or justify a robust physiological basis for differentiation along ethnic or cultural lines, cultural difference and identity are more to do with experiences, knowledges and systems of beliefs. Of course, this not only overlooks the way this assumption places itself outside of 'the cultural', but also fails to consider alternative ways of differentiating that do not hinge upon the presuppositions of racial biology.

Here, as Gayatri Spivak has observed, it is useful to consider the way in which 'representation' is best understood as having two interrelated senses: 'as "speaking for", as in politics, and ... as "re-presentation", as in art and philosophy'.<sup>19</sup> Keen to reveal the politics of the conditions under which representation becomes possible, she insists that we not conflate the two senses but rather consider how 're-presentation', in the sense of depiction, definition or characterisation, can fix or delimit what counts as 'representative', as well as the way re-presentation always already implies and posits a representor or a 'speaking on behalf of'. At the very least, this prompts us to consider what and who is framing the non-Western as 'authentic', 'autonomous' or 'representative' and so alerts us to the fact that, as Jacques Derrida has observed, 'the very project of attempting to fix the context of utterances, [meanings or identities] ... cannot be apolitical or politically neutral ... and [is] never a purely theoretical gesture'.<sup>20</sup>

While the suggestion that identities are articulated relationally can be accepted as a universal proposition, criticism of the allegedly essentialist tendencies of representations of Indigenous cultures and cultural identities has led Andrew Lattas to argue that the critique of essentialism 'has come to operate recently as a "truth effect" in Aboriginal Studies; it has become a common way by which white intellectuals can morally authorise themselves despite coming from varied political positions'.<sup>21</sup>

What is often overlooked by such critiques, as Lattas suggests, is the way in which they assume a generalisable notion of culture or identity: identity-in-general as constructed and as defined relationally. While an essentialist notion of identity may be politically dangerous, and may uncritically objectify and naturalise a specific notion of identity, a shift that objectifies and naturalises 'culture' as the condition of identification may be equally dangerous. As Lynette Russell has observed, there is an intimate relationship between the 'paradigm of Aboriginality as descent, dependent as it is on mathematically demonstrable genetic links' and the 'discourse of Aboriginality as culture-tradition'.<sup>22</sup>

Similarly, while cultural theory's problematisation of the objectivity of cultural categories may be theoretically correct, insofar as it brings into question the manner in which objectivity is constructed, this can also undermine the basis for the definition and protection of rights and cultural property. Culture, while including a 'world of "real" tangible objects and things', is taken to be principally a discursive complex or system not able to be thought of as 'real' or 'objective' independently of those to whom 'culture' belongs.

A subject's status as a member of a culture, like any relation of belonging, already presupposes a position from which they are recognised as such. Thus, from one perspective, culture is taken to constitute and orient subjects to 'a world' of things, actions, relations and meanings. While from another perspective, cultures can be appraised for their veracity or coherence. The problem, of course, is that the position from which cultures tend to be 'objectively' judged, verified and defined is typically derived from an assumedly 'neutral', but ultimately Eurocentric, perspective.

There are obvious contexts in which cultural differentiation is required, such as when trying to establish who is entitled for certain rights, properties or entitlements. Historical and social circumstances in Australia have created a situation in which clear and definitive definitions can be enormously difficult. However, surely the most appropriate approach to cultural definition is one that takes into consideration its link both to self-determination, since members of a particular group should be the ones to determine how they define themselves, and, in an obviously related way, to how definitions themselves emerge from and reflect cultural positions or perspectives.

Thus, while the notion of 'race' may be problematic, the shift into the vocabulary of 'ethnicity' or cultural identity may amount to an uncritical acceptance of an ethnocentric

and universalist notion of identity and culture. Ethnicity may emphasise the contingent and politically contested aspects of identity, but it both undermines the basis for a more substantial and ongoing claim and, in its crudest formulations, fails to critically consider the relationship between the corporeal specificity of cultural bodies and epistemologies of identification and knowledge. Indeed, it is not as if the vocabulary of 'race' is simply mobilised against Indigenous persons by non-Indigenous persons. As Russell notes, 'ironically Aboriginal people themselves frequently imply a genetic basis for their identity'.<sup>23</sup>

It may just be the case that enabling Indigenous peoples to determine the meaning of 'Indigenous or Aboriginal person' results in something very much like a biological definition, but if it did, it would do so because that was meaningful from that particular perspective. As Mick Dodson recommends, 'If the element of descent is to remain in Australian law as a test of Aboriginality, it should be interpreted in accordance with Indigenous cultural protocols'.<sup>24</sup>

How, then, should we distinguish among the uses of terms that appear to imply a commitment to a racial or biological notion of identity in Indigenous and non-Indigenous contexts? Of course, as I have suggested, the matter of who is defining who and its relationship to issues of self-determination is highly relevant here. We might also allow for what Spivak has called the 'catachrestic' use of names or terms to describe the way in which terms or words in colonial contexts are mobilised in a manner than resembles but differs from their use in colonial discourse.<sup>25</sup> As Spivak argues, the use of the terminology of colonial discourse can be catachrestic in the sense:

that everyone knows that the so-called adequate narratives of the emergence of those things were not written in the spaces that have decolonized themselves, but rather in the spaces [and terminology] of the colonizers ... There the question of essences becomes a question of regulative political concepts.<sup>26</sup>

Hence, the terminology of race may resonant with epistemologies of descent and genealogy or with a corporeal or material foundation of identification without necessarily ascribing to a notion of race as biology as it has been articulated within scientific racist discourse. Expressions are limited and restricted by the vocabularies and terminology available to them. As Dodson has argued:

The recent trend to charge self-representations by Indigenous people with the politically incorrect crime of 'essentialism' is little more than a modern extension of the politics of control over knowledge that has been going on since colonization ... Certainly, the practice of fixing us to our blood or our romanticised traditions has been a cornerstone of racist practices. But depriving us of our experiences with the past is another racist practice.<sup>27</sup>

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1. Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972–1977*, ed. Colin Gordon, Pantheon Books, New York, 1980.
2. This point is particularly pertinent with respect to questions concerning the perceived scope of customary law, for example, what can be claimed to be ‘Indigenous’ in the context of intellectual property or what might be considered ‘traditional’ with respect to Native title determinations. In particular, see *Yorta Yorta Peoples v. The State of Victoria & Ors* (1996).
3. John McCorquodale. *Royal Commission into Aboriginal Deaths in Custody, Annual Report* (1991) 11.12.5.
4. *The State of Tasmania v. Commonwealth* (1983) 1 CLR at 273–4.
5. *Mabo v. The State of Queensland* (1992) 2 ALR at 70.
6. *Gibbs v. Capewell* (1995) ALR at 580.
7. Aboriginal and Torres Strait Islander Social Justice Commissioner—Human Rights and Equal Opportunity Commission, *Submission G160*, 13 May 2002.
8. *Edwina Shaw & Anor v. Charles Wolf & Ors* (1998) AILR 26.
9. Mick Dodson, ‘The End of the Beginning: Re(de)finding Aboriginality’, in Michele Grossman (ed.), *Blacklines: Contemporary Critical Writing by Indigenous Australians*, Melbourne University Press, Melbourne, 2003, p. 33–4.
10. For example, in *Hayes v. The Northern Territory* (1999) AILR at 11 an Aboriginal woman testified that the place where an expectant mother first experienced the quickening in the womb:
  - links a person not only to a Dreaming and its track, but also 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.
11. Eliot Marshall, ‘Cultural Anthropology: DNA Studies Challenge the Meaning of Race’, *Science Magazine*, vol. 282, no. 5389, 1998, p. 654.
12. Australian Law Reform Commission and the Australian Health Ethics Committee, *Protection of Human Genetic Information* IP 26 (2001) ALRC, Sydney [12.26].
13. Paul Rabinow, *French DNA: Trouble in Purgatory*, University of Chicago Press, Chicago, 1999, p. 16.
14. Franz Fanon, *The Wretched of the Earth*, Penguin Books, London, 1969, p. 251.
15. Franz Fanon, *Black Skin, White Masks*, trans. Charles Lam Markmann, Grove Press, New York, 1967, p. 110.
16. William Dampier, ‘Encounter with Australian Aborigines (1699)’, in Robin Hanbury-Tenison (ed.), *The Oxford Book of Exploration*, Oxford University Press, Oxford, 1993, p. 390.
17. Hanbury-Tenison, pp. 406–8, 410–11, 428–9.
18. Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences*, Vintage Books, New York, 1970, p. 345.
19. Gayatri Spivak, ‘Can the Subaltern Speak?’, in Cary Nelson and Lawrence Grossberg (eds), *Marxism and the Interpretation of Culture*, University of Illinois Press, Chicago, 1988, p. 275.
20. Jacques Derrida, *Limited Inc*, trans. Sam Weber, Northwestern University Press, Evanston, Illinois, 1988, p. 132.
21. Andrew Lattas, ‘Essentialism, Memory and Resistance: Aboriginality and the Politics of Authenticity’, *Oceania*, vol. 63, 1993, p. 240.

22. Lynette Russell, *Savage Imaginings: Historical and Contemporary Constructions of Australian Aboriginalities*, Australian Scholarly Publishing, Melbourne, 2001, p. 16.
23. Russell, pp.15–16.
24. Aboriginal and Torres Strait Islander Social Justice Commissioner—Human Rights and Equal Opportunity Commission, *Submission G160*, 13 May 2002.
25. Gayatri Spivak, 'In a Word: Interview', in Naomi Schor and Elizabeth Weed (eds), *The Essential Difference*, Brown University Press, New York, 1994, p. 167.
26. Spivak, 'In a Word', p. 167.
27. Dodson, pp. 39–40.