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Ideologies of descent in linguistics and law

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ABSTRACT

Contemporary jurisprudence of self-determination draws on a trope of European conjectural anthropology, the *Stammbaum*, as it surfaces in documentary linguistics. This essay traces the work of linguist Ken Hale in Australia, first in linguistic phylogeny, later in endangered language documentation. It argues that linguists' linguistic ideology supports multiple metaphysics of collective legal persona: one in which shared speakership is diacritic of group cohesion, two in which possession of language as a kind of property is central to collective flourishing. It juxtaposes linguists' interventions in Australian indigenous land claims with recent debates among cultural property theorists as to the limits of property, and it proposes that linguists take a more active role in these debates. [*Stammbaum; Australia; native title; cultural environmentalism; Locke, Kenneth Hale (1934–2001)*]

1. From the Stammbaum to the legal person

Here I want to offer, to borrow an expression from Michel Feher, a "fragment for a history of" the legal body (Feher et al., 1989). Or rather, of the legal *person*, since my aim is to pick out one thread in the history of how one legal tradition has attributed legal personhood to certain kinds of social bodies. The tradition in question is actually twofold: on the one hand, that known as the common law, which, from humble beginnings in medieval England has come to flourish worldwide in the legal systems of the settler states descended from the British Empire; on the other hand, the system of positive international law that made its debut between the 1880s and the 1920s.[1]

As in the case of how anthropologists, cognitive scientists, and moral philosophers have distinguished certain forms of life as possessed of, or capable of possessing, personhood, language has played a key role in marking off legal personhood and particular legal persons.[2]

Obviously I am not the first to deal with this theme. Many are the efforts to retrace the origins of a well-known ideology in which language is understood to be the mark at once preeminently constitutive of and emblematic of collective political persona. Such collectivities, these now suspect theories hold, are consociational—bound together by a shared history and common communicative practice to which speakers of other first languages could not, in the first instance, gain access.[3] Stepping outside the hermeneutic circle of this social entity—Stamm, Volk, ethnos, gens, nation—is a political act. Through the work of Charles Taylor (harking back to Hegel), this act has come to be known as recognition. And though Taylor's own invocation of

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[1] Here I'm using *common law* to refer both to the common law *per se* and to the traditions of constitutional appellate law it has spawned, in particular in the United States, Canada, and Australia. Waldron (2005) discusses the contemporary relationship between common law-based appellate law and international law.

[2] On the language faculty as the mark of the human, see, e.g., Radick (2008) and Tomasello et al. (2005). On construing personal identity over time, see Johnston (2010).

[3] E.g., Taylor (1999, p. 153): "I am evoking the picture of a plurality of human cultures, each of which has a language and a set of practices that define specific understandings of personhood, social relations … and the like. These languages are often mutually untranslatable."

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Johann Gottfried Herder's conjectural theory of the origin of language was intended to reinstate recognition, and the comity it entails, as a condition ethically prior to the responsibility to one's own hermeneutic national affines, in practice the incorporation of a politics of recognition into international law and diplomacy has had the effect of reifying the consociational basis of political identification as an anthropological *a priori* of the law of collective self-determination (Bauman and Briggs, 2003; Cowan, 2008; Finlay, 2008; Jung, 2008; Markell, 2003; Sartori, 2008; Weitz, 2008).

Anthropologists commonly complain that political theorists and policy makers cleave to a retrograde tendency to reify culture. Asked to account for the persistence, in other disciplines, of an obsolescent Culture concept, critics point to canonical texts of Late Enlightenment conjectural anthropology. But textual authority does not exist in a historical vacuum. It is the product of a finely-woven mesh of interactions among historically specific actors among whom, in the case at hand, anthropologists figured prominently. It might be useful to have a close contextual working out of the networks between anthropology and law in the time when what we know as the law of collective self-determination was being hashed out. This is what I shall attempt.

In 1958 Ken Hale was wrapping up his PhD under Carl Voegelin at Indiana University. His dissertation was a Bloomfieldian structural grammar of O'odham, based mainly on work with a single informant over the previous three summers (Hale, n.d.a). But Hale had more ambitious plans for postdoctoral work. In a proposal he submitted that year to the National Science Foundation, Hale made the case for a systematic survey of genealogical relationships among the languages of Australia, something which, despite the efforts of Arthur Capell and Norman Tinsdale over the previous two decades, was as yet lacking. Hale hypothesized that the languages of Australia would turn out to comprise a single linguistic phylum. To illustrate what he had in mind he cited the Uralo-Altaic language family of northern Asia.[4]

This comparison gave me pause when I encountered it in Hale's papers, preserved at the MIT Archives, in 2007. Today, not only is Uralo-Altaic not considered a clear-cut instance of descent-based lineage, there is no longer any consensus that the Altaic languages—that is, Turkic, Mongolic, Tungusic, and depending on whom you ask, Korean and Japanese—constitute a set of languages descended from a common ancestor.[5] Hale's reference to Uralo-Altaic is not surprising. Though he did his graduate work in the Anthropology department, Indiana was by then well-established as a center of Uralic and Altaic area studies. I began to think about how a pretheoretical disposition to take single-parent descent with divergence as the null hypothesis of "normal" language formation (Dixon, 1997, p. 10; Mufwene, 2008) might diffuse from one academic discipline to another or from one areal, methodological, or institutional tradition to another. This disposition, what we might call the Stammbaum ideology, does not, of necessity, entail a corresponding disposition with respect to the emergence and development of peoples or *nations*. But the two tend to travel together as a package.[6] This is exemplified by the work of Wilhelm Schmidt, founder of *Anthropos* and leading practitioner of *Kulturkreislehre*, the diffusionist school of culture-historical ethnology that dominated anthropological scholarship in the German-speaking world up to the Second World War.[7] To Hale, O'Grady, and Carl and Florence Voegelin, Schmidt's pathbreaking treatise on the phylogeny of Australian languages, *Die Gliederung der australischen Sprachen*, constituted an authoritative source on Australian comparative linguistics more than 40 years after its publication (Fig. 1).

I became curious about the legal ramifications of the Stammbaum ideology, in particular, initially, for the definition of *persons* and *peoples* in the international law of self-determination. What had led me to Building 14N at MIT in June 2007 was Hale's subsequent involvement in endangered language activism, and it was the history of endangered language documentation and its implications for legal characterizations of cultural intellectual property that were my main quarry. Initially I was unaware Hale had ever been anything other than the generative syntax theorist his 35-year MIT affiliation and many contributions to syntactic theory (e.g., Hale, 1983) would imply.[8]

Yet Hale's earlier career, as a Boasian comparativist, turned out to shed a great deal of light on the question of how a set of commitments to the nature of language and language change might come to inform legal characterizations of people, peoples, and their possessions. Hale and his family spent a productive 2 years in Australia, and his work there became the basis for the Pama-Nyungan thesis, which we can state this way:

1. All the languages of Australia represent descendents of a single common ancestor, Proto-Australian, with the possible exception of the Tasmanian languages (about which not enough is known to make a determination, since the British

[4] The reference to Uralo-Altaic comes in a discussion of typological comparison, but Hale ties the theoretical value of typological characterization to the assumption that the languages in question belong to a single phylum, even if subgrouping analysis is not complete.

[5] On the current state of the Altaic controversy, see Vovin (2005). On the history of the debate, see Georg et al. (1998), and on the ideological linkage of language and descent in one northeast Asian Altaic language community, Graber (2012). Of related note, Stephen Wurm, a close collaborator of Hale's in Australian comparative work, started his career lecturing on Turkic philology in Vienna.

[6] This ideology has also taken root in archaeology and population genetics (Lamberg-Karlovsky, 2002; Atkinson and Gray, 2005).

[7] On *Kulturkreislehre* and Schmidt, see Penny (2008) and Strenski (2008). *Kulturkreislehre* is not to be confused with the contemporary British school of diffusionism, which was anathema to Radcliffe-Brown (see Kuklick, 2008).

[8] A reviewer suggests that Hale's contribution to generative syntactic theory was in the nature of a critique or at least contrary to discipline's conventions. Hale (1983) would be a case in point, since it dramatizes the fact that a phenomenon common in Warlpiri, the co-occurrence of null anaphora with free word order (specifically, word sequences in which constituency is denied), is inexplicable in Government-Binding Theory. I agree that Hale's work, in phonology (1973) and in syntax, embodies a willingness to step outside the bounds of the generativist program. At the same time, Hale's point in introducing the Non-Configurational parameter was to preserve the G-B program, not to propose a break with it, and he welcomed subsequent analyses that moderated his claims about Warlpiri, making it seem less different from the languages conventionally associated with generativist theory. Constituency, in fact, is crucial to the theory of argument structure he later developed (Hale and Keyser, 2002). Golumbia (2004) discusses the work done by the Non-Configurational parameter in generative syntax. On Hale generally (Keyser, 2001).

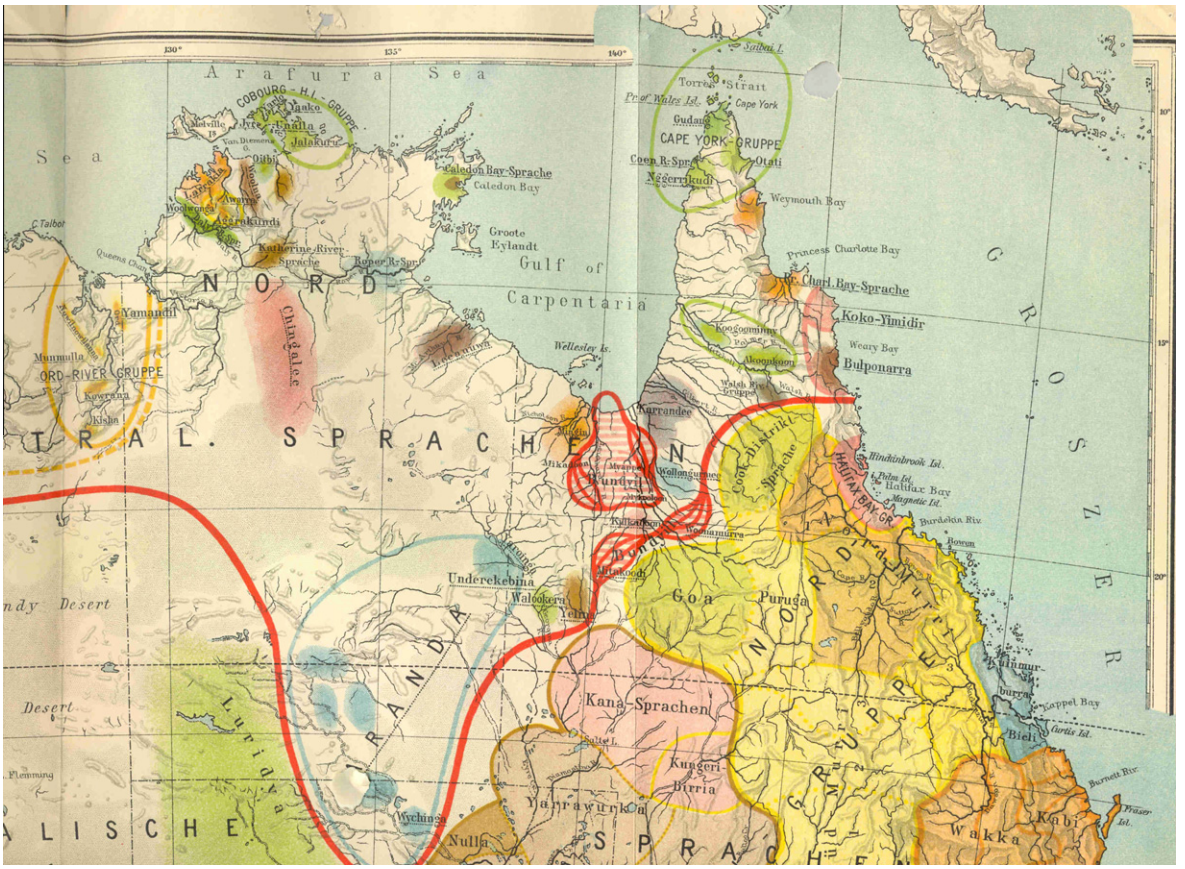

Fig. 1. *Kulturkreislehre* heads south. Detail of linguistic map, Cape York Peninsula and the Gulf of Carpentaria, from Schmidt (1919) *Die Gliederung der australischen Sprachen*. Thick red lines indicate Schmidt's proposed demarcation of distinct linguistic phyla corresponding to multiple waves of human migration into the continent. (For interpretation of the references to color in this figure legend, the reader is referred to the web version of this article.)

and French settlers of Van Diemen's land made a thorough effort at exterminating the Tasmanians in the 1820s) and those of the Eastern Torres Strait.[9]

2. *Most* extant or historically documented languages of Australia, extending over more than 80% of the landmass of the continent, represent descendents of a single common ancestor, Proto-Pama-Nyungan, with a time depth of approximately 5000 years (Bowern and Koch, 2004a). The designation "Pama-Nyungan," incidentally, was coined by Hale and his field partner Geoff O'Grady in conformance with the precedent set by Radcliffe-Brown in 1911 of naming the languages he encountered in Australia for the least-marked word for adult male (O'Grady and Klokleid, 1969, p. 301; cf. Schmidt, 1919, pp. 216–219).

In the language of science studies, we might say that by the early 1980s the Pama-Nyungan thesis had achieved closure, that is, it was no longer the object of active debate but the basis for ongoing work in theory-building. Which is not to say that it is without prominent critics.[10]

Hale and his colleagues faced considerable technical difficulties. For one thing, linguistic boundaries in Australia seemed to be considerably more fluid than in other parts of the word. Specifically, dialect continua defined by commonalities of lexicosemantic cognacy did not line up with those defined by commonalities of structural traits.[11] To accommodate this

[9] On my reading of the literature, an assumption that Proto-Australian is a genetic entity predominates, despite the caveats of Bowern and Koch (2004b, pp. 12–13). See, e.g., Evans (2005) and Sutton and Koch (2008), both reviews of Dixon (2002).

[10] See Aikhenvald and Dixon (2001, p. 7), as well as Hymes (1960b).

[11] In looking to define language boundaries on the basis of minima of lexicosemantic cognacy, the linguists in question were using lexicostatistics. Lexicostatistics and glottochronology referred to the theory that time since divergence between two languages descended from a common ancestor could be gauged by comparing the retention of shared forms for words denoting a certain inventory of basic concepts. These concepts were held to be universal and *culture-neutral*, thus, words for these concepts would, it was presumed, be (1) universally applicable in the comparison of languages, and (2) subject to a slow, regular rate of change that could be modeled as a Poisson process exhibiting simple exponential decay of the original lexical stock. The basic vocabulary test list was often referred to as a Swadesh list, after Morris Swadesh, who devised it. Hale found he had to make substantial modifications to the Swadesh list to make it suitable for Australian patterns of semantic selection (Hale, n.d.b, pp. 6–7; Hymes, 1960b). For a presentation of lexicostatistics as it was practiced at the time of Hale's fieldwork, see Hymes (1960a).

phenomenon, the formulators of the Pama-Nyungan thesis coined the terms "family-like language" and "phylum-like family" to refer to the gradient properties of dialect geography that obtained over much of the continent (O'Grady et al., 1966).

Hale himself faced a certain degree of interpersonal resistance from the Old Guard, notwithstanding strong backing from leading Australian linguist Arthur Capell. Legendary ethnographer of Arrernte oral tradition Ted Strehlow had no patience for Hale's efforts to use a Swadesh-type basic vocabulary test list to render linguistic phylogeny geographically legible in Central Australia. As he railed in a letter to Capell, the fact of 80 years of "disruptive white influences" made it absurd to think one could find informants who could give a coherent set of "dialectal forms of [Hale's] 100-word list" for any of the "dialectal units" of the Centre, let alone the ten Hale purported to map. Hale acknowledged he had been wrong to assume "that these dialects would still, to some extent, reflect the original state of affairs."[12]

Perhaps the most fundamental difficulty of applying the Stammbaum model in Australia was that the notion of a *first language* did not seem to make sense. This had been noted anecdotally by anthropologists as early as the 1930s. In their exposition of the Pama-Nyungan thesis, the coiners of "family-like language" propose that multilingualism, "so widespread in Australia as to be virtually universal," may be implicated in the phenomenon they are struggling to describe (O'Grady et al., 1966, p. 12). As Bruce Rigsby and Peter Sutton would argue 13 years later, in certain parts of Cape York Peninsula, the characteristic bond between person and language was not one of speaking competence but of custodial responsibility devolving from totemic affiliation. This bond they glossed as language *ownership* (Rigsby and Sutton, 1980; Evans, 2007). Through Sutton's work on land claims hearings then getting underway in the Northern Territory, the notion of language ownership became enregistered in the legal ontology of indigenous land claims in Australia (see Sutton and Palmer, 1980; Walsh, 2002).

One might suppose the fact that local political communities did not approximate to monoglot speech communities would militate against the use of language as a proxy for political persona in determinations, say, of indigenous land tenure prior to colonization. In fact, when procedures for hearing indigenous claims to Crown lands were put in place in the Northern Territory in 1977, land claims commissioners were instructed not to allow shared language to be used as a basis for recognizing the coherence of claimant blocs as landholding entities. To have a claim recognized, claimants had to demonstrate continuity of legal tradition and title since the onset of Crown sovereignty, i.e., the incorporation of the Northern Territory into the Colony of South Australia in 1824. In the model of indigenous political structure that informed the rules for evaluating claims, shared language was understood not to track land title. The Northern Territory Aboriginal Land Commission was guided by the *Aboriginal Land Rights (Northern Territory) Act 1976 (Commonwealth)*, which in turn reflected the recommendations of the Woodward Royal Commission. The Woodward Commission had been set up in 1973 in the wake of the Tent Embassy standoff of 1972, in which Aboriginal activists from New South Wales occupied the lawn of the Commonwealth Parliament in Canberra, demanding recognition as the embassy of a sovereign Indigenous power to the Commonwealth of Australia.

Up to this point, there had been just one land claim case in Australia, *Milirrpum v Nabalco*, decided in the Supreme Court of the Northern Territory in 1971. In *Milirrpum*, Edward Woodward was lead counsel for the plaintiffs. There, the trial judge, relying on a provincial high court ruling from British Columbia in the *Calder* case which would subsequently be substantively reversed by the Supreme Court of Canada, first recognized the political integrity and longevity of the Yolngu claimant group and the legal intelligibility of Yolngu law to British common law, then denied the Yolngu petition to forestall the granting of a mining concession at Yirrkala, on the northeast coast of Arnhem Land.[13] The Woodward Commission relied more or less on the account of Aboriginal political structure laid out by Alfred Radcliffe-Brown in his 1930 monograph, *The Social Organization of Australian Tribes*, as explicated by his former protégé W.E.H. Stanner in testimony to the Commission in 1973. As early as 1912, Radcliffe-Brown—then simply Brown—was aware that in many parts of Australia, speech community is coextensive neither with the landholding local group nor with the clan defined in terms of patrilineal affinal kinship.[14] In *The Social Organization of Australian Tribes*, Radcliffe-Brown cam close to admitting that the *tribe*, a theoretical structure defined on the basis of shared speech but tacitly assumed to constitute a biological or racial lineage over the chronological modulus of human migrations, was an empirically vacuous category as far as Australia was concerned. Yet he left the door open to a flexible interpretation of the status of language as a marker of Australian political differentiation, arguing that the heart of traditional law in Australia was the totemic kinship system, and the kinship system varied systematically by *tribe*, and thus, in principle, by language (Radcliffe-Brown, 1931, pp. 29, 32).[15]

The time in which Radcliffe-Brown was writing came at the tail end of an epochal shift in the social and jurisprudential ontology of international politics, a shift that was of a piece with the institutionalization of international law between the Berlin Conference of 1884–5 and the Paris Peace Conference of 1919. The Berlin Conference marked the onset of the crystallization of international law in a system of autonomous, self-perpetuating institutions. It did so by setting ground rules

[12] Strehlow–Capell–Hale correspondence, May 1962, Hale Papers, Box 91, folder "'Cousin of Fancy Man'/Misc." Manuscript Collection, MC 523, MIT Archives. On the Strehlows' (father Carl and son Ted) role in the ethnographic characterization of indigenous Central Australia, see Austin-Broos (2009) and Nicholls (2007). Strehlow's spleen in part reflected what Capell, in the letter to Hale in which he enclosed Strehlow's letter, characterized as the latter's "wellknown [*sic*] claim to proprietary rights in the Aranda language," but it also reflected his sense of having been marginalized in the discussions surrounding the organization of the AIAS and, more generally, his awareness that other linguists and anthropologists considered him a methodological relic.

[13] On *Calder*, see Foster et al. (2008).

[14] Rumsey (1989), Hiatt (1996), Sutton (2003), Williams (2008), Brown (1913), and Radcliffe-Brown (1931, 1935). On *Milirrpum* see Williams (1986). Peterson (2006) discusses the confusion surrounding Radcliffe-Brown's definitions of *clan* and *horde*; cf. Williams (2008, pp. 203–204 and 215–216, note 7).

[15] Williams (2008, pp. 204–207) discusses the confusion in *Milirrpum*, among anthropologists and jurists alike, surrounding attributions of group belonging on the basis of dialect versus clan.

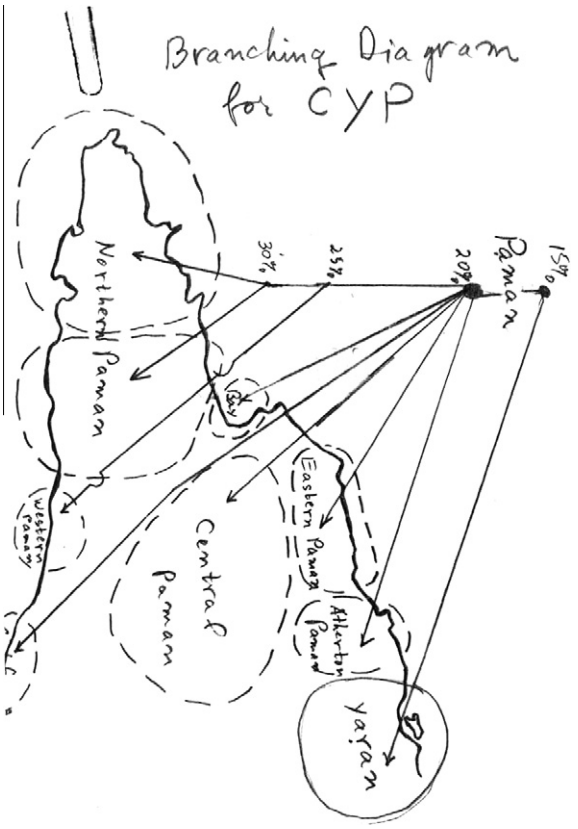

Fig. 2. Stammbaum redux. Hale's map of Cape York Peninsula, 1961 (Hale Papers, Box 146). Reproduced by permission of the Institute Archives and Special Collections, MIT Libraries.

among the imperial and would-be imperial powers for recognizing a stretch of country as vacant, belonging to no one, and thus subject to colonization at the whim of a sovereign power (Anghie, 2005; Bell, 2007b). The League of Nations represented the culmination of the process begun in Berlin and, with it, as Weitz (2008) has recently argued, the uncoupling of legal personality from territoriality. A population's claims of collective standing at international law, and, specifically, of self-determination, were to be validated not on the basis of *preexisting* territorial nexus (as witness, say, the multiethnic Ottoman and Austro-Hungarian Empires) but on the basis of the coherence of the population itself as a people. Weitz contends that the shift in the epistemology of legal personhood from one of territories to one of peoples provided the underlying warrants both for the jurisprudence of collective human rights and for the legal justification of forced removals of populations out of place.

By 1980, it was becoming apparent to the Northern Territory Aboriginal Land Commission that applying Radcliffe-Brown's definition of *horde*, or landholding local group, to the populations of Arnhem Land was not viable. Shared language emerged as a ready-at-hand alternative. And in the wake of the *Native Title Act 1993*, the speech community again emerged as an unassailable index of political community. In 1996, Ken Hale revisited data he'd collected on Cape York Peninsula 35 years earlier to prepare a brief for the High Court of Australia hearings in *Wik v Queensland*. *Wik* was the first major native title case since the High Court had recognized the existence of native title in the 1992 decision in *Mabo v Queensland No. 2*.[16]

At stake in *Wik* was whether extant native title might be found to exist even in places where long-term pastoral leases had effectively alienated the land into private hands.

In Australia, by contrast to North America, as a rule, land concessions for plantation agriculture, animal production, and mineral extraction come in the form of so-called pastoral leases, not in the transfer of fee-simple title. This is a legacy of efforts by the Colonial Office in the 1840s to maintain control of the settlement process in Australia and New Zealand from London.[17]

[16] On Australian native title case law, see Strelein (2009).

[17] On pastoral allotment squatting in southeastern Australia in the 1840s, see Weaver (1996). On governance at a distance in the nineteenth-century British Empire, see Bell (2007a).

To demonstrate that the Wik peoples had in fact inhabited the contested parts of Cape York Peninsula since prior to the start of colonization in 1788, Ken Hale used substantially the same type of glottochronological analysis that had prompted Strehlow's 1962 pen-lashing (Fig. 2).[18]

The vindication of the Wik land claims in *Wik v. Queensland* represented, among other things, the vindication of the Stammbaum as a device by which to reconstruct a cadastral record of the pre-contact era. In Hale's 1961 diagram, the Stammbaum is projected upon Cape York Peninsula as if it were the languages, and not just the populations, that had occupied the land since some point in the deep past. Land occupancy, I argue in the next section, is not the only mode of possession that, through the intervention of a linguistic ideology associated with documentary linguistics, has come to be articulated with theories of collective legal persona.

2. Language, property, and peoplehood

Throughout his career, Hale was a passionate advocate on behalf of the struggle for self-determination and land return of the people he worked with, above all in Australia. He was also a tireless proponent of the notion that fieldwork should be understood to be an integral part of linguistics, and of the training of native speakers of the languages of the Americas and Australia as linguists. At MIT in the 1970s and eighties, these were difficult positions to take. Arguably, Hale was the single most instrumental figure in sparking the revival documentary linguistics has witnessed over the past 15 years.[19] His 1992 special section of *Language*, "Endangered Languages," (Hale et al., 1992) is a watershed in the emergence of the contemporary endangered language documentation movement.

In his writings on the need for endangered language documentation, Hale made a two-pronged case. First, he stressed the need for a broad sample of the ways people have of relating linguistic form to meaning for syntactic theory. Second, he argued that in some communities, language represents a genre of cultural property that has been the object of creative elaboration to such a degree as to render the loss of language a form of theft. Reflecting on his work among the Lardil of Mornington Island, off Cape York Peninsula, Hale wrote,

Imagine a society of mobile extended family groups whose material wealth consists of the land, the tools of subsistence and defense (generally small enough and light enough to carry in the hand), some personal adornments, and ceremonial objects, generally hidden from view. The bulk of the wealth of the community is mental, a towering body of knowledge consisting of, among other things, ... artificial auxiliary languages (both oral and signed) embodying an abstract semantic analysis of the entire lexicon of the ordinary language and, in some cases, an invented phonology which systematically overturns certain canons of the ordinary language ... [Hale, 1997, p. 88].

Around the time Hale was calling for recognition of Australian languages as a form of wealth, a mobile extended family group of legal scholars, based mainly in North America and Australia, began to press for a jurisprudence of cultural environmentalism. The cultural environmentalists were alarmed by the increasing willingness of courts operating in the common law tradition to sanction private ownership claims in intangible goods whose provenance reflected the work of multiple actors, often over a span of many generations. Their aim was to create space for a robust public domain, or, in James Boyle's characterization, "the opposite of property" (Boyle, 2003). At the same time, as anthropologists such as Cori Hayden, Shane Greene, and Kimberly Christen and legal theorists such as Madhavi Sunder, Anupam Chander, Pamela Samuelson, and Rosemary Coombe have stressed, the *public* in public domain did not refer equally to all prospective beneficiaries (Hayden, 2003; Greene, 2004; Christen, 2005; Sunder, 2007; Chander and Sunder, 2004; Samuelson, 2006; Coombe, 1998) Nor, in light of the historical circumstances of territorial and intellectual dispossession that form a major part of the context for the present-day enclosure of the intellectual commons, should we *expect* contemporary representatives of communities affected by intellectual dispossession to embrace the public domain as a vehicle of restitution. Acknowledging the illusory romance of the public domain, some observers of debates over the legal status of indigenous cultural intellectual property argued that granting exclusive title in intellectual goods to communities of origin—where they can be unambiguously identified (Greene, 2004)—might represent a step toward a more equitable distribution of the social and economic benefits to be derived from capitalizing knowledge.

Lately, some legal theorists have grown uneasy with this extension of the writ of property, and have argued that to assimilate forms of custodianship so intimately tied to the terms in which the communities in question negotiate material, social, and metaphysical well-being to a property law tradition grounded in "possessive individualism" is to debase and potentially destabilize the native cultural environment. Perhaps, these doubters seem to suggest, we have reached the limit of what Jordanna Bailkin, in her discussion of cultural property struggles in metropolitan Britain ca. 1900, referred to as a culture of property (Bailkin, 2004).

In a recent article, legal theorists Kristen Carpenter, Sonia Katyal, and Angela Riley mount a "defense of property" (Carpenter et al., 2009). The common law tradition is elastic enough, they contend, to accommodate a renewed understanding of what property consists in, and it would be rash of activists for native self-determination to refuse to draw on the deep reserve of property case law to defend native interests. Drawing on Margaret Radin's pathbreaking 1982 article "Property

[18] Hale Papers, Box 146. Hale's analysis prompted alarm from at least one colleague who commented on a late draft of Hale's paper. One example: "Page 29, setting them up in a coastal strip – sure makes it simpler, but in general not very realistic. Maybe in some sorts of situations it's OK – e.g. on peninsulas – but in general, languages do not arrange themselves geographically that way."

[19] On implications of the documentary revival for linguistics, see Dobrin and Berson (2011).

and Personhood" (Radin, 1982)—written in the wake of the US Supreme Court's 1980 endorsement of full utility patents in lifeforms—Carpenter, Katyal, and Riley propose that certain parts of the human-shaped environment are so closely bound up with, in Radin's term, the human flourishing of particular collectivities, that they should be protected from encroachment from outsiders even though—or precisely because—they do not, for their titular custodians, bear the qualities of monetary commensurability, alienability, or susceptibility to sanctioned destruction, i.e., the usual "bundle of sticks" associated with property.[20] The common law, they argue, contains enough case precedent to support a theory of property as custodianship, rather than as occupation/possession.[21]

The relationship between language and legal persona, it would seem, has shifted from the definition of legal persona–possessing populations as those possessed of certain essential properties, shared monoglot language *primus inter pares*, to the assertion that the protection of certain properties is essential to the continued or renewed flourishing of particular legal persons. Is language among those certain properties? *Should* it be, should linguists be making the kind of arguments Hale and Sutton have made? As Shaylih Muehlmann (2008, 2012) points out, outsiders' casual, often well-intended assumption that language is essential to the peoplehood of marginalized native communities can wreak havoc with efforts within the community to come to grips with the facts of language shift. And as Lise Dobrin (2008) notes, in communities where individuals' personhood and political power are understood to derive, in the first instance, from an ongoing process of relating to outsiders, language revitalization can take on value not for what the language might do for the cultural coherence of the community but for what future benefits might devolve from connections forged with the outside consultants brought into set up the language development project.

Carpenter et al.'s discussion is limited to land and material resources, and I want to consider the implications of their argument, say, for language. In Carpenter, Katyal, and Riley's characterization, ownership and custodianship stand in opposition as possible intuitive bases of property. Hale's characterization of language as the wealth of a community would seem to refer to possession-as-ownership, whereas Sutton's characterization of language as possessed by totemic affiliation suggests possession-as-custodianship. Both characterizations attribute to language possession a legally productive entitlement whose moral force is laminated not to the social-constitutive role of continual reenactment of the possessory relation but to a static typification of possession *as* a moral entitlement. This, of course, is what defines property in liberal common law: the legal force of the property relation stems not from the conditions in which some thing was first subjected to the property relation, nor from the conditions under which one acquired that thing. Nor is it connected to any requirement to regularly demonstrate one's occupation or possession (Rose, 1985). It simply is—something does not stop being your property simply because you don't make use of it.[22]

Of course there is an exception to the static typification of possession embodied in the property relation, and that is adverse possession, the phenomenon whereby an adventitious occupant may, through a demonstrated commitment to occupancy over time and in the face of a protracted absence of such commitment on the part of the titular owner, acquire title to an estate. That adverse possession is the exception rather than the rule points to the fact that the tradition of property theory that grew out of the European early modern colonial enterprise has taken for granted that land is the natural referential prototype of property (Rose, 1998; Heller-Roazen, 2009, pp. 120–123, 163–165). The material properties imputed to land—i.e., rival claimants cannot simultaneously make use of a tract of land and an actor who has firmly established occupancy can exclude adverse claimants at will—have tended to naturalize the conventional character of property. Anthropologists' and cultural environmental theorists' ambivalence toward the use of the property idiom to stem the appropriation of the incorporeal indicia of disenfranchised collectivities reflects, among other things, anxiety surrounding the extension of the writ of private property to an ever-expanding domain of nonrival and nonexcludable substances (see Berson, 2010 for a review).

Rose (2003), grasping the conventional, historically mediated character of all property, land no less than language, is not fazed by the long-insisted-upon natural quality of property in land and the mooted ephemerality of incorporeal substances. Having arrived at a point where, through the pervasive availability of technologies for the objectification of image, sound, and gesture, intellectual capital has attained a salience once limited, in the North Atlantic property tradition, to land, we would do well to extend to intellectual property the full range of buffers against the moral hazards of unbridled commodification developed *for* land. These include, in the Stoic tradition that was so central to the making of early modern European law (Armitage, 2000; but see Benton and Straumann, 2010 for caveats), *res divini juris*, that which is immune to private capture by virtue of being sacred. In the realm of land, Rose proposes, a modern interpretation of *res divini juris* might provide a useful rubric with which to make sense of the status of wilderness preserves. In the intangible realm, "It is the canon, the

[20] On lifeform patents, see Kevles (2007). Kirsch (2001) offers a corrective to the readiness of some theorists to see continuity of land possession as intimately tied to continuity of culture in communities roughly of the sort Carpenter et al. have in mind (cf. Brown, 2010).

[21] Manning (2004) offers an instance where the tension between possession as sentimental belonging and possession as a productivist capacity to dispose of capital has been enregistered in the contrasting indexical roles associated with a spatial deictic, the Welsh *acw*, '[non-present] there.' The disemic indexicality of *acw* is exemplified in the difference between, say, "The house/congregation/village/union *there* [to which I belong]," and "The mine/firm *there* [that I own]." He traces the indexical disemy of *acw* to a Victorian reification of the domestic and the productive as disjoint spheres of activity.

[22] If anything, it is Hale's formulation—which, at first glance, seems more closely related to the property-as-ownership tradition Carpenter et al. are at pains to distance themselves from—that suggests the status of recurring performance of the wealth-like quality of language as a eudaimonically propitious activity. The section quoted above (Hale, 1997, p. 88) goes onto discuss Damin, a ritual coded sub-register of Lardil, the language spoken on Mornington Island, in the Gulf of Carpentaria. It is Damin Hale has in mind when he refers to coded registers "embodying an abstract semantic analysis of the entire lexicon of the ordinary language and, in some cases, an invented phonology which systematically overturns certain canons of the ordinary language." It was missionaries' preventing Lardil elders from conducting the initiation rites at which Damin was transmitted that led to the loss of the intellectual wealth manifest in the sub-register.

classics, the ancient works whose long life has contributed to their status as rare, extraordinary—and also a little wild, never quite capable of complete domestication even by the most erudite pedant. And lest we forget that all things godlike may be accompanied by lesser gods (or even false ones) and their representations, we might wish to include here too the iconography of modern commercial culture" (Rose, 2003, p. 109).

Here is where it would be useful for linguists to attend to how theories of possession and belonging that arose within linguistics have influenced the legal figuring of the communities that provided so much of the data for linguistic theorizing. For in his advocacy on behalf of indigenous land claims, W.E.H. Stanner extended Radcliffe-Brown's theory of Aboriginal Australian estate in a subtle but significant way. Prior to the convening of the Woodward Commission, Stanner served as an expert witness for the petitioners in *Milirrpum*. In his 1969 affidavit, Stanner stressed that his capacity to give a just account of Yolngu land law was hampered by absence of appropriate English words, and he felt compelled to coin a new phrase. Indigenous Australian collectivities held land not simply *in rem*, that is, in the thing itself, as a possession inviolate against all challengers, but *in animum*, that is, by virtue of filial descent from a totemic Ancestor who had fashioned the stretch of country in question in the cosmogonic era we refer to, after Stanner's own popularization, as the Dreaming (Williams, 2008, p. 203). Possession *in animum* held not just for the land itself, understood as what today we might call a lot or an estate, but as a plenum in which distinctive physiographic elements, plants and animals, and, as others would later argue (Evans, 2007; Rigsby and Sutton, 1980; Rumsey, 1989), language, were not just bound up with the land but constitutive of it. Insofar as we can hope to translate Indigenous Australian law into the common law, that which is subject to property is not the land *per se*, or not simply the land, but the Country. And the nature of that property might be something more akin to *res divini juris* than fee-simple freehold—with the caveat that the divinities in question are not gods in the Roman or Judeo–Christian–Islamic tradition but something specific to the cosmogony of the titleholders.

Under the sign of Country, and drawing on Carpenter et al.'s argument for a jurisprudence of property-as-custodianship and Rose's proposal for rehabilitating *res divini juris* for the intellectual property age, linguists might imagine a way to break out of the confines of the Stammbaum. The set of legally palatable arguments for an indexical relation between language and collective identity is not limited to those validated by the model of language change linguists have inherited from comparative philology. Principles of belonging and possession are manifold and defeasible, and linguists, through an awareness of how linguistics methodology structures their selection among these principles, might take a role in shifting legal figurings of belonging and possession away from genealogy and ownership.

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