Treaty of Waitangi Sovereignty-Talk: Lost Moments

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In 1828, twelve years before the signing of the *Treaty of Waitangi*, the Legislature of the State of Georgia passed a statute to assert control over Cherokee lands supposedly protected under the *Treaty of Hopewell*, signed in 1785.[1] The Cherokee turned to the United States Supreme Court for protection against this unilateral act of incorporation. In the second of the two Cherokee Cases, John Marshall CJ, talking about the relationship between the Cherokee and the United States of America, offered this by way of context:

> [T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence – its right to self-government, by associating with a stronger, and taking its protection. A weak State, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a State. Examples of this kind are not wanting in Europe.[2]

Marshall CJ, speaking for the Court, held the Georgia statute in question to be void. And he held that Indian 'nations' were distinct peoples with the right to retain independent political communities. Georgia's effort to impose its law on the Cherokee was deemed to be an illegitimate 'extra-territorial' act.

Marshall CJ's judicial opinion stimulated various fundamental questions relating to politico-legal identity in his time. Such questions have continued to flow. In a 1991 *Cardozo Law Review* essay on the topic of sovereignty Perry Dane asked the following questions: 'How would Marshall have drawn a ... cartographer's map [of Georgia]? Would it have included the lands of the Cherokee nation? Or would Marshall have drawn the Georgia state lines around the Cherokee nation?'[3] Dane responded to these questions as follows:

> I suspect that Marshall might have insisted on drawing two maps. In one, Georgia and the Cherokee nation would be separate states. In the other, they would not. To say that the Cherokee were 'extra-territorial' was, I think, for Marshall both an exercise in the imagery of state exclusivism and, also, a transformation of that imagery. The Cherokee could be both inside and outside Georgia. They can (I am less certain that Marshall would agree with this) be both inside and outside the United States. That willingness to draw two maps, or three maps or four maps is, as much as anything, the surest sign of sovereignty-talk at its most mature, its most expansive, its most real. Indeed, I would be willing to generalize from Marshall's procedure: Sovereignty-talk, at its best, comprehends the willingness and the ability to hold, in tandem, apparently contradictory images of the relationship between self and other. It is the ability to insist on absolute dominion, and yet also

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1 For details of this treaty see R Dawson, *The Treaty of Waitangi and the Control of Language* (2001) 57.

2 *Worcester v Georgia*, 6 Pet (31 US) 515, 561.

3 P Dane, "Maps of Sovereignty: A Meditation" (1991) 12 *Cardozo L Rev* 951, 990.

> recognize the dominion of others, or to comprehend the possibilities of equality even while comprehending a relationship of hierarchy. It is an exercise of craft – legal craft – in which these different images all find their respective places and their appropriate contexts. It is the epistemic courage to see that these images need not be reduced one to the other, or to some single compromise position that is unfaithful to them all.[4]

How are we to judge Dane's judgments about different kinds of sovereignty-talk? Dane seems to be claiming that there is a virtue in ambiguity. If so, how could this possibly be? Are we as lawyers not to value highly a technical language in which precise ideas are to be conveyed in precise terms?

The subtitle of Dane's essay is *A Meditation*. A meditation! What connection does the activity of meditating have to do with the activity of being a lawyer? Is not meditating some sort of religious activity, and thus outside the law? Against those questions, however, does not Dane sound like a lawyer, confidently speaking with the language of sovereignty? Is he not writing from inside the law? In his own sovereignty-talk Dane seems to be offering the 'contradictory images' that are his subject. He seems to want to render problematic the sharp distinction between inside and outside.

Dane's topic of sovereignty has affinities with Marc Poirier's 2002 *Cardozo Law Review* essay on 'the virtue of vagueness' in property takings law.[5] Poirier dissents from what 'appears to be an almost universal assumption' that the 'vagueness' of takings law 'is a bad thing, a mysterious dysfunction.'[6] Poirier argues that 'vagueness in takings doctrine is quite functional and entirely appropriate' – and indeed 'inevitable.'[7] He adheres to a 'dialogical conception of law', which in the context of his topic is associated with his talk of property as 'a kind of social relation that is renegotiated over time as circumstances change.'[8] He argues that the 'process of undertaking negotiations' on whether or not compensation for a 'taking' of 'property' is due 'may well promote a sense of belonging to a civic community that is essential in times of transition or crisis'.[9] Matters of agreement and disagreement can become intimately tied together: 'even as we argue endlessly, we may reaffirm our participation in the community and its conflicting values.'[10] So-called 'essentially contested concepts' such as property, 'and the endless debate they engender, are in an important sense constitutive of community.'[11] Those people or peoples whom insist on fixed rules, along with a static social order constituted by them can, Poirier suggests, exacerbate social tensions, through intransigence, that the inevitability of flux brings. Through his own performance in presenting his dialogical approach Poirier hopes to

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4 Ibid 990–1.

5 M R Poirier, "The Virtue of Vagueness in Takings Law" (2002) 24 *Cardozo L Rev* 93. For a similar approach to the topic, without the explicit dissent on the virtue of vagueness, see R Dawson, "Doing Justice in 'Takings' Cases: From Coal to Sand" (2006) 12 *Canta LR* 292.

6 Ibid 93.

7 Ibid.

8 Ibid 100.

9 Ibid 101-2.

10 Ibid 137.

11 Ibid 137.

plant 'a kernel of faith'[12] that justice, in the form of constructive 'dialogue', can be done in the drama of law.

What would New Zealand be like today if the participants in the negotiations of the *Treaty of Waitangi* openly talked about the virtue of the vagueness of its terms, such as 'Sovereignty'? 'Lost moments in history' is a phrase that was introduced by historians to mean great turning points, long-term changes in one direction rather than in another, changes that might not have materialized if circumstances had been different.[13] The history of *Waitangi*-talk has an abundance of such lost moments. Centering on the use of the word 'sovereignty', this essay concerns itself with two of them. The first, in 1840, relates to Edward Gibbon Wakefield's interpretation of the Sovereignty Clause of the United Tribes' *A Declaration of the Independence of New Zealand*, which is the translation of the Mana Clause of *He Wakaputanga o te Rangatiratanga o Nu Tireni*. (The meaning of the *Declaration* would become intimately bound up with efforts to make sense of the *Treaty*.) The second, in 1843–4, relates to Attorney-General William Swainson's opinion and Governor FitzRoy's judgment on the Wairau altercation and its connection to the Sovereignty Clause of the *Treaty*.

Before engaging with these lost moments, in the first section below we examine some earlier sovereignty-talk, tuning-in to different senses of language, namely mechanistic and organic. Dane's sovereignty-talk centers on an organic sense, with 'the whole' being different than the sum of its parts:

> Sovereignty, whether it takes that name or some other name, is a socially constructed category. To say that, however, is not to say that it reduces to other, more primary, variables. Sovereignty is tied to power, cohesion, identity, culture, faith, community, and ethnicity, among other things. But it is more than the sum of those parts. Moreover, those other variables are themselves, as often as not, socially constructed, in part out of the language of sovereignty.[14]

More generally, language is non-mechanistic, involving interdependencies between words that are complex and contextual. Such a sense of language, as Dane understands well, has significant social implications.[15]

I. Sovereignty-talk before the *Treaty*

Sometime between 1662 and 1675 Thomas Hobbes wrote his *A Dialogue Between a Philosopher and a Student of the Common Laws of England*,[16] in which he set out what would be his final published thoughts on fundamental matters of law and sovereignty. One fragment from the *Dialogue* is as follows:

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12 Ibid 102.

13 H W Spiegel, *The Growth of Economic Thought* (1991; 3rd ed) xxv.

14 Dane, above n 3, 966.

15 'All language', claims Maggie Kilgour, 'is potentially colonial discourse, as in order to make ourselves understood by others we constantly have to make the strange familiar, the uncanny canny.' M Kilgour, *From Communion to Cannibalism: An Anatomy of Metaphors of Incorporation* (1990) 239.

16 This work was published for the first time in 1681, two years after Hobbes' death. Until recently, the *Dialogue* was available only in Molesworth's *The English Works of Thomas Hobbes* (v 6). Alan Cromartie is the editor of the most recent edition, dated 2005. References to the *Dialogue* below are from this edition.

Philosopher:

> We have hitherto spoken of Laws without considering any thing of the Nature and Essence of a Law; and now unless we define the word Law, we can go no farther without Ambiguity, and Fallacy, which will be but loss of time; whereas, on the contrary, the Agreement upon our words will enlighten all we have to say hereafter.

Student:

> I do not remember the Definition of Law in any Statute.

Philosopher:

> I think so: For the Statutes were made by Authority . . . Statutes are not Philosophy as is the Common-Law, and other disputable Arts, but are Commands, or Prohibitions which ought to be obeyed, because Assented to by Submission made to the Conqueror here in England, and to whosoever had the Soveraign Power in other Common wealths; so that the Positive Laws of all Places are Statutes. The Definition of Law was therefore unnecessary for the makers of Statutes, though very necessary to them, whose work it is to Teach the sence of the Law. . . .

Student:

> How would you have a Law defin'd?

Philosopher:

> Thus; A Law is the Command of him, or them that have the Soveraign Power, given to those that be his or their Subjects, declaring Publickly, and plainly what every of them may do, and what they must forbear to do.[17]

What kind of 'dialogue' do we have here? Throughout the *Dialogue* we have the Philosopher seeking to instruct the Student, to fill him with deposits of information which the Philosopher considers to constitute true knowledge. Thus we do not have, as in the dialogues Plato left us with Socrates in action, a joint exploration involving creative conflict.[18] A dialogue in the Socratic tradition would at the very least have had the parties raise difficult and searching questions, after which the parties might well depart knowing that they did not know what they thought they knew.[19] Think how richer the fragment above could have been if the Student asked, say: 'What do you mean by *Ambiguity* and by *disputable Arts*?' Also, 'Is not the activity of defining *Ambiguity*, including in the context of lawmaking, a *disputable Art*?' Further, 'Was the Conqueror really a *Conqueror*, for did he not come to England as a legitimate claimant? By legitimate I mean . . .' And so on. In the *Dialogue* Hobbes structured the talk so that the Philosopher always predominates, for the Student is defined not as a conversational partner but as a passive receiver of Truth.

Hobbes, however, was not one to celebrate the activity of conversation,

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17 Ibid 29–31.

18 This point is made by J Hexter, "Thomas Hobbes and the Law" (1980) 65 *Cornell L Rev* 471, 473.

19 See T Eisele, "Bitter Knowledge: Socrates and Teaching by Disillusionment" (1994) 45 *Mercer L Rev* 587.

genuine open-ended conversation, which takes its own unpredictable turnings. This stems from his own well-known purpose of promoting and defining his 'Soveraign Power', one who is defined as having the capacity to communicate 'plainly'. This capacity requires a transparent language. In his 1651 book *Leviathan*, Hobbes refers us to the Garden of Eden, a place where Adam is said to have spoken a language that was like a flawless glass. This language, he says, was 'lost at the tower of Babel, when by the hand of God, every man was stricken for his rebellion, with an oblivion of his former language.'[20] The tower's fall marked the beginning of a complete communicative breakdown. The damage could be undone in Hobbes' view by creating a new language, its concepts strictly and 'scientifically' defined.[21] Language, for Hobbes, could function as a transparent tool for pointing to something. Where language can function in this way, all thought can be reduced to a kind of calculation. A mechanistic image of communication is associated with this view of language, and it may be summed up as follows: Communication is conveying meanings in words. With this view of language it is possible to objectively say what you mean, and communication failures are matters of subjective errors: since the meanings are objectively right there in the words, either you did not use the right words to say what you meant or you were misunderstood.[22] Efficient communication requires a single, universal language so as to avoid the need for translation. For Hobbes, then, language can be a kind of mechanism, a closed system of mutually adapted parts working together as in a machine.

This mechanistic conception of language is tied up with his conception of 'science'. In a highly figurative passage depreciating figurative language, he writes:

> The Light of humane minds is Perspicuous Words, but by exact definitions first snuffed, and purged from ambiguity; Reason is the *pace*; Encrease of *Science*, the *way*; and the Benefit of man-kind, the *end*. And on the contrary, Metaphors, and senslesse and ambiguous words, are like *ignes fatui*; and reasoning upon them, is wandering amongst innumerable absurdities; and their end, contention, and sedition, or contempt.'[23]

Hobbes thought it possible to 'cleanse' language of 'metaphor' and therefore make it an instrument for pointing to an independent reality, free of dangerous rhetoric. The force of a logical argument could simply compel agreement on fundamental issues of life. But Hobbes' own work is, as arguably it must be, 'rhetorical'. He 'employs' metaphors and appeals to 'common sense' (for example, references to 'our naturall Passions'[24]) in an attempt to persuade his readers to become a member of a community his text defines and applauds.

Sometime before 1676, Lord Chief Justice Hale responded to Hobbes with his

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20 T Hobbes, *Leviathan* (1651; 1985) 101.

21 Ibid 105.

22 See G Lakoff and M Johnson, *Metaphors We Live By* (1979) 198-9. In the context of *Waitangi*-talk, see R Dawson, "Waitangi, Translation, and Metaphor" (2005) 2 *A Journal of Social Anthropology and Cultural Studies* 33.

23 Hobbes, above n 20, 116–7.

24 Ibid 223.

Reflections on Mr. Hobbes His Dialogue of the Lawe.[25] Hale began with a section on the topic of 'reason'. He believed that there is no area 'of So greate a difficulty for the Faculty of reason to guide it Selfe and come to any Steddiness as that of Laws, for the regulation and Ordering of Civill Societies and for the measuring of right and wrong, when it comes to particulars.'[26] For Hale, 'Casuists, Schoolmen, [and] Morall Philosophers' are 'most Commonly the worst Judges that can be, because they are transported from the Ordinary Measures of right and wrong by their over fine speculacons Theoryes and distinctions above the Common Staple of humane Conversations.'[27] Hale evidently imagined 'the law' differently than did Hobbes: they lived by different metaphors. Hobbes sensed the law as a domain of 'reason' and 'command'; and Hale sensed the law as 'reason' in a different sense and also a medium of 'humane Conversations'. Hale was cautious about theorists and he took experience seriously:

> [I]t is a reason for me to preferre a Law by which a Kingdome hath been happily governed four or five hundred yeares then to adventure the happiness and Peace of a Kingdome upon Some new Theory of my owne tho' I am better acquainted with the reasonableness of my owne theorey then with that Law. Againe I have reason to assure myselfe that Long Experience makes more discoveries touching conveniences or Inconveniences of Laws then is possible for the wisest Councill of Men att first to foresee. . .
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> Laws . . . are the Production of long and Iterated Experience which, tho' itt be commonly called the mistress of Fooles, yett certainly itt is the wisest Expedient among mankind, and discovers those defects and Supplys which no witt of Man coud either at once foresee or aptly remedye.[28]

Against Hobbes, Hale argued that 'it appears that men are not borne Comon Lawyers, neither can the bare Exerciss of the Faculty of Reason give a man Sufficient Knowledge of it, but it must be gained by the habituateing and accustomeing and Exercisieing that Faculty by readeing, Study and observation . . .'[29] Hale sensed that Hobbes did not do justice to the common law, which for Hale was an enormous, patterned, always changing yet stable mosaic,[30] the whole of which, like a language, is more than the sum of its parts.

In a section titled 'Of Soveraigne Power' Hale challenged a set of Hobbes' propositions, including (1) 'That there can be noe Qualifications or Modifications of the Power of a Soveraigne Prince but that he may make, Repeale & alter what Laws he please, impose what Taxes he pleases, Derogate from his Subjects propertie how and when he please'; and (2) the King 'alone is the Judge of all publique dangers and may appoint Such remedyes as he pleases'.[31] For Hale, who offered numerous references, including Magna Carta, these were 'wild

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25 Hale, for reasons unknown, was reluctant to publish his writings. His *Reflections* was published for the first time in 1921. See F Pollock, "Sir Matthew Hale on Hobbes: An Unpublished Ms." (1921) 37 *L Q Rev* 274.

26 Ibid 288.

27 Ibid 289.

28 Ibid 291.

29 Ibid 292.

30 This mosaic imagery draws from Hexter, above n 18, 483.

31 Hale, above n 25, 297.

Propositions'.[32] As to the first proposition, 'Such a Man that teacheth Such a doctrine as this as much weakens the Soveraigne Power as is imaginable and betrayes it with a Kisse.'[33] This 'Soveraigne Power' can be understood as an inherited form of conversational life, quite unlike that which inhabited Hobbes' imagination.

Hale's disposition to grant authority to this inherited conversation is suggested in his metaphor of the Argonaut's ship:

> But tho' . . . particular Variations and Accessions have happened in the Laws, yet they being only partial and successive, we may with just Reason say, They are the same English Laws now, that they were 600 Years since in the general. As the Argonauts Ship was the same when it returned home, as it was when it went out, tho' in that long Voyage it had successive Amendments, and scarce came back with any of its former Materials.[34]

For Hale, the binding, 'soveraigne' force of the law depends on continuity with the past, notwithstanding the actuality of constant flux.

How might Hobbes have responded to Hale's *Reflections* if Hale had decided to publish it rather than leaving this up to someone who might come across it sometime in the future, as someone did 250 years later? Would Hobbes have fundamentally modified his basic propositions in his *Leviathan*? Hale's decision not to publish can readily be classed as a grand lost moment in history. What, for example, might have become of the doctrine of Parliamentary Sovereignty if Hale's 'humane conversations' metaphor for law and sovereignty had come, just before the Glorious Revolution, to have some significant weight in the 'marketplace of ideas'?

II. Edward Gibbon Wakefield on the Sovereignty Clause of the *Declaration*

In July 1840, six months after the first signings of the *Treaty*, a House of Lords Select Committee inquired into the statements contained in the Petition of the Merchants, Bankers, and Ship-owners of the City of London respecting the Colonization of New Zealand. Wakefield, as a Director of the New Zealand Company, addressed the Committee, and he talked about the Sovereignty Clause of the *Declaration*. What became of them in this talk? We begin this section with some words on the background of the *Declaration* and on Wakefield.

In 1831, Nga Puhi leader and missionary Rawiri Taiwhanga, fearing that France sought revenge for the killing of Marion du Fresne,[35] suggested appealing to King William IV to become their guardian. Leaders from several tribes petitioned him; in addition to du Fresne they mentioned their concern about 'troublesome' settlers as a reason for their petition. In 1832, the Colonial Office appointed James Busby as Resident, and when he arrived in 1833 he carried with him the official reply to the 1831 petition. No military force was provided, however, and further

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32 Ibid 298.

33 Ibid 301.

34 Sir M Hale, *The History of the Common Law of England* (1713; 1971) 40. Hale circulated this work in manuscript form. It would be nearly forty years after his death before the work would be published.

35 L Kelly, *Marion Dufresne at The Bay of Islands* (1951).

> independence. I have seen that declaration in the native language; and it was to that I alluded the other day, when I said that the natives were so little capable of asserting their national independence that in this declaration they knew not what name to give their country, and therefore called it Nu Terene [sic], which expresses their pronunciation of the English words New Zealand.

Committee:

> Does not it appear to you that there might have been a divided sovereignty over particular parts of the island, and yet no general sovereign power over the whole?

Wakefield:

> I think there was no sovereignty at all, because there can scarcely exist amongst any society of men an institution for which that society have no name. Now there is no such word as "sovereignty" in the New Zealand language.[41]

The Committee would have done well here, at least in the sense of adopting the role of Socratic Interlocutor, if it had delved into the topic of naming. Dutch explorers gave birth to the name 'Zeelandia Nova'; the pre-'United Tribes' indigenes did not have a specific name for the same collection of islands the explorers referred to. Individual islands had names, such as Te Ika a Maui and Te Waipounamu. At the time the *Declaration* was composed (several years after the United States Supreme Court had decided the Cherokee Cases) a tribe arguably was similar in character to that of a European 'nation'. These tribes had names, although Wakefield perhaps did not know them. Wakefield did not offer to demonstrate his competency in the 'New Zealand' language (and in the English language for that matter) by talking about various uses of terms in the *Declaration* such as 'mana' and 'rangatiratanga' and how these uses compare with uses of the term 'sovereignty'. The *Declaration*, as I have said, was an institutional innovation, and this required some linguistic innovation by the translator Williams. Wakefield does not address the fact that the 'New Zealand' language was evolving, in part through Williams' use of 'Nu Tirini' and 'Kingitanga'.

The word 'uses' in the previous paragraph is at the heart of a key difference between a mechanistic image of language and an organic, literary sense, in which, there are interdependencies between words that are complex and contextual. Wakefield's claim that 'there is no such word as "sovereignty" in the New Zealand' reflects (judging from what he went on to say) the mechanistic image that words are names and knowing what a word means requires that one knows what it stands for. For one who accepts the literary image of language, the meaning of a word is its use in the language, and for this we need to consider the form of life in which its use is a part. 'Understanding' (which is a matter of degree and is never perfect) the part requires learning about the larger living whole.

Against Wakefield one might be tempted to say that the word 'mana' could

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41 E G Wakefield, 'Minutes of Evidence taken before the Select Committee on New Zealand, 16th & 17th July 1840', *British Parliamentary Papers: Colonies: New Zealand* 1 (1837-40; 1968) (582) 40.

act as a perfectly good substitute for 'sovereignty'. But I suggest that there are dangers here of accepting and becoming committed to his mechanistic talk about language.

The Committee evidently was not fully persuaded by Wakefield's claim that 'there is no such word as "sovereignty" in the New Zealand language':

Committee:

> Nor any equivalent word?

Wakefield:

> I believe no equivalent word: the thing does not exist. The best proof of its non-existence is that there is no name for the country. Nationality without a name seems hardly to be possible; and what we understand by sovereignty is something not conceived by the mind of a New Zealander.[42]

Who are included in Wakefield's 'we' here? And what is it that 'we' supposedly 'understand'? Here Wakefield suggests that 'sovereignty' is a term that points to some objective phenomenon that all can see, save a 'New Zealander'. We only have to listen in on the differences between Hobbes and Hale, among others, to sense some significant diversity on that which the word 'sovereignty' is used to signify.

The serious and blunt Wakefield we are hearing in action here is not the same humorous and reflective Wakefield that we have had a glimpse of above. If Wakefield could at least acknowledge doubts and uncertainties about the meaning of 'sovereignty', like 'the meaning of every common term' in political economy, we might see an interchange worthy of the name conversation. Wakefield's rhetoric in his opening paragraphs is crafted to establish his authority and to convince the Committee of the definiteness of sovereignty-talk. With such a hierarchical community, genuine conversation will be hard to come by.

The Committee appeared to keep trying to better explore the possibility of an appropriate application for the word 'sovereignty' to the situation of the indigenes:

Committee:

> [I]s it not possible that there may have been a sovereign power in each particular tribe, without there being a sovereign power over the whole island?

Wakefield:

> It might so have happened that the island should be cut up into a great number of separate nations, each of whom should enjoy a national sovereignty; that might have happened, just as we see in some parts of Europe and in several parts of Asia exceedingly small district ruled over by the sovereign authority of separate nations. But that was not the case in New Zealand, because there the authority exercised in each tribe was not of the nature of a sovereign authority. . . They had not the words which belong to the existence of sovereignty, and they had not the words because they have not the idea: and having neither the words nor the idea,

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42 Ibid 40.

of course they had not the thing.[43]

Here Wakefield talks of similarity and difference, and comes to the conclusion of an essential difference. For Wakefield, an idea is an object, and words are containers for ideas. Wakefield here is living by a mechanistic image of communication, which Hobbes, as we have heard, idealized.

The Committee did not explicitly challenge this mechanistic image, but it did seem incredulous about Wakefield's claims, if what seems to be persistence on a fundamental point is anything to go by:

Committee:

Do you admit that there exist independent sovereignties in parts of the island?

Wakefield:

I think not in any part of the island, because as far as I understand the capacity of these people, they do not know what sovereignty means, either small or great.

Committee:

But there were certain chiefs exercising the power of life and death?

Wakefield:

Yes; but very much in the same way in which we see some animals exercising the power of life and death over inferior animals, and over inferior beings of their own class, without any fixed law. It was a law of passion: an inferior offended a chief, and the chief knocked his brains out with a tomahawk. That is not law; it is savage nature; it is that state of things in which the idea of sovereignty cannot be conceived, or of law or justice. All those words are words which the mind of a native of New Zealand cannot understand.[44]

Arguments that seek to justify treating one group of people differently than another group often depends on claims about the *essential* qualities of both. Members of groups such as women, Jews, Native Americans, African Americans, and Japanese Americans have learned this putative fact through painful experience. I suggest that with this language from Wakefield, the indigenes were threatened with the same kind of experience. If Wakefield's words – or something like them – about what counts as 'sovereignty', as 'law', as 'savage', as 'justice' and as 'passion' could be made to stick, then the indigenes would be forced into assimilating to a particular way of imagining the world.

Toward the end of their interchange Wakefield touched on the matter of evidence with respect to his arguments:

Committee:

Do you understand that there is no word in the language of New Zealand which expresses the relation between a chief and his inferior?

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43 Ibid 40–41.

44 Ibid 41.

Wakefield:

> . . . I doubt whether there is any word tantamount to obedience. The language is extremely poor; the best proof of which is, that you will find in publications in the native language, which have been made by the missionaries, that in point of fact they are obliged to coin words to express almost any abstract idea. The . . . words . . . in the native language . . . which express abstract ideas are very few indeed; they relate chiefly to the passions; and any abstract idea in relation to law, government, or sovereignty, I am quite satisfied their language does not possess the means of expressing.[45]

One did not have to have to be a sophisticated literary critic to doubt that the books written by missionaries were the 'best proof' of the quality of the Maori languages. As to Wakefield's remark on 'the passions', his separation of passion and law is problematic. The materials of the law concern who we are in our relations to one another, and I cannot imagine how 'passion' can be extracted from this, save for falsely imagining law to be a closed system of rules, written in a neutral and transparent language.

In all that he said in his interview with the Committee, Wakefield appears to me as a classic cultural cum linguistic imperialist. He does not for a moment acknowledge that he may have something of value to learn from te reo Maori and that his own language may have limits, especially as a means of valuing a language different from his own.

What rich and powerful story might Wakefield have told to the Committee about the 'sovereignty' of the *Declaration* if he had exercised his reflective and witty self? Wakefield, I suggest, had the potential for offering some illuminating insights, and it is a significant lost moment in history that these insights were not forthcoming. If one or more members of the Committee had the imagination to invent the right questions of Wakefield we might well have a radically different politico-legal constitution in New Zealand today. After all, Chief Justice Prendergast, in the 1877 infamous case of *Wi Parata v The Bishop of Wellington*, rendered Wakefield's language of racism into a legal institution.[46]

III. The Wairau Altercation

In the late 1830s Edward Gibbon Wakefield was a dominant force in establishing the New Zealand Company. In May 1839, after learning that the Crown intended to negotiate a treaty with the indigenes, New Zealand Company officials sent out agent Colonel William Wakefield to purchase land before such purchases would be controlled by the Crown. In October 1839, Wakefield persuaded Te Rangihaeata and Te Rauparaha to sign a deed involving a vast area of land, the extent of which became contested. The Ngati Toa leaders, both of whom later signed the *Treaty of Waitangi*, agreed to allow Land Commissioner William Spain to investigate the transaction. In April 1843, two months before Spain's investigation was due to take place, company surveyors, against the will of the Ngati Toa leaders, erected a hut on disputed land. The chiefs responded by burning down the hut. Company officials persuaded Police Magistrate Henry

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45 Ibid.

46 See Dawson, above n 1, 78–80.

Thompson and several Justices of the Peace to issue an arrest warrant on a charge of arson. Thompson resolved to attend the execution of the warrant himself, accompanied by an armed force of 47 men.[47]

During an argument in which Thompson threatened to handcuff Te Rauparaha, a musket was discharged, apparently accidentally. Alarmed members of settler party then opened fire, and Te Ranghaeata's wife Te Rongo and other Ngati Toa members were killed. Musket-fire was returned, and the settler force retreated. Justice of the Peace Captain Arthur Wakefield, who was also a New Zealand Company agent, decided to surrender, and a group of ten joined him. Te Rangihaeata demanded their execution, in part as a return for the death of his wife. Each prisoner was clubbed to death.

Acting-Governor Willoughby Shortland asked Attorney-General William Swainson for a confidential opinion on the altercation. In an opinion dated 13 July 1843, Swainson stated that the action of the Police Magistrate, who had been killed by Te Rangihaeata, 'was illegal in its inception, and in every step in its execution, up to the moment of the attack itself.'[48] The warrant, he said, had been issued without any substantial evidence that the chiefs were criminals. Swainson detected an impropriety in relation to the *Treaty*. In reference to the Property Clause, he stated: 'It appears to me to be necessary to the peace of the colony, that the principles on which the British Government undertook the occupation of these islands, should be ever kept before the settlers, that the natives should have no reason to doubt the good faith of the treaty by which they were guaranteed the exclusive and undisturbed possession of their lands.'[49]

As to Te Rauparaha and Te Rangihaeata and others who helped them, Swainson was of the opinion that 'the attack upon them, by upwards of 40 armed Europeans, being unlawful and of a deadly nature, they were justified in repelling force by force, even unto death, in self-defence.'[50] Regarding the killing of those who had surrendered, Swainson argued that even if Rangihaeata could be proved to have killed them, the 'passions' roused by the death of his wife, would, 'according to British law', render the act 'manslaughter'.[51]

Swainson went on to the question whether British law could apply in this particular case. This connected with the topic of sovereignty:

> With reference to a former transaction, my opinion was given to the effect that, as to all other nations, the sovereignty of Great Britain over the whole of these islands is absolute and entire, but that, as to the natives, keeping in view the solemn and repeated disclaimers of Her Majesty's Government of every pretension to seize on the islands of New Zealand, or to govern them as part of the dominion of Great Britain, unless the free and intelligent consent of the natives should first be obtained; that those chiefs and tribes who were not parties to the treaty, and who had always refused to recognize Her Majesty's sovereign authority over them,

47 For a comprehensive discussion of this action see R Hill, *Policing the Colonial Frontier* (Part 1) (1986) 165–71.

48 "Appendix to Report from Select Committee on New Zealand" *British Parliamentary Papers: Colonies: New Zealand* 2 (1844; 1968) 165.

49 Ibid 67.

50 Ibid.

51 Ibid.

> could not be deemed British subjects and amenable to our laws.
>
> A more difficult question now presents itself in reference to the present case. Rauparaha and Rangiaiata [sic], the most powerful chiefs of the Southern districts, I am informed, signed the treaty; but it cannot be said that they gave their intelligent consent to it, as it is now well known that, in common with most others, they had not the most remote intention of giving up their rights and powers of dealing, according to their own laws and customs, with the members of their own tribes, or of consenting to be themselves dealt with in all cases according to our laws.
>
> Experience has also taught us that they are a powerful, intelligent and independent people, possessing a strong sense of justice, and that nothing less than the military occupation of the country would enable the Government to subject them to British law.[52]

Swainson's reasoning here is problematic. The *Treaty*, including both the English-language text and the Maori-language text, may be read as supporting the position that the chiefs 'had not the most remote intention of . . . consenting to be themselves dealt with in all cases according to our laws.' If one reads the Treaty this way, as Te Rauparaha and Te Rangihaeata may have done, then Swainson's claim that 'it cannot be said they gave their intelligent consent to it' is potentially incorrect. His view is built upon an assumption about the scope of the Sovereignty Clause, a scope that is not self-evident.[53] A conversation with the Ngati Toa chiefs may well have been helpful for exposing Swainson's assumption as exactly that, an assumption. A fundamental issue concerns the relative capacities and constraints of the Governor and Te Rauparaha and his fellow chief with respect to powers of governance.

Six months after the altercation at Wairau, Governor FitzRoy visited the settlements of Wellington and Nelson, where he conducted his own inquiries into the altercation. FitzRoy's inquiries continued at Waikanae, where he had a meeting with Te Rauparaha and Te Rangihaeata and about 500 Ngati Toa people. FitzRoy presented himself at Waikanae as a judge: 'I have visited Wellington and Nelson, and have heard the White man's story; now I have come here – tell me your story, the natives' story, that I may judge between them.'[54] After he called on Te Rauparaha to speak, FitzRoy only asked him one question, which concerned whether Thompson threatened to fire or ordered to fire. Te Rauparaha stated that Thompson gave the order to fire. FitzRoy then apparently wrote notes for about thirty minutes and then consulted translators. FitzRoy, who identified himself as 'the representative of the Queen of England, the Governor of New

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52 Ibid.

53 An early writing stressing the ambiguity of the scope of the Sovereignty Clause is L A Chamerovzow, *The New Zealand Question and the Rights of Aborigines* (1848). Chamerovzow, Assistant-Secretary of the Aborigines Protection Society, claimed that the English-language text was anything but plain. On the Sovereignty Clause, he stated: 'The ambiguity, then, . . . was on the part of the British in not defining more clearly and unmistakably what they meant by Sovereignty' (140–1). The meaning of the Sovereignty Clause, in his view, was not a separate issue from that of the meaning of the other clauses. On the interdependencies of the clauses, see R Dawson, *Waitangi, Law, and Justice: A Conversational Turn* (2006) 46–51.

54 *British Parliamentary Papers* 2, 517.

Zealand', then spoke. His speech, as contained in a copy of the Minutes of the Proceedings, is as follows:

> In the first place, the Pakehas were wrong; – they had no right to build houses upon land to which they had not established their claim ... They were wrong in trying to apprehend you, who had committed no crime. ...
>
> Had you been Pakehas, you would have known that it was wrong to resist a magistrate, under any circumstances; but not understanding English law, your case was different. ...
>
> The very bad part of the Wairau affair, that part where you were so very wrong, was the killing of men who had surrendered, who trusted to your honour as chiefs.
>
> Pakehas never kill their prisoners; Pakehas never kill men who have surrendered. It is the shocking death of those unfortunate men that has filled my mind with gloom ...
>
> But I know how difficult it is to restrain angry men when their passions are roused. I know that you repent of your conduct, and are now very sorry that these men were killed.
>
> As the Pakehas were very greatly to blame, and as they brought on and began the fight, as you were hurried into crime by their misconduct, I will not avenge their deaths.
>
> In future, let us dwell peaceably without distrust. I have told you my decision, and my word is sacred. I will punish the English if they attempt to do what is unjust or wrong. You chiefs must help me to prevent the natives from doing wrong, so that we may happily live in peace, helping and doing good to one another; no man injuring or encroaching on his neighbour, but buying and selling freely ... Where there is a mistake or doubt about boundaries of purchase, appeal must be made to the law. The law will see justice done, and I will be responsible for its execution by properly qualified persons.[55]

What did the chiefs think of FitzRoy's description of their custom of killing prisoners as a 'horrible crime'? What relation, if any, did they think FitzRoy's decision had with the *Treaty*, especially the Sovereignty / Kawanatanga Clause? What was their reading of the *Treaty* as it concerned who could determine what counts as a 'crime'? What, possibly in the language of sovereignty, was to be their role in determining 'the law', or at least in giving FitzRoy 'help' in controlling their own people? What was the relationship – present and future – between a magistrate and a chief? Upon what or whose terms did FitzRoy and Te Rauparaha and Te Rangihaeta think the future could be worked out for all peoples to 'happily live in peace'? Where might Swainson's language of sovereignty fit in here? It seems to me that FitzRoy's failure to address these fundamental questions constitutes a significant lost opportunity for exploring the imaginings of the parties to the *Treaty*, especially its Sovereignty Clause. Little light is shed on what the various parties had said immediately after the altercation in terms of expectations concerning who could do what to whom.

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55 *British Parliamentary Papers: Colonies: New Zealand* 4 (1843–5; 1968) 186–7.

The chiefs evidently were unimpressed. According to a recent discussion of the Wairau case, 'FitzRoy had not greeted Te Rauparaha with the ceremony and protocol that should have attended such a momentous meeting – he had not even sought an introduction to him – and there had been only three speeches, two from FitzRoy. Te Rauparaha was deeply offended and considered that FitzRoy, in truth, wanted utu for the death of the Nelson settlers but did not have the courage or the soldiers to take it.'[56] As for Te Rangihaeta, he 'considered Ngati Toa had been shamed by FitzRoy's lack of respect, that he had spoken to them as their master and yet was unable to exact utu.'[57] This reading was associated with a vegetative metaphor, 'The Governor is soft, he is a pumpkin.'[58] Had Te Rangihaeta sought to constructively engage with FitzRoy and to invent metaphors about their politico-legal relations some potentially fruitful seeds for a constitutional conversation could have been planted.

Many New Zealand Company officials and settlers responded to FitzRoy's judgment with strong criticism. Jerningham Wakefield's critique is of particular interest here. Whilst advocating that 'the White men were in the right', and thus being disappointed with the *result* of the case, he offered criticism on the *procedure* by which FitzRoy's decision was arrived at:

> I should not have dared to contradict the verdict of twelve impartial and fairly-chosen Jurymen, or to impugn the sentence of a Judge acting as he was entitled and bound to do by the British constitution. But I have a right to dissent, in the most explicit terms, from the despotic decree of a man who has assumed to himself, against all law and custom, both of these important functions.
>
> The mode of investigation adopted by Captain FitzRoy was subversive of the simplest principles of justice towards both parties. In fact, he decided the matter without hearing either state his own case, and without giving either an opportunity of answering the other. . . He professes to have heard the White story, and thus to be qualified to assume the office of public prosecutor of the accused men. When did he hear the White story? It is just possible that he may have read the depositions taken before the Magistrates; but as no further proceedings that can be called legal ever took place, how can the public know that he ever even did that? . . .
>
> He professes to have heard the Maori story, and thus to be qualified to act as counsel for the accused person. When did he hear the Maori story? He heard a confused narrative from one of the accused men . . .
>
> Thus he picked up what he calls the story of each party from one or two chance representatives of its interests; and heard both stories by snatches without any means of testing the truth of either, and without giving either the opportunity of commenting on the other. Among the uncivilized savages themselves, when they do decide a dispute by formal conference, a *korero* is never thought complete unless the two parties are confronted with each other. But Captain FitzRoy preferred a course no less inconsistent with the customs of New Zealand than with the laws of England and the practice of civilized men . . .
>
> No matter whether his decision were right or wrong, he was guilty of a breach of the

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56 Quoted in P Temple, *A Sort of Conscience: The Wakefields* (2002) 361.

57 Ibid.

58 Ibid 362.

> law, without having the apology of conforming to the customs of the New Zealand chiefs . . . If he had decided that the savages were in the wrong, and had taken upon himself to order their apprehension and execution for the crime, equally without the intervention of those forms of our law which are revered for their even-handed justice, he would have been equally culpable in the highest degree.[59]

Concerning Wakefield's identification of a basic similarity of the customary 'British' mode of procedure for formal dispute resolution and that of the 'New Zealand' mode, both are said to work by the practice of a hearing, in which 'the two parties are confronted with each other.' The hearing, he suggests, may be thought of as a vying between two stories, with the two parties telling their respective views of the same event or the same issue. This procedure is at least an implicit recognition that the parties involved in a dispute likely if not inevitably will differ in their views of fact and law.[60] For Wakefield, putting aside the matter of whose legal system he would give privileged standing to, whether the forum of justice reaches a result he happens to prefer is not the most important question. He is interested in whether the forum of justice establishes an appropriate character for itself and an appropriate relationship with the parties in the case. The central idea of justice here is a matter of relations.[61] It is about a method of argument and a conversation that recognises each party's story of their own situation and complicates each story by obligating each party to recognise the story of another. It can be thought of as a kind of friendship in its insistence on the reality and validity of others.[62] Here there would be no need for the language of sovereignty in the sense of unequivocal and unlimited superiority.

In their participation in the aftermath of the altercation at Wairau, Swainson and FitzRoy had the chance to bring not only two parties together to integrate their stories and to establish a workable mutuality but also to integrate two evolving cultures, two evolving common law streams. The altercation at Wairau was a complex event: the experiences of the parties involved no doubt differed markedly from one another – different experiences that were shaped to some degree by different cultures. Wakefield unquestionably felt that FitzRoy trivialized the settlers' experiences of the altercation. It may well be that Te Rauparaha and Te Rangihaeata felt a similar way in regard to their experiences. Whatever the case may be, a significant opportunity for achieving greater degrees of mutual understanding was lost. FitzRoy said nothing on the altercation in relation to the *Treaty*, a topic of central importance for making sense of who the parties are to each other. With FitzRoy's silence on the meaning of the present in relation to the parties' shared past, he offered no resources with which to negotiate the future together.

Soon after FitzRoy handed down his Wairau judgment, lawyer and poet Alfred Domett drew up in verse a 'Petition from the Gentlemen and Inhabitants of Nelson to the High and Mighty Prince Fitzgig the First':

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59 J Wakefield, *Adventures in New Zealand* (1845; 1908) 717–8.

60 See F Cohen, "Field Theory and Judicial Logic" (1950) 59 *Yale Law Journal* 238, 240–4.

61 Here my reading draws from J B White, *Justice as Translation* (1990) 197.

62 See J B White, *When Words Lose Their Meaning* (1984) 274.

Thus we see in your method to civilize savages,
By giving them licence to murder and thieve,
And then hanging up all who resist their wild ravages,
A scheme which it needed your brain to conceive!
For 'tis doubtless but democrat pride that embitters
The present dilemma to which it consigns us,
Before us the savage's Tomahawk glitters,
Yourself and the gallows stand frowning behind us![63]

Europeans at various places around the colony would quote this verse. Its author, twenty years after composing it, would be elevated to the status of Premier. In this position Domett pushed for the assimilative subjugation of the indigenes, in part by designing the land confiscation program that would become a deep wound for generations to come, a wound rationalized by Chief Justice Prendergast's Wakefieldian language in *Wi Parata*. An integrative judgment refuting Domett's construction of the Other may well have prevented such a wound.

IV. Concluding Remarks

Some readers may have expected or desired this article to begin with a precise definition of sovereignty. What purpose would such an act of definition serve? After quoting some definitions of sovereignty crafted in Hobbes' abstract style, Thomas Biersteker and Cynthia Weber, in their 1996 book *State Sovereignty as Social Construct*, stressed the conditional character of the definitions. 'We consider these definitions to be provisional,' they said, 'not because we cannot agree on them, but because we cannot use definitions to capture the essence of a subject we believe is so deeply contested and undergoing change.'[64] Rivalry 'over fundamentally contested concepts cannot be brought to closure by means of definition.'[65] They agree with Rob Walker when he writes, 'the very attempt to treat sovereignty as a matter of definition and legal principle encourages a certain amnesia about its historical and culturally specific character.'[66] In writing this article I am seeking to discourage such amnesia.

'A word', wrote Holmes J, 'is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.'[67] If Hobbes had encouraged the use of 'sovereignty' in a manner demonstrating a necessity to give it new vitality in the unique circumstances surrounding its use, we ('you', 'me', and 'we humans') could well be imagining 'our' places in the world very differently from what 'we' do today. What could have become of our lives, of us, but did not because of the influential habit of mind that 'sovereignty' is transparent?

The word 'sovereignty' does not and cannot point to some plain 'thing'; it is a human artifact used to talk about another human artifact concerned with a

63 Quoted in Temple, above n 56, 360.

64 T J Biersteker and C Weber, *State Sovereignty as Social Construct* (1996) 2.

65 Ibid.

66 Ibid. The quotation is from R B J Walker, *Inside/Outside: International Relations as Political Theory* (1993) 166.

67 *Towne v Eisner*, 245 US 418, 425 (1918).

structure of human relations, one that is in a process of becoming through our talk about it. As we compose with the word 'sovereignty', we compose ourselves. At this level we are interested not in abstract definitions but in the articulation of competing claims and rival voices.

Some readers may be less than impressed with the attention given to Edward Gibbon Wakefield's voice in this article. In 1996 The Friends of the Turnbull Library held a seminar entitled *Edward Gibbon Wakefield and New Zealand 1830–1865: A Reconsideration*, to mark the bicentenary of the birth of Wakefield. In a contribution to the seminar Executive Director of Te Rauananga o Toa Rangatira Matiu Rei questioned the grounds for the seminar. At the beginning he stated this: 'I am not here to commemorate or celebrate [Wakefield], as, from a tribal perspective, he made a significant contribution leading to the loss of our lands and mana. Furthermore, I find it extraordinary that people would actually organise and attend a three-day event to celebrate Edward Gibbon Wakefield, who by all accounts was a scoundrel, who managed to pull off the biggest scam in this country's recorded history.'[68] But so long as Wakefield is regarded as nothing but a 'scoundrel' then progress in *Treaty*-talk will be impeded. A constructive critical engagement with Wakefield may help intercultural dialogue, ultimately the telling of imaginative and integrative stories. I have claimed that Wakefield's interchange with the 1840 Committee was a significant lost moment in history, for he failed to give the kind of imaginative and integrative story that he was so capable of doing, a story capable of making quite a difference to the history to come. Instead he offered a mechanistic picture in which words, such as 'sovereignty' merely point to things. This picture would become institutionalized, and we might do well to de-institutionalize it. Criticism of the story he gave to the Committee may serve as a resource for the constructive stories that are needed for *Treaty* 'progress'.

[68] M Rei, "Edward Gibbon Wakefield: A Ngati Toa View", in *Edward Gibbon Wakefield and the Colonial Dream: A Reconsideration* (1997) 195.