

On Close Reading the Treaty of Waitangi: An Encounter with Joseph Vining

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*People who vocalize their reading, who let it register on the ear
and not simply on the eye, are apt to be more than ordinarily sensitive
to the fantastic and baffling variability of sounds in any sentence or phrase,
and of how this precludes their arriving at any sure sense of meaning.*

Richard Poirier¹

In 1839, Lord Normanby composed treaty instructions for Captain William Hobson, expressing a desire to ‘govern [. . .] New Zealand [. . .] as a part of the dominion of Great Britain’, conditional on ‘the free and intelligent consent of the natives’ (Normanby 1839, 38). An attitude of cultural superiority suggested that the ‘intelligent consent’ would lack depth. Normanby remarked, for example, that ‘their ignorance [. . .] of the technical terms [. . .] may enhance their aversion to an arrangement of which they may be unable to comprehend the exact meaning’ (Ibid.). Also, he used literacy and literature as a standard of civilized as contrasted with primitive living:

The establishment of schools for the education of the aborigines in the elements of literature, will be another object of your solicitude; and until they can be brought within the pale of civilized life, and trained to the adoption of its habits, they must be carefully defended in the observance of their own customs, so far as these are compatible with the universal maxims of humanity and morals. (Ibid., 40.)

Normanby delineated the British as the carriers of ‘civilized life’ who will show ‘the aborigines’ how to properly order the world. In his us/them world, ‘they’ who lacked an ‘education [. . .] in the elements of literature’ were inferiors with much to learn.

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¹ Poirier 1992, 176.

While Normanby expected the indigenes to be positively changed as a result of their encounter with the British, there was no indication that he expected any kind of reciprocal change. Given his attitude of cultural superiority, it may have been beyond his imagination to consider asking what the literates could learn from an oral-aural culture—a learning that could modify, for example, his sense of ‘the elements of literature’. He may well have had prejudices relating to literacy and literature that warranted a challenge. It would turn out that when engaging with practices of literacy and literature, the indigenes retained certain habits. A century after Hobson arrived at Waitangi and pursued ‘the free and intelligent consent of the natives’, the Maori scholar and lawyer Sir Apirana Ngata remarked:

Reading and writing! A miracle in combination, the greatest inventions of civilization! [. . .] But here the reader of these few comments should be introduced to a feature of early Maori society, one which persists to this day. The people preferred to hear the matter, whether written or printed, read to them. [. . .] [I]t was closer than *mute transference* through the *eye* to what they had been accustomed to; it was nearer to the old-time narrative of adept raconteurs, or of poetical and priestly reciters. More than that, the genius of the race *preferred education through the ear*, conveyed by artists in *intonation* and *gesticulation*. (Ngata 1940, 48-49, emphasis added.)

We might wonder what might have happened had Normanby’s instructions recommended exploring the possibilities of ‘education through the ear’ for the colonists. What might be the significance of the ‘eye’/‘ear’ distinction when reading the Waitangi treaty? If an eye-reader and an ear-reader meet to read the treaty, they might consider asking: ‘*What* is it precisely that we are reading?’ An eye-reader may point to a *document*, from which to get the meaning by a brief *look*. An ear-reader, however, may imagine that the document is *mute* fragment of an *aural/oral event*, in which people are speaking to each other and trying to establish shared meanings. (Here we could connect to the metaphor of writing as shadow in Plato’s *Phaedrus*.²) An attempt to vocalize their readings may lead them to question the faithfulness of a brief look.

To whom might we turn for help with ear-reading in a legal context? Joseph Vining has offered a conception of law as an aural/oral activity. I began reading him when thinking about ‘standing’—about getting into court to be given a hearing. My inquiry began with this specific question: Should Maori have treaty-based ‘standing’ to challenge unjust legislation passed by a Pakeha (European) majority? From that question came this general one: What is at stake in the question of standing? Vining’s first book, *Legal Identity*, has much to say about that question. In one section, he connects legal life to seemingly remote life—‘an octopus, which builds a cave for itself on the ocean floor’:

² After Socrates complained that ‘written words [. . .] maintain a solemn silence [. . .] if you ask them a question’, Phaedrus wondered whether ‘written speech might fairly be called a kind of shadow’ of ‘living and animate speech’ (Plato 1973, 275-276).

[O]nce a case is formed only certain facts, certain laws, certain consequences, certain persons are treated as relevant, *except* insofar as the court chooses to break out and consider the relevance of other laws, effects, or persons. Inside the self-constructed home everything does not depend on everything else and entities do not dissolve conceptually into some other entity or some large unity. The court can swim out into the great sea around and dart back when frightened by its dark vastness. But when considering standing and jurisdiction the case is not yet formed and the legal mind has no home. Fear may make it too difficult to admit, except by allusion, that one is swimming in the sea and that one's behavior is a reaction to it. Denial is a normal defense of the human mind against great fear; the legal mind is not peculiar in this regard. (Vining 1978, 94.)

Vining's will to connect law to potentially 'everything else' may be read as an attempt to 'break out' of narrow boundaries in conventional talk about 'the legal mind'—an attempt that may evoke the 'fear' he mentions. Those who insist that we should keep law separate from the rest of life might question the value of analogical reasoning about law. On hearing the octopus analogy, a colleague of Vining's imagined a 'disaster': 'One will end by reading poetry under a palm tree' (Ibid.). Resisting the imagined slippery slope (and any suggestion that poetry is beyond the pale of legal discourse) may awaken us to defective analogies by which we live. An awakening could be liberating, especially for those who desire to reconstitute the 'home' of 'the legal mind', a home that takes justice seriously.

Vining has been described as 'among the more [. . .] elusive [. . .] legal thinkers in recent decades' (Smith 2006, 1306). The elusiveness comes 'not [. . .] from ponderous prose or jargonistic terminology' but from our habitual modes of thought and expression: 'It may be that readers are simply not accustomed to a legal author whose sensibility and message seem more characteristic of a poet than of either a traditional doctrinal technician or of a law-and-whatever type' (Ibid., 1306-1307). In his third book, *From Newton's Sleep* (1995), Vining offers to render the ordinary activity of reading productively strange. He does so partly by giving attention to different ways of reading, one of which he calls 'close reading'. He begins to give life to the term in this passage:

The ordinary legal text stands somewhere between piece of journalism and sacred text or studied work of art. Legal method holds it there.

Journalism does not last. It is not read closely, reread—there is hardly time to do so. It is replaced. It cannot be reread, read closely, if it does not last, and if it is not reread, it does not last. It disappears.

The legal text, like a piece of journalism, also is replaced. But it is read closely in course of writing the new statement of law that replaces it. Legal method, close reading, makes a legal text last at least long enough to be read closely, and pulling back from the rush of journalism, and looking to the studied work of art, demands devotion of the time and care to writing that will support close reading. (Vining 1995, 6.)

From Newton's Sleep creates for its reader an in-‘between’ place that reveals contrasts between different ways of reading. In doing so, the book offers a resource that can help us to reimagine what it means to ‘read’, especially for contributing—with ‘care’—to a ‘new statement of law’. Different ways of reading are different ways of life, and an awareness of this could equip us to, say, notice and resist destructively bureaucratic legal writing.³

We might hope that by attuning to Vining on ‘close reading’ we can contribute to a valuable conversation about the Waitangi treaty. A Vining reader may appreciate that we could do this by becoming equipped to, say: identify the existence of overlooked and under-heard ambiguity; make an unduly neglected voice more audible; and resist over-confident dispositions in talk about either the treaty’s meaning or ‘the law’. At the very least, we may detect and help reduce misunderstandings. More positively, we may enable deeper mutual understanding and a meaningful quest for justice.

Section I of this essay engages with parts of Vining’s book *From Newton’s Sleep* that are concerned with ‘close reading’. While the engagement will include attending to what he says *about* the activity of close reading, it is vital to notice that the engagement takes the form of *participation in* the activity—rather than passively viewing descriptive statements. This is reading by immersion in a language, a reading experience that may noticeably transform the reader. The experience could include culture shock, a disorienting process in which the familiar becomes strange, leading to some basic questions, such as: ‘Why have I assumed that the world is like this rather than that? Why have I not asked that “why” question before?’ Section II extends Vining’s line of inquiry to the treaty of Waitangi. Section III concludes the essay. As a whole, a central aim is to identify and transcend (from ‘trans’ and ‘scendo’, ‘to climb across’) some dehumanizing habits of thought and expression about both ‘the treaty’ and ‘the legal’—with the aim of adopting richer habits.

1. ‘Close Reading’: Joseph Vining

Vining’s *From Newton’s Sleep* has eight sections and a vast collection of subsections. One reviewer remarked: ‘I despair of giving an accurate account of the complex whole, but I shall try my hand at putting some of the parts together as the author invites readers to do’ (Ball 1996, 2017). The reviewer appreciated that meaning is not ‘in’ the text but in the experiential process of ‘putting some of the parts together’ and creating out of them a new whole. This brings to mind the quandary of the ‘hermeneutic spiral’ (named after the movements of the messenger-god Hermes): in order to understand the whole of a text one must have a prior understanding of its parts, but in order to understand each part one must have a prior understanding of the whole. Making sense of a text involves a spiraling process of moving between understanding the parts and the whole. An awareness of an inevitably incomplete

³ Vining’s *The Authoritative and the Authoritarian* (1986) is written out of a concern with bureaucratic writing.

understanding can make a space for endless learning.

A basic question for a legal philosopher is this: What is the nature of law? Many responses to that question are ‘abstract’, in the sense that they draw away from particulars in pursuit of impersonal knowledge. At the outset of *From Newton’s Sleep*, Vining indicates a dissent:

Beginning with clear and distinct ideas, and building on them: how wrong that is, though ‘objectivity’ is conceived now to be based upon it. [. . .] Ideas, clear and distinct, are to be captured, tied down [. . .]—they do not themselves lead on to other ideas or beyond themselves, and they do not themselves lead one on. But the what of an idea [. . .] always escapes. It leads on, unfolds, is not captured, and cannot be made into a unit. [. . .] The whatness of an idea [. . .] is not separate from the person thinking. [. . .] The *love*, *fear*, and *envy* treated in psychology are a person’s love, fear, and envy, and always escape [. . .] the definitions proposed to capture them so that those using and building on the definitions can [. . .] be seen not to be speaking or thinking about *love*, *fear*, or *envy*. (Vining 1995, 10.)

If we are reading Vining for the first time, we might be disposed to ask: What is the ‘whatness of an idea’? A more ‘person’-oriented re-reader might suggest this question instead: What does ‘idea’ mean to Vining and what is wrong about ‘beginning with clear and distinct ideas’? Also: How might I talk about the meaning to Vining in a way that does not reproduce the language of ‘ideas’? By way of a signpost: his resistance to a quest for ‘clear and distinct ideas’ is of significance for our sensorial economies. The word ‘idea’ is a visual metaphor, coming from the Latin *videre*, to see. The word ‘define’ is also a visual metaphor, coming from *definire*, a finish line. Sight can be a distancing sense, and the use of these visual metaphors can readily commit a user to imagining a mechanistic world of static and mute objects ‘out there’. Such imagining may lead us to unduly neglect a ‘person’, a sonic metaphor, coming from *personare*, to sound through. A person’s voice is a fleeting event that cannot be captured, and this can help us to remember that we inhabit an organic world of movement and shifting relationships. If we become more attuned to our sensorial economies, we might rehear the legal hearing and notice its possibilities for justly re-orienting human relationships. Lawyers and non-lawyers alike might wonder what could become of, say, the *sovereignty*, *property*, and *treaty* treated in the legal hearing. What could become of us when *re-sounding* these terms?

The tradition that seeks impersonal objectivity idealizes language as an instrument that can connect to reality in a way that is ‘literal’—with meaning being independent of context. This tradition has sought to control metaphor, lest it poetically distort reality. The word ‘metaphor’ has Greek roots, coming from *meta* (across) and *phor* (carry). ‘Metaphor’ is a metaphor that suggests we are re-locating meaning, imagery that may mislead us to imagine ‘meaning’ to be an object that can be re-located. Vining offers a different imagery:

Metaphor is not the use of the name of one thing for the name of something else. That would be a literalism once removed. In metaphor the word or pattern of words disattached from a previous object of understanding is not reattached to another previous object of understanding, but is used to express something new—or alive, which is the same—and that something new is meaning itself, the meaning of what is being said. Metaphor is the result actually of a *search for precision*, an attempt to speak the new which is in mind beyond language and of which language is only evidence. (Vining 1995, 89, emphasis added.)

After reading Vining, we may find that we pursue a more precise understanding of ‘understanding’, for want of a better metaphor. For Vining, metaphor need not be a mere figure of speech (in the commonly suggested ornamental sense); rather, he suggests is an essential part of an event that we call meaning, ‘of which language is only evidence’. He can be read as giving the meaning of ‘meaning itself’ some poetic ‘precision’, which may sound oxymoronic to those who imagine the poetic to be ‘beyond’ the pale of reason. He may be read as trying to ‘speak the new’ about what can be involved when a person tries to ‘speak the new’.

In the act of unsettling seemingly clear distinctions (such as literal/figurative), a speaker contributes to the making of a language. That which we call language is not an object that can be captured, tied down. With a desire to de-reify language, we might consider using the verb ‘to language’. The noun ‘language’ can be deceptive, possibly leading us to reify ‘meaning’. Concerning acts of language and meaning:

There is always an enormous *difficulty*, an enormous *struggle* in law particularly, to recall and keep in mind that language is *evidence of meaning*, not *meaning itself*. The struggle comes from the *thirst to know*, for *closure*, that can always be slaked for the moment by *illusion*, but at a *cost* and often a terrible cost. The difficulty, the struggle, is the *difficulty of listening*, and it is a *person* one listens to—only a person, whom one approaches in *good faith*, which includes faith that there is a person to be heard. Axiomatic elimination of the person, at least from *conscious presence* in the reasoning mind, is a way of cutting short the struggle, stopping the work of listening. (Ibid., 239, emphasis added.)

There is always the temptation in law to approach a statute as if its words had *meanings in themselves and by themselves*—the *authoritarianism* sometimes shown by those devoted the maintaining the supremacy of democratic politics and legislative authority. (Ibid., 240, emphasis added.)

What does Vining mean by ‘evidence of meaning’, not ‘meaning itself’? Our answers will be influenced by our ‘struggle’ to make sense of what he means by ‘authoritarianism’, ‘difficulty’, ‘thirst to know’, ‘closure’, ‘illusion’, ‘cost’, ‘listening’, ‘person’, ‘good faith’, and so on. For Vining, a word is never alone but inhabits a complex network of associated meanings. (Simply declaring what he means with person-less dictionary-style definitions would be a performance of the ‘authoritarianism’ that he seeks to resist.) When encountering these familiar words, his reader may find

that the familiar becomes unfamiliar—that the words have lost their ordinary or conventional ‘meaning.’ It may be that an experience of disorientation is an essential part of a ‘struggle’ to listen to a person in ‘good faith.’ The experience may help us inhabit a place where we speak and listen with another person with fuller ‘conscious’ (from ‘con’ and ‘scire,’ ‘to know together’) awareness.

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‘Lawyers listen for the live meaning of the whole of what they read’ (Vining 1995, 156). The whole, for Vining, is more than the sum of its parts. The activity that Vining calls ‘close reading’ does not lend itself to a dictionary-style definition, for it calls for creative involvement in a process that directs a reader’s attention both outward and inward:

In close reading, one has to *imagine* another using a word and *imagine why* another used that word. Reading is a constant calling upon the *imagination*. There is a running *question* ‘why’ in the reading mind, asked over and over.

But the question ‘why’ is not asked out of ignorance, doubt, or challenge. And it is answered by oneself. It is actually hardly a question at all, more the inchoate and preliminary form of identification, of *placing oneself with the writer*, heads together as it were, and looking at the choosing and choice of the word through his or her eyes. (Ibid., 70, emphasis added.)

Let us check any inclination to look at the plain meaning of those words from Vining. Instead, let us read as the author and *imagine* using the words and imagining why they were used. We may be confident that Vining would have his reader take ‘imagination’ seriously, which would include transcending the influential tradition that sets imagination and reason as opposites. If we can imaginatively imagine him using the word ‘imagination,’ we may hope that we will be fittingly ‘placing’ ourselves ‘with’ him. Also, we may do well to *question* our questions (or lack of them) and to repeatedly ask the ‘running question “why”’. If we can place ourselves *with* him, we may notice sights and sounds and questions that we would have otherwise missed.

As Vining’s readers read *From Newton’s Sleep* the first time through, they may notice that their answers to the ‘running question “why”’ change. A gap between expectations and experience—the material of surprise and disorientation—may stimulate new questions, which can form a new standpoint for rereading. Vining offers this imagery of the activity of rereading:

[W]hat one determines to be the meaning of the author, and therefore takes away from the text, is very much a product of one’s own work. [. . .] If what we take away changes as we go back to the text again and again, the reason may be that there has been a change in us, our resources, our understanding of life. That we have not discovered its final meaning (because we discover that *it means something new to us each time*, and have no reason to think that readings have come to an end) is as much a tribute to us as it is an indication of the difficulty of the author. It is *a sign of adequacy in us*, not inadequacy. The meaning we

take away from the text becomes more easily seen to be attributable to us as well as to the author. (Vining 1995, 81, emphasis added.)

How might we treat that passage with the hope of achieving ‘a sign of adequacy in us’? We may do well to read it ‘again and again’ and hope for ‘a change in us’. On each rereading we might ask ourselves what we can contribute (with Vining) to the joint ‘product’ (‘the meaning’) of the text. Habitually asking that question as a reader of texts will help us to resist any temptation to imagine that we have captured a text’s ‘final meaning’.

When we read heads together with the author, we may become more sensitive to our inescapable presence as readers. Drawing attention to the collaborative nature of reading, Vining invites his readers to attend to the images by which they might live (perhaps without noticing them) when reading:

Give up the notion that an author’s meaning is apart from our creation of it. Shy away from phrases such as ‘recovering’ an author’s meaning from a text. ‘Recreate’ would be a better word than ‘recover’ in describing what we do. (Ibid., 87.)

How might we judge Vining’s suggested approach to talking about ‘meaning’? Close reading, it seems tempting to say, is a self-‘creation’ process. Not every ‘creation’ will be equally faithful to an author or text. How can we distinguish better from worse and how can this help with reading the Waitangi treaty?

From Newton’s Sleep lends itself as a resource for thought and expression about our economies of attention. Vining invites his reader to notice acts of noticing. In order to notice noticing we need to pay attention to acts with language. Turning to the life of the lawyer:

There are all manner of words or phrases in law that point to attention, to embracing, and to the within as part of the *phenomenon of authority*—or respect—or true deference. Many such characterizing words or phrases invoke ‘faith’, which is a notion in some academic trouble. ‘In good faith’ is one of them, peppering statute, rule, opinion, doctrine, and discourse in corporate and securities, constitutional, civil rights, and criminal law. ‘Bad faith’ [. . .] and ‘fidelity’ and ‘faithfulness’ cluster about *the standard phrase*. And the words ‘real’, ‘actual’, ‘genuine’, ‘substance’, ‘spirit’ as legal terms have a similar function, referring as they do to the object of faith. Lawyers, legislators, and judges do not bracket them when using them. They are used rather *unselfconsciously*, and they are used pivotally, which should make law an object of *amazement* to the modern and postmodern mentality. (Ibid., 110, emphasis added.)

Here and elsewhere Vining seeks to render the familiar (‘the standard phrase’) unfamiliar by directing attention to it. When experiencing the familiar-to-unfamiliar transition, we may wonder about our lack of ‘amazement’ with legal language; with the fact that lawyers and judges use these words ‘unselfconsciously’ without ‘bracketing’ them. (Does the ‘authority’ of law get enacted in part by a lack of amazement?) The

experience of wonder commonly sparks a questioning spirit. What forces may have been behind our old patterns of noticing? What questions does Vining ask himself when he reads materials from the law? Why does he render the familiar unfamiliar? Does he seek to take the ‘un’ out of ‘unselfconsciously’?

Making sense of an experience of the familiar-to-unfamiliar transition calls for rereading that which was familiar. To read one’s rereading is an act of placing oneself with oneself and with the writer, heads together as it were. How might one describe one’s motives for doing so? What terms might be fitting for talking about our motives for engaging in close reading?

The very act of close reading presumes or indicates that the *meaning of another* person makes a difference. [. . .] Of course one who is truly interested in another’s thought may be truly *interested* because he wants to know what he *himself* believes. It is his *own mind* in which he is ultimately interested. But if he reads hastily and sloppily and does not read closely and carefully when he has time to do so, he does not *care* what the *other* actually thinks. What the other actually thinks does not make a difference to him. Perhaps then he does not care what he *himself* actually believes. (Vining 1995, 138, emphasis added.)

‘Meaning’ for Vining is an experiential process that can change who we are, including our motives. In a process-oriented spirit: Who are we becoming in the process of reading? Or: Why read at all? Some economists might be disposed to respond to that last question by assuming persons are ‘self-interested’, in the sense of seeking to ‘maximize their utility’. Vining offers the possibility of a different sense, namely that of being ‘interested’ in the kind of ‘self’ that the other is and that one is becoming—with reference to character virtues such as ‘caring’ for oneself and others. And this requires careful reading of texts in contrast to hasty or sloppy reading (without care for the other). With a will to resist economic or legalistic varieties of imperialism, we surely should care about what we ourselves actually believe about the value of maintaining the distinction between care and self-interest.

Vining seeks ‘to find a place in thought for the real existence of caring mind’ (Ibid., 180). Caring involves paying real attention to oneself and others. In the context of reading, such attention involves rereading. Turning again to law:

Rereading, or reading anew, which is done in *each* legal argument and *each* case and *each* time a lawyer turns to the texts, involves seeing words or phrases that *were not seen before* [. . .], emphasizing words or phrases or sentences or structures that were not *emphasized* before [. . .], moving aspects of the object in or out of *attention*. The question in law is always what one emphasizes, *concentrates* upon. Any written text is open to this, and all music. A reading one year is rarely the same as reading another year. (Ibid., 219, emphasis added.)

A question in reading Vining is what one concentrates upon. He invites his readers to attend to ‘the question’ of ‘attention’ and its place in that which we call ‘legal’ argument. It would seem that to pay attention to one’s own shifts of attention—to

read one's rereading—would be an important way of treating oneself as a person. And all this is at stake in each legal argument, each case, and each time a lawyer turns to texts. The shifts offer a resource for a story about who one is becoming in and out of law's stories.

In an inquiry about the identity of lawyers, Vining has taken a theological turn. At one point, he imaginatively connects the legal imagination and the theological imagination:

There is a terrible tension in what both lawyers and theologians *do*, given what tools and methods are put at their disposal for doing it. Always flickering in them is *the terror of responsibility in the face of the unknown*. Lawyers and theologians reach for the sovereign, look to the sovereign, speak for the sovereign, something or someone to pay serious attention to, or, to use the liturgical term, to praise. They turn to texts. But the texts to which they turn are selected and are old, necessarily from the past, requiring translation over time and between languages and places, year to year, decade to decade. Why do the words 'authentic' and 'legitimate' punctuate the history of law and the history of theology? They state the object of the work, of course, but their *repetition marks repeated doubt* and repeated challenge as the work goes on. (Vining 1995, 263-4, emphasis added.)

For Vining, both lawyers and theologians are concerned with the big questions of life, which involves confronting 'the unknown', including their own identity—what they 'do', who they are, and who they are becoming. In matters of ultimate authority, some un-'authentic' lawyers and theologians may be inclined to flee 'responsibility' by asserting, with an authoritarian tone, something like this: 'The sovereign is the sovereign and that is the end of it'. In reply, Vining might be inclined to attempt to take the essence (the invisible cultural force) out of the word 'sovereign' by, say, playfully remarking: 'You, who must be the real Sovereign, say "the sovereign is the sovereign is the sovereign is the sovereign is the sovereign..."'. With such 'repetition', the apparently known may become 'unknown', while the 'unknown' becomes known—or a known unknown. Alternatively, he might reply with a tricky question, such as: Should the sovereign have standing to define what the sovereign is? To whom could such a question be properly directed? The supra-sovereign sovereign? Concerning Waitangi, what would it mean to use the word 'sovereignty' more self-consciously?

Vining's reader may readily feel that a key line of inquiry pursued in *From Newton's Sleep* is oriented toward addressing the limits of our languages, especially in matters relating to inexpressible yet real experience. At the end of his book, he offers a poem, 'Present Meaning', which is concerned with such limits. It ends:

What we say—
 Always behind us,
 You, me,
 In the silence,

The present silence,
Existing beyond words,
Always beyond words,
In the clear silence,
The moving stillness—

What, we might ask after hearing ‘moving stillness’ as an oxymoron, is Vining saying about ‘What we say’? Is he saying something about the unsayable? What is ‘silence’? How might an ear-reader let ‘it’ register on the ear? We might wonder if Vining’s turn to silence here is an attempt to make a space for his reader to begin a response to *From Newton’s Sleep* as a whole. Does a sound close reading begin and end in a certain kind of ‘silence’? If so, given the elusiveness of silence, it would seem that we are a very long way from the culture that values clear and distinct ideas, and building on them. This distance may help us to hear the sound of silence in the Waitangi treaty.

2. The treaty of Waitangi

2.1 Negotiations

At the conclusion of his treaty instructions to Captain Hobson, Lord Normanby remarked on their incompleteness. It was not possible to deal with every contingency in detail:

Many questions have been unavoidably passed over in silence, and others have been adverted to in a brief and cursory manner, because I am fully impressed with the conviction, that in such an undertaking as that in which you are about to engage, much must be left to your own discretion, and many questions must occur which no foresight could anticipate or properly resolve before-hand. (Normanby 1839, 42.)

With his ‘silence’ and grant of ‘discretion’, Normanby was beginning a constitutional conversation that would be directed in part by new ‘questions’. The Waitangi treaty would be another stage in the conversation. Whether he knew it or not, Hobson would pass over many questions in silence and leave much to the discretion of others. A close reading can help us tune in to the possibilities for others to ask questions and to join the conversation.

‘On the 4th of February, about four o’clock p.m., Rev’d Henry Williams wrote in a paper titled ‘Early Recollections’, ‘Captain Hobson came to me with the Treaty of Waitangi in English, for me to translate into Maori, saying he would meet me in the morning at the House of the British Resident, Mr. Busby, when it must be read to the chiefs assembled at ten o’clock’ (in Carleton 1948, 312). That time limit would seem to be a remarkably short for such an important and complex task! We might wonder about the image of meaning by which Hobson was living when he spoke with Williams. Perhaps governed by habits of thought associated with literacy,

was Hobson's sensorial economy visual-oriented? Did he imagine 'the Treaty' as a written document containing 'clear and distinct ideas'? Did he imagine a word as a visible object, a thing, rather than as an event? Was he, to echo Vining, disposed to approach the text *as if its words had meanings in themselves and by themselves*—and without relation with the *person* who does the reading/translating? He may have imagined translation as a mechanical conveying of meaning from one language to another. A markedly different image may have been apparent if, for instance, he had given Williams a week to work on the translation and encouragement to repeatedly address the question of meaning, so that he could *place himself, heads together, with* Hobson. Such encouragement would have made a place for close reading—for both Williams and Hobson. Hobson could have been given the opportunity to reread his own text and to place himself with himself, asking why he used this and that word.

What did the Waitangi transaction mean to Williams? How did he imagine meaning? Here are some fragments from his 'recollections':

In this translation it was necessary to avoid all expressions of the English for which there was no expressive term in the Maori, preserving entire the spirit and tenor of the treaty . . . In the midst of profound silence, I read the treaty to all assembled. I told all to listen with care, explaining clause by clause to the chiefs, giving them caution not to be in a hurry, but telling them that we, the missionaries, fully approved of the treaty; that it was an act of love towards them on the part of the Queen, who desired to secure them their property, rights and privileges; that this treaty was a fortress for them against any foreign power which might desire to take possession of their country.

There was considerable excitement amongst the people, greatly increased by the irritating language of ill-disposed Europeans, stating to the chiefs in most insulting language that their country was gone. . . . Many came to us to speak upon this new state of affairs. We gave them but one version, explaining clause by clause, showing the advantage to them of being taken under the fostering care of the British Government, by which act they would become one people with the English in the suppression of wars and every lawless act; under one Sovereign, and one Law, human and divine.

No chief raised any objection that he did not understand the treaty, though some held back under the influence of the Romish Bishop and his priests. (Normanby 1839, 312-315.)

How might we 'listen with care' to Williams? Why did he use the word 'love' when referring to the motives of 'the Queen'? Does he imagine that 'human' law is founded on 'divine' law and that a purpose of law to create the conditions in which 'love'—of God and of neighbor— flourishes? If so, is this purpose connected with 'the spirit and tenor of the treaty'? What did he mean by that phrase? Did he use it *unselfconsciously*? What relation did it have to the letter of the treaty (to use an ancient distinction)? Let me suggest that he was referring to that which he thought his 'explaining' left out (for

want of adequate language) and which nevertheless was significant. Perhaps sensitive to certain forms of ‘silence’ and how they impact on the meaning of what is said, he may have appreciated that something was lost in translation and that it was *beyond* expression to completely identify the ‘something’. If so, it may have been valuable for him to say that there was a sense in which he himself did not *fully* ‘understand’ the treaty. Saying as much may have started an inclusive dialogue, perhaps with the ‘ill-disposed Europeans’ and ‘the Romish Bishop’, in which participants found themselves asking questions about their ‘understanding’ of what ‘understandings’ they shared. (The ‘ill-disposed Europeans’ may have imagined that the Article 1 sovereignty clause⁴ clearly and distinctly functioned to authorize the appropriation of ‘their country’.) Dialogue—from the Greek *dia logos*, ‘across word’—can only happen when, among other conditions, the participants treat each other as persons (like ‘us’) and what we might call ‘good faith’ can overcome any fear of an unfamiliar world. Acts of dialogue could be a fitting occasion for Williams to re-use the word ‘love’—a new context for us to make sense of what he may have meant by the word at Waitangi.

After the conclusion of the Waitangi meeting, British officials headed elsewhere to get ‘intelligent consent’ to the treaty. On 27 April 1840, officials and Te Rarawa leader Nopera Panakareao met at Kaitaia. In one account, John Johnson (the Colonial-Surgeon) noted that the officials ‘endeavoured’ to make the word ‘sovereignty’ ‘intelligible’ to Panakareao (in Belgrave 2005, 108). The following day, after the conclusion of the meeting, Johnson wrote:

Nopera’s speech was evidently that of a man of reflection and the elegant figure by which he expressed the word Sovereignty showed that he had ponder’d deeply on his conversation of the previous evening, nothing could be more beautiful or expressive than ‘The Shadow of the Land is to the Queen, but the substance remains with us.’ (Ibid., 109.)

How are we to read Panakareao’s ‘elegant figure’ of speech about the shadow and the substance of the land? It seems that he has put the *whatness* of ‘sovereignty’ in question. Sir Apirana Ngata (from whom we heard in the introduction to this essay) read Panakareao as having ‘combined the words of the first article with those of the second article’ (Ngata 1922, 10)—the sovereignty and property provisions.⁵ Was Panakareao reading the treaty by ear and *listening for the live meaning of the whole* (including the interaction of the clauses)? (If so, might his way of reading challenge an eye-reader who has a concern with clear and distinct ideas?) Is his figure a *creative act of poetic precision* in an attempt to *speak the new* and to understand the Waitangi event? I am unaware of any evidence to suggest that the British officials inquired

⁴ ‘The Chiefs [. . .] cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty . . .’

⁵ The Article 2 property clause is: ‘Her Majesty the Queen of England confirms and guarantees to the Chiefs [. . .] the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties. [. . .]’

into the meaning of the ‘elegant figure’. Asking explorative questions—such as ‘Why the metaphor of the shadow?’—about its meaning might have led to a creative *dialogue* about the meaning of the treaty, and perhaps about Panakareao’s creativity. We might wonder if the British officials thought to put the question of meaning to him. If they did not think to ask, this may have been because they assumed that what Panakareao said was the same as what he (and they) meant. Such an assumption can conceal an opportunity for real *listening*.

2.2 Part-whole relationships

When a copy of Nopera Panakareao’s speech reached England, Parliamentary-Under-Secretary Vernon Smith ‘feared that the Maoris would discover that the [European] subjects of Queen Victoria had something more than the shadow’ (in Wards 1968, 49). He failed to say more about the ‘something more than the shadow’. His remark connects to claims that the ‘illiterate’ indigenes did not ‘fully understand’ the treaty, contrary to its epilogue. (The epilogue in the document refers to ‘We the Chiefs’ as ‘having been made fully to understand the Provisions of the foregoing Treaty’.) In 1848, the Assistant-Secretary of the Aborigines Protection Society, Louis Chamerovzow, responded to the claims. The treaty document, he stressed, had more than one possible meaning. ‘The ambiguity [. . .] was on the part of the British in not defining more clearly and unmistakably what they meant by Sovereignty’. Rejecting the claim ‘that the New Zealanders were incapable of comprehending the nature and the importance of the Treaty’, he quoted Panakareao:

As to their appreciation of the term ‘sovereignty’ limited as it was by the second article of the Treaty, the explanation given by Nopera [. . .] is perhaps at once the most graphic, the most poetic, and the most logical. [. . .] [C]oming to the question of the sovereignty as asserted in antagonism with the second article, he said: ‘The shadow of the land goes to Queen Victoria, but the substance remains with us’ [. . .] This speech is [. . .] an explanation of ‘sovereignty’ as the New Zealanders understood it [. . .] [and] an assertion of their title to the soil. (Chamerovzow 1848, 14.)

For Chamerovzow, the first article directly connects to the second article: the meaning of sovereignty is ‘limited [. . .] by’ the meaning of the property clause. How ‘limited’? He passed over that question, and thus failed to open up basic questions about part-whole relationships when reading the treaty. In situations of discord over the meaning of ‘title to the soil’, the ‘explanation given by Nopera’ offers not a determinate answer but a resource for a dialogue undertaken in the hope of creating a workable harmony, of doing justice.

Panakareao’s act of metaphor (the shadow-substance imagery) may be imagined as a movement in the ‘hermeneutic spiral’. Making sense of a text, to repeat, involves a spiraling process of moving between understanding the parts and the whole. The emergence of new questions can stimulate new movements. Questions about roads would directly touch on the sovereignty-property relationship. In 1862, Attorney-

General Henry Sewell questioned the right of ‘the Crown as Sovereign, by virtue of what is termed its Eminent Domain,’⁶ to make roads through ‘Native Lands’ (Sewell 1864, 39). The Colonial Secretary urged that ‘policy, not less than justice, requires that the course of the Government should be regulated with a view to the expectations which the Maories have been allowed to base on the Treaty of Waitangi’ (Ibid). Here the Secretary, perhaps unknowingly, was suggesting a *persons*-oriented rule of interpretation to which Chief Justice Marshall gave life in a case involving a United States-Cherokee treaty.⁷ Sewell was familiar with that case and an earlier one involving the Cherokees. In 1863, he wrote to the Secretary identifying ‘a pretty exact parallel’ with ‘the American Indians and their relations with the United States.’ He quoted Marshall’s opinion declaring the Cherokee to be a ‘domestic dependent nation.’ Then, perhaps feeling the *terror of responsibility in the face of the unknown*, he asked: ‘Did the New-Zealanders any more than the American Indians, imagine that by placing themselves under the guardianship of the British Empire they forfeited their inherent rights to govern themselves according to their own usages, and to retain the ownership of their land?’ Here Sewell *imaginatively places* himself with a possible ‘placing’, the material of close reading. He went on to connect to say:

[T]he treaty of Waitangi expressly reserves to them their territorial rights. [. . .] [I]t is true they surrendered to the Queen the ‘Kawanatanga’—the governorship—or sovereignty; but they did not understand that they thereby surrendered the right of self-government over their internal affairs. [. . .] The acknowledgment of sovereignty by the New-Zealander was the same in effect as in the case of the American Indians. It carried with it the exclusive right of pre-emption⁸ over their lands, and the exclusion of interference of foreign nations. [. . .] [B]ut it could not authorise us to inflict on them, as ordinary citizens the penalties of laws which they never heard of, expressed in language of which they are ignorant. (Sewell 1864, 9.)

In a *search for precision*, Sewell gives meaning to the sovereignty clause by contemplating a similarity with a different situation. Re-reading the treaty of Waitangi in the echo of a reading of another treaty is an act of metaphor, which can *create new* meaning. ‘Without a “right” to modify the indigene ‘right of self-government over their internal affairs,’ ‘the Queen’ may have had a less substantial (or more shadowy) existence in New Zealand than any Crown officials had imagined. (This talk of ‘self-government’ readily fits with the translation of the Article 2 property clause, by which the Queen agrees to the Chiefs to ‘te tino rangatiratanga o o ratou wenua o

6 Eminent domain is commonly defined as the power to take (with compensation) property for public use.

7 *Worcester v. Georgia* 30 US (5 Pet.) 1 1831, 582. Marshall stated: ‘The language used in treaties with the Indians should never be construed to their prejudice. [. . .] How the words of the treaty were understood by this unlettered people [. . .] should form the rule of construction.’ For a discussion of the case, see Dawson 2001, chapter 2.

8 The ‘exclusive right of pre-emption’ here means the sole power to purchase indigene lands. On conflict over the meaning of pre-emption, see Dawson 2014, 233-234.

ratou kainga me o ratou taonga katoa.⁹) Here new life can be given to Panakareao's shadow-substance imagery by connecting it to the 'domestic dependent nation' category of Chief Justice Marshall in *Worcester*.

2.3 The subjection of the tribes

Soon after the Waitangi negotiations, Captain Hobson contributed to hostilities between and within tribes over relative capacities to sell land. Disputants included Pororua of Ngapuhi and Panakareao of Te Rarawa. In 1988, the Waitangi Tribunal reported:

Hobson [. . .] learnt [. . .] of the rivalry over the Oruru and Mangonui lands. The hostility was such that the settlers feared for their own safety and promptly told Hobson so. [. . .] [He] appears to have struck upon a solution of his own though he knew very little of the Maori mind. [. . .] It appears that on the spur of the moment he agreed to pay a nominal sum in exchange for Te Rarawa's claims to the whole of the disputed land. Far from easing the situation, the 'purchase' inflamed it. To Pororua the transaction was a treaty between Te Rarawa and the Crown in which the latter recognised a Te Rarawa right over Ngapuhi land. (Waitangi Tribunal 1988, 17-18.)

Perhaps having an attitude of cultural superiority that would serve as an obstacle to a conversational equality, Hobson set up a basic relational problem: with decision-making being unilateral ('a solution of his own') and arbitrary ('on the spur of the moment'), he became authoritarian. Those exposed to this arrangement might sometimes applaud a 'right' (or a 'treaty' 'transaction') that is 'recognised', but the exposure was a form of subjection to the extent that 'the Crown' could unilaterally and arbitrarily take away their right at a later moment.

Following Hobson's miss-steps, Panakareao reversed his elegant figure: 'The substance of the land goes to the Europeans, the shadow only will be our portion' (in Wards 1968, epigraph). The reversal could be read in various ways. He may have, for example, dramatically modified his image of the treaty, or he may have been inferring that Hobson was being unfaithful to the treaty. In 1856, just before he died, he called into question his acts of metaphor: 'What truly is a shadow? It is like death that the hand cannot hold' (in Mutu 1992, 17). Here he may have become aware that his original image of the treaty was open to some fruitful questioning. In questioning his metaphor, we might imagine that he is rereading both himself and the treaty. Perhaps he came to imagine an inadequacy in his earlier reading of the treaty. If so, such an imagining could be a sign of adequacy in him and inadequacy of the treaty.

* * *

9 In translation: 'the unqualified exercise of their chieftainship over their lands over their villages and over their treasures all' (Kawharu 1989, 319-320).

In the 1860s, a settler-controlled legislature put in place the legal foundations for the subjection of the tribes with the enactment of the Native Lands Act 1865, which sought ‘to encourage the extinction of [. . .] Maori proprietary customs’ (in Williams 1999, 142), by establishing a Native Land Court that would determine which ‘Maori’ could sell what land. Questions would arise as to how this and other statutes connected to the treaty. An address by Governor Bowen to chiefs in 1868 is indicative:

It has been asked by one of the speakers at the present meeting, if the Treaty of Waitangi is still in force. [. . .] The sovereignty of the Queen in New Zealand was founded on the willing love and loyalty of the Maoris. And now, my friends, hearken well to my words. The faith of the Queen will be preserved inviolate. [. . .] The Treaty of Waitangi is still in force; the only difference of late years is, that the disposal of their lands is now placed more entirely at the discretion of the Maori owners. By the treaty, the right of purchase was reserved to the Queen alone; but now the Maoris can sell and lease their lands to whomsoever they please. The right of property will be safe under the shadow of the Queen and of the law. Harken to this word: the Treaty of Waitangi has not been broken; it has, on the contrary, been strengthened and extended. (In New Zealand 1990 Commission 1990, 13-14.)

It may have been beyond Bowen’s imagination to appreciate that ‘the Treaty’ could mean something new to him each time he read it—and that its meaning to him might unavoidably differ from each of those at the meeting. Indigenes may have welcomed an invitation to dialogue on the meaning of ‘the shadow of the Queen’—dialogue that compared and contrasted Panakareao’s image of ‘the shadow of the land’. (The invitation could have been a fitting response to the ‘willing love and loyalty of the Maoris’ upon which Bowen imagines Victoria’s ‘sovereignty’ to be ‘founded’. Recall that Williams identified an opposite flow of love: ‘the treaty’, he said at Waitangi, ‘was an act of love towards them on the part of the Queen.’) Had the chiefs questioned Bowen about the meaning of ‘sovereignty’ (a meaning that could readily connect to the meaning of ‘property’), they may well have turned ‘friends’ into enemies. To ‘hearken well’ perhaps really meant ‘passively listen and obey my commands’. A substantial impropriety was the unilateral creation and appropriation, in the name of the Queen, of the unlimited discretion to read the treaty for the purpose of making and interpreting ‘the law’. The authoritarian exercise of this discretion undermined the ‘discretion’ of the chiefs to determine who were ‘Maori owners’ and to determine the justness of the owners’ capacities and constraints in relation to non-owners. We might say that Bowen lacked a *caring* disposition, given his elimination of the indigenes from a meaningful participation in working out the ‘force’ of the Waitangi compact.

* * *

In 1877, Ngati Toa leader Wi Parata entered the Supreme Court to challenge acts by colonial officials that breached the Waitangi transaction. An *authoritarian* judgment

deemed the ‘pact’ to be ‘a simple nullity’. The indigenes were ‘primitive barbarians’ and ‘[n]o body politic existed capable of making cession of sovereignty, nor could the thing itself exist.’¹⁰ *Wi Parata* had no standing. (Recall Vining’s image of the octopus. Did the Court swim out into the great sea around and dart back when frightened by its dark vastness?) In both depreciating the indigenes and reducing ‘sovereignty’ to the condition of a distinct and controllable ‘thing’, the Court unimaginatively composed a self-contained legal domain that had no place for the question of justice. (Augustine (1958, 88) claimed that sovereignty without justice is organized brigandage.) At a *terrible cost*, the Court *eliminated the work of listening* to the treaty and to indigenes disposed to make claims in relation to it. Had Rev’d Henry Williams lived to listen to the Court, he may have judged that the Court was erasing an ‘act of love’ by law—and erasing law worthy of the name.

After *Wi Parata*, an institutionalized judicial devotion to maintaining the supremacy of legislative authority would make it difficult for lawyers to take claims of injustice seriously.¹¹ A settler-dominated legislature had no formal limits to disempower and dispossess the indigenes. The conditions for legislative authoritarianism were created by an act judicial authoritarianism.

2.4 ‘The principles’

The early 1970s saw the emergence of the American Indian Movement, helping to create a force that led to a March on Washington during election week in 1972. Echoes could be heard in 1975 in the Land March from Te Hapua to Wellington. In 1975, Parliament passed the Treaty of Waitangi Act, establishing the Waitangi Tribunal. Its preamble states:

Whereas [. . .] the text of the Treaty in the English language differs from the text of the Treaty in the Maori language: And whereas it is desirable that a Tribunal be established to make recommendations on claims relating to the practical application of the principles of the Treaty and, for that purpose, to determine its meaning and effect and whether certain matters are inconsistent with those principles [. . .].

Let us resist any temptation to approach the statute *as if its words had meanings in themselves and by themselves*. In what sense might the texts ‘differ’ from one another? Contrary to a literalistic imagination, difference is not simply there to *see*, like a rock in front of us. Rather, difference is a relationship established by the metaphorical imagination, which creates similarity and difference simultaneously. An awareness of this can help make us *conscious* of our acts of metaphor and of our *responsibility* for making meaning.

¹⁰ *Wi Parata v. Bishop of Wellington* (1877) 3 NZ Jur. (NS) SC 72, 78. For a fuller discussion of this case, see Dawson 2014, 136-138.

¹¹ Such judicial devotion can be heard in *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590. For criticism of this case, see Dawson 2015, 417-418.

* * *

In 1983, the Waitangi Tribunal released its first major report, on the Motunui-Waitara claim, initiated by a member of Te Atiawa following the discharge of sewage and industrial waste into the sea. In a section on interpretation, the Tribunal said:

A Maori approach to the Treaty would imply that its wairua or spirit is something more than a literal construction of the actual words used can provide. The spirit of the Treaty transcends the sum total of its component written words and puts narrow or literal interpretations out of place. (Waitangi Tribunal 1983, 47.)

How are we—‘Maori’ and others—to ‘approach’ the Tribunal’s words? The orientation metaphor ‘approach’ may mislead us into imagining ‘the Treaty’ as a passive object outside of us rather than as a conversational event that we recreate when we talk about it. Given that there is no such thing as an impersonal ‘literal construction of the actual words’, we might wonder what the ‘something more’ is. Such wondering may help us to avoid using the word ‘spirit’ *unselfconsciously*. We—‘Maori’ and others—might do well to consciously transcend the setting of the ‘spirit’ in opposition to the ‘literal’. The real question concerns the kind of spirit with which we might engage with the letter.

* * *

In 1986, Parliament passed the State-Owned Enterprises Act, which enabled the transfer of assets, including land, controlled by government departments to ‘State-Owned Enterprises’. The New Zealand Maori Council believed that transfer could reduce the likelihood that Maori would be able to get land returned to them—an injustice that would add to past injustices. The Council began a Court action, putting to work Section 9, which specified: ‘Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi’. The Court of Appeal reached a unanimous decision, agreeing with the Council that a transfer would be ‘inconsistent’. The Court’s President, Sir Robin Cooke, wrote:

The principles of the Treaty are to be applied, not the literal words. As is well known, the English and Maori texts [. . .] do not necessarily convey precisely the same meaning. The story of the drafting of the Treaty and the procurement of the signatures [. . .]—events in which no lawyer seems to have played a part—is an absorbing one, but not within the ambit of this judgment.

The differences between the texts and the shades of meaning do not matter for the purposes of this case. What matters is the spirit. This approach accords with the oral character of Maori tradition and culture. [. . .] In brief the basic terms of the bargain were that the Queen was to govern and the Maoris were to be her subjects; in return their chieftainships and possessions were to be protected, but sales of land to the Crown could be negotiated. These aims partly conflicted. The Treaty has to be seen as an *embryo* rather than a fully developed and integrated set of ideas.

The Treaty signified a partnership between races, and it is in this concept that the answer to the present case has to be found. For more than a century and a quarter after the Treaty, [. . .] the assimilation of the Maori to the Pakeha [European] was the goal which in the main successive Governments tended to pursue. [. . .] Now the emphasis is much more on the need to preserve Maoritanga, Maori land and communal life, a distinctive Maori identity.

[T]he principles of the Treaty [. . .] require the Pakeha and Maori Treaty partners to act towards each other reasonably and with the utmost good faith. That duty is no light one. It is infinitely more than a formality. If a breach of the duty is demonstrated at any time, the duty of the Court will be to insist that it be honoured. All too clearly there have been breaches in the past.

[T]he present decision [. . .] means that there will now be an effective legal remedy by which grievous wrongs suffered by one of the Treaty partners in breach of the principles of the Treaty can be righted. I have called this a success for the Maoris, but let what opened the way enabling the Court to reach this decision not be overlooked. [. . .] If the judiciary has been able to play a role to some extent creative, that is because the legislature has given the opportunity.¹²

Sir Robin Cooke's image of the treaty as 'an embryo rather than a fully developed and integrated set of ideas' seems sound and helpful, given that neither the texts nor the larger events in which they emerged set up working relationships (with procedures and roles) that offer a resource on which to found a communal life. The absence of such relationships makes it difficult to precisely identify specific 'breaches', not least because the basic question of who decides is an open one. A judge less devoted to maintaining the supremacy of legislative authority may have been disposed to take this basic question seriously.

Like the Waitangi Tribunal, Sir Robin sets 'the spirit' in opposition to 'the literal'. If we imagine 'meaning' not as a 'convey'-able object (like goods transported by a vehicle) but as an experiential process to which author and reader contribute, we will be inclined to question the suggestion that 'differences between texts' exist independently of our imaginings. Our imaginings will include context against which the texts were composed, context that will influence textual meaning. As such, the Court should properly include 'events' such as 'the drafting of the Treaty and the procurement of the signatures' as 'within the ambit of this judgment'. This could make a place for taking seriously Panakareao's image of sovereignty as shadow, an image that could dramatically change what the texts mean to a reader. Listening to Panakareao would fit with taking seriously 'the oral character of Maori tradition'.

* * *

The *Maori Council* case has received criticism from various standpoints. Some critics expressed concern about the Court's task. Auckland University legal academic

12 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 662-668 (Cooke P).

Jane Kelsey, for example, considered the terms of the governing legislation to be defective:

[T]he State Owned Enterprises Act [...] said that the Government had to comply with the ‘principles of the Treaty’, not the Treaty itself. So the five Pakeha male judges on the Court of Appeal set about defining these principles. [...] The Treaty was redefined to remove the guarantee of rangatiratanga and to reinforce British sovereignty. This is how the Government has been able to argue that it was honouring the ‘principles’ of the Treaty while its actions clearly breached the guarantees of both the Maori and the English text. (Kelsey 1989, 129.)

Perhaps not one to vocalize her reading and to listen to the whole of what she reads, Kelsey seems insensitive to the possibility that ‘the Treaty itself’ is open to various readings, the existence of which may lead us to doubt our capacity to arrive at any sure sense of what ‘the guarantees’ mean. (Such doubt opens up the procedural question of who decides, a question that is perhaps inchoately behind her reference to ‘Pakeha male judges.’) Her word ‘redefined’ may lead us into delusively imagining that an impersonal pre-existing literal meaning can exist—that ‘the Treaty’ is a passive object to be seen rather than a conversational event that can transform us in the process of tuning in to it. In what direction might she have gone if she had chosen the word ‘recreated’ instead or ‘redefined’? One possibility is that she may have connected to Panakareao’s elegant figure.

* * *

Canterbury University academic David Round has also faulted ‘principles’ talk. He targeted ‘judicial activism’:

How can one *extract* the ‘principles’ of the Treaty from its terms? It is entirely a speculative and *imaginative* exercise. The terms of the Treaty are simple. Maori recognise the sovereignty of the Crown, and in return have their possessions guaranteed and enjoy the rights of British subjects. These terms—and such a treaty—are surely little more than meaningless in a settled legal order where the Crown *undoubtedly* has sovereignty, and where all subjects and citizens are guaranteed the enjoyment of their possessions. To move from this very simple prescription for a legal order to ideas of partnership and special relationships is not done by ineluctable logic but by *invention*.

The *discovery* and application of ‘Treaty principles’ is a political, imaginative and unpredictable activity, and rule by ‘Treaty principles’ must inevitably have something about it of rule by secret law never known until it is revealed in particular decisions. (Round 2000, 653, emphasis added.)

Round’s guiding question (an ‘invention’ of sorts?) begins with a problematic metaphor (‘extract’) that can tempt us into imagining ‘meaning’ as an impersonal object, a metaphor that sets up a false opposition: ‘terms’ versus ‘principles.’ (The

metaphor ‘discovery’ may conceal ineluctable ‘imaginative’ creativity in working out ‘principles.’) The real question for an interpreter concerns the interpretive principles with which they treat both the terms and the persons with whom the terms are concerned. With the voice of certainty, telling his readers how things ‘undoubtedly’ are, he speaks of ‘sovereignty’ as if it is a distinct object than can be possessed (like one’s tangible ‘possessions’), in this case by ‘the Crown’. (To echo Panakareao, sovereignty is like death that the hand cannot hold.) A volume could be written on the elusiveness of ‘the Crown’ (and of ‘sovereignty’ and ‘possessions’). To raise the issue of the identity of the Crown could readily unsettle what Round imagines as ‘settled’.

* * *

In 2007, Ngapuhi elder Titewhai Harawira initiated a wide-ranging claim to the Waitangi Tribunal, concerning various ‘impacts’ (‘political, social, economic’ and ‘cultural and spiritual’) on the tribe’s ‘wellbeing’ (Healy et alia 2012, Appendix 1). Her opening remarks (made on behalf of herself and Sir Graham Latimer) referred to the Waitangi compact:

Everyone knows that the promises [...] have been broken. Yet instead of figuring out how to honour [them] in a principled way, new principles have been invented to change what the agreement was in the first place [...]. (in Healy et al. 2012, ix.)

Does Harawira’s ‘everyone knows’ speak for us? She seems to call for nothing more than a brief glance at ‘the promises’ to see if they have been fulfilled or not. Until we engage in a lawyerly close reading of ‘what the agreement was in the first place’, we cannot meaningfully *begin* to talk about a ‘change’ of meaning and to judge what is and isn’t ‘broken’. She has implicitly accepted the defective image that *an author’s meaning is apart from our creation of it*. Concerning the activity of law, a vital question concerns the identity of those who should read, and in reading *recreate*, the treaty in the pursuit of justice. This is a question that seems to be beyond her horizons.

* * *

Various contributors to talk about ‘the principles’—the Waitangi Tribunal, Sir Robin Cooke, Jane Kelsey, David Round, and Titewhai Harawira—sound off-key to my ears. They accepted without question Parliament’s statutory language. Let us return to the Treaty of Waitangi Act: ‘Whereas [...] the text of the Treaty in the English language differs from the text of the Treaty in the Maori language’. It seems reasonable to imagine that the authors of the statute imagine (i) that a ‘language’ is a transparent container of meaning, or a tool for pointing to an object for all to see; and (ii) that the meaning contained in the texts ‘differ’ from one another. Concerning the different meanings, the authors might readily accept without question these remarks by the legal historian David Williams:

While oral transactions may have been more important at hui [meetings] in 1840, it is the written word which has come down to us today. In the workings of our legal system careful scrutiny of written formulations are paramount. [. . .] [E]ach Treaty document has a distinctively different general thrust. The Māori text predicates a sharing of power and authority in the governance of the country between Crown and Māori. The English text is about a transfer of power, leaving the Crown as sovereign and Māori as subjects. Much of the Treaty's history has been bedevilled by the fact that Māori and Pākehā have been 'talking past each other'. (Williams 1989, 79-80.)

In a spirit of 'careful scrutiny': how does Williams imagine 'the written word'? From where or whom did it (whatever 'it' might be) 'come down to us'? Was the movement a *mute transference* from eye-reader to eye-reader? Our ear-training with Vining might prompt us to transcend the opposition between the 'oral' and the 'written' word. If Williams was disposed to *vocalize* his reading of the Waitangi texts with Panakareao's shifting shadow-substance imagery in his mind's ear, he may have been less sure on what each of them is 'about'. An artist in *intonation* and *gesticulation* perhaps could render 'sovereign' and 'subjects' as equals, if only in their capability for 'talking past each other'. If we accept the possibility of equal capability, we might be disposed to ask what principles we should adopt in attempting to talk together. I would begin by proposing a lawyerly fair *hearing* exploring the meaning of sovereignty the unique Waitangi context. This could enable Panakareao's 'elegant figure' to be heard.

3. Conclusion : Provocation to rereading

What are we doing when we are reading? Lord Normanby passed over in silence that question when he composed treaty instructions for Captain Hobson. Hobson perpetuated the silence. Many others have followed them. We commonly read *unselfconsciously* and do not even think to question ourselves about what is involved in acts of reading and whether we can do better. Inspired by Joseph Vining and his imaginative efforts to reconstitute the home of the legal mind, this article offers an attempt at a conscious act of reading.

Vining has invited his reader to set about learning anew to read. There is a sense in which he contributes to thought and expression about legal literacy. The direction he takes resembles efforts by the literary critic George Steiner to promote 'humane literacy'. Steiner has sought to transcend the simple opposition between literate and illiterate. Let him speak:

In that great discourse with the living dead which we call reading, our role is not a passive one. [. . .] We engage the presence, the voice of the book. [. . .] A great poem, a classic novel, press in upon us; they assail and occupy the strong places of our consciousness. [. . .] A man who has read Montaigne's chapter XX (*Que philosophe c'est apprehendre à mourir*) and Hamlet's use of it—and who is not altered, [. . .] who does not, in some subtle yet radical manner, look on the room in which he moves, on those that knock on the door, differently—has

read only with the blindness of physical sight. [. . .] To read well is to take great risks. It is to make vulnerable our identity, our self-possession. In the early stages of epilepsy there occurs a characteristic dream (Dostoevsky tells of it). One is somehow lifted free of one's own body; looking back, one sees oneself and feels a sudden, maddening fear; another presence is entering into one's own person, and there is no avenue of return. Feeling this fear, the mind gropes to a sharp awakening. So it should be when we take in hand a major work of literature. [. . .] He who has read Kafka's *Metamorphosis* and can look into his mirror unflinching may technically be able to read print, but is illiterate in the only sense that matters. [. . .] It is the task of literary criticism to help us to read as total human beings, by example of precision, fear, and delight. (Steiner 1967, 28-29.)

Steiner's own 'example of precision, fear, and delight' and the experience of transcendence with which he is concerned ('somehow lifted free of one's own body') will be familiar to a Vining reader—or at least a *close* reader who has felt *From Newton's Sleep* 'press in'. The passage could serve here as a frame for imagining Vining. After *placing oneself with him, heads together as it were*, one will be disposed to claim that a key task of legal philosophy is to help us to read law and legal criticism 'as total human beings'. She (or he) who has read *From Newton's Sleep* and who does not notice the law in which she moves differently has failed to pay due attention to the voice of the book. As for a Waitangi lawyer, if Vining's 'presence' has entered into her own person, she may well begin to notice those who have read the treaty only with the blindness of physical sight' and to do better than them. She may wonder what it might mean if those speaking in the name of the Queen made vulnerable their identity, their self-possession, in Waitangi talk. Such a disposition would be readily connectable to the 'act of love' (Henry Williams) at Waitangi.

Practices that are worthy of being called 'humane literacy' will reflect an awareness of language as a cultural force that is at once outside us and inside us—in contrast to the image of language as an external transparent container of meaning. Vining touches on the mixture of inside and outside as follows:

Writing wholly unconverted about religious conversion is not quite writing about *it*, religious conversion. Yet if converted one must have at least one foot on the outside in order to write about it. Language itself puts us in that stance. We do not have to struggle to assume the position of being both inside and outside. The instant one says something one is detached from it and critical of it, able to ask whether it is what one really thinks, and yet one is sufficiently behind it to say it and knows it is not someone else who is saying it. (Vining 1995, 72.)

'Language itself' is mysterious, yet often taken for granted, like reading. When Vining draws attention to 'it', his reader may readily become lost for words as their image of 'it' turns inside out, a movement that could serve as a resource for attuning to the precarious 'stance' about which he writes. This is a stance that could prod a

Waitangi reader to wonder if she is *both inside and outside* the treaty—a wondering that productively puts in question *what* ‘the treaty’ is. She may initially feel like at least two persons at once, with one immersed in the world Vining creates and the other able to ask the ‘what’ question (‘what one really thinks’) in the Waitangi context. A third person within her could act as a translator for the two of them, *heads together as it were*. A fourth person, a poet, may feel inclined and equipped to judge the translation. If the fidelity of the translator is questioned, a fifth person within her might wonder how to pursue a workable harmony in situations of talking past each other. A sixth may suggest to all of them that they enter into a ‘treaty’ in order to guide their Waitangi talk in the direction of justice. If a workable harmony does emerge between her selves, she could consider offering the personal ‘treaty’ as an example for Waitangi talk at a national level.

This personal treaty could be called the Treaty of Transcendence. Vining, or at least one of his many selves, might quibble over the name:

The transcendent produces such agony now, that we want to deny it. Why? Is the reason frustration, that we cannot understand despite our yearning to understand and so we try to avoid the trial altogether? Not this only. ‘Frustration’ is too mild. There is fear too, fear of pain, being torn apart. (Ibid., 329.)

That passage could help us to reflect on the experience of responding to our ‘yearning to understand’ a multitude of understandings of the treaty—as expressed by various people, including Henry Williams, Nopera Panakareao, Henry Sewell, Sir Robin Cooke, Jane Kelsey, David Round, Titewhai Harawira, and David Williams. (Recall the epilogue in the Waitangi document, referring to ‘We the Chiefs’ as ‘having been made fully to understand the Provisions of the foregoing Treaty’.) If we can come to ‘understand’ the need for a deeper understanding of what it is to ‘understand’, we could say that we have had a valuable experience of transcendence. Why? In the process of coming to understand the *limits* of our understanding of understanding, we will have moved *beyond* our former horizons (when we thought we fully understood what understanding is). If it was common for us to attend to and talk about the various limits against which we ‘understand’ the treaty, we might hope to transcend talking past each other and begin to talk together, aided by the imaginative enterprise of close reading.

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