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Transcendental Sense and a Playful Approach: The Treaty of Waitangi

by Richard Dawson*

There is a rite of passage in New Zealand that is called "OE," an acronym for "overseas experience," commonly undertaken by people aged in their twenties. Many people speak of OE as a potentially valuable education. These remarks by Claudia Bell are indicative:

> Once away, the young New Zealander stops being an insider in a taken-for-granted culture, and becomes an outsider somewhere else. On OE there is the liberty to reconstruct themselves. OE transcends the intellectual and spiritual limitations of staying in a small New Zealand town, or an over familiar city. A huge world of options and experiences has suddenly opened. During their absence they also develop an "outsider" view of New Zealand. They can now claim a far larger vision than those who stayed at home.[1]

An OE education (the word "educate" comes from the Latin "educere," "to lead out") involves a movement that "transcends" (from "trans" and "scendo," "to climb across") various "limitations," which may only be sensed as limitations when becoming an "outsider." The claim of "a far larger vision" may turn out to be questionable if, among other possibilities, "those who stayed at home" have been absorbed in some productively disorienting reading.

My experience of reading Jack Sammons has resembled an OE. In particular, I became aware of some taken-for-granted language that can conceal important dynamics in our engagement with language. I had explicitly identified some virtues relating to exercising "control" over

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1. Claudia Bell, *The Big "OE": Young New Zealand Travellers as Secular Pilgrims*, 2 TOURIST STUD. 143, 147 (2002).

language but had, as Sammons suggested, neglected possible vices.[2] In order to avoid these vices, I could alter attention from "control" to "play," in the sense of a movement that can combine control with the out-of-control. (There are some virtues associated with the out-of-control, such as openness and receptivity.). Such play does not lend itself well to a dictionary-style definition, for it is a creative process in which a person is experiencing shifts of consciousness. The following passage from David Tracy offers helpful imagery:

> When I enter a game, if I insist upon my self-consciousness to control every move, I am not in fact playing the game. Rather I am playing some curious game of my own where self-consciousness is the sole rule, while any vulnerability and any ability to transcend myself are . . . forbidden moves. . . .
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> . . . [In] the actual experience of playing any game [,. . .] self-awareness and self-centeredness are lost. . . . In playing, I lose myself in the play. I do not passively lose myself. In fact, I actively gain another self by allowing myself fully to enter the game. Thus do I allow myself to be played by the game. I move into the "rules" of the game, into the back-and-forth movement, the experienced internal relationships of the game itself. The game becomes not an object over against a self-conscious subject but an experienced relational and releasing mode of being in the world distinct from the ordinary, nonplayful one.[3]

Which "self" within might fittingly respond to that passage in the spirit of play? "Play" can help us to "transcend" the simple opposition between "actively" and "passively," making a medial place with "back-and-forth movement."[4] Tuning in to medial can prod us to become conscious (from "con" and "scire," "to know together")[5] of the ways in which a person's plural selves may play and be "played." We may hope to notice appreciatively or open up an "experiential relational and releasing mode of being" that we might readily marginalize or ignore.

Part I of this Article offers an OE traveler's guide to some passages in Sammons's writings that are concerned with the play of language. I hope my traveling "will to understand" Sammons reflects not a "will to power"

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2. Jack L. Sammons, *Richard Dawson: Justice as Attunement: Transforming Constitutions in Law, Literature, Economics, and the Rest of Life*, 11 NOFO 134, 142 (2014) (book review).

3. DAVID TRACY, THE ANALOGICAL IMAGINATION: CHRISTIAN THEOLOGY AND THE CULTURE OF PLURALISM 113-14 (1981).

4. "[T]he most original sense of playing is the medial one." HANS-GEORG GADAMER, TRUTH AND METHOD 93 (1975).

5. "Consciousness seems to be related to the idea of bringing different ways of knowing together." NICHOLAS DAVEY, UNQUIET UNDERSTANDING: GADAMER'S PHILOSOPHICAL HERMENEUTICS 238 (2006).

but a will to play and be played.[6] This is a medial sense of understanding, which begins from "under" (underneath), not from an imperial "standing" above.[7] Part II returns "home" and offers an insider/outsider's engagement with communication about the founding transaction between Maori peoples and a representative of Queen Victoria, the Treaty of Waitangi.[8] This engagement, which brings into play under-standings from reading Sammons, is intended to be accessible to an insider and an outsider, each of whom are offered, respectively, de-familiarizing and familiarizing experiences. Part III concludes.

I.

In *Homo Ludens*,[9] Johan Huizinga identifies a neglected "play-element" in a range of human activities (including art, law, music, philosophy, poetry, and war),[10] and in doing so he connects aspects of our social world that may seem unconnected. In a summary of key "characteristics of play," he speaks of "a free standing activity . . . absorbing the player intensely and utterly."[11] He plays with (or, perhaps better, transcends) "our way of thinking" that commonly sets "play" as "the direct opposite of seriousness."[12] He suggests that setting the two in opposition to each other could mislead us into imagining that we need not take play seriously. Much is at stake: "[T]rue civilization will always demand fair play," which "is nothing less than good faith expressed in play terms."[13] Put differently, "[T]he cheat or the spoil-sport shatters civilization itself."[14]

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6. The phrase "will to understand" comes from Jack Balkin, who distinguishes it from Nietzsche's "will to power." For Balkin, "the will to understand is not a celebration of human domination. The urge to understand is an urge towards a certain type of vulnerability." J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE L.J. 105, 159 (1993).

7. On the medial sense of "under-standing," see PHILIPPE EBERHARD, THE MIDDLE VOICE IN GADAMER'S HERMENEUTICS: A BASIC INTERPRETATION WITH SOME THEOLOGICAL IMPLICATIONS 109 (2004).

8. Treaty of Waitangi, Feb. 6, 1840.

9. JOHAN HUIZINGA, HOMO LUDENS: A STUDY OF THE PLAY-ELEMENT IN CULTURE (Routledge 2002) (1949).

10. *Id.* at 211.

11. *Id.* at 13.

12. *Id.* at 5.

13. *Id.* at 211.

14. *Id.*

In *Justice as Play*,[15] Sammons identifies the "play-element" in practice of law more fully than Huizinga did. After a nod to *Homo Ludens*, he identifies his line of inquiry:

> Why do we take those social disputes in our ordinary lives that often seem most serious and therefore most divisive, turn them over to playful participants in a legal game, and then choose, more or less, to call the outcome of this game *justice* and to trust it as such even to the point of preferring it to the political? Why, that is, do we think that it is justice that arises from this play?
> . . . The *justice* here is the *justice* of *justice was done*, but in the procedural sense of doing that refers to the legal conversation's having gone well on its own terms. It is, in other words, the *justice* best described, and most admired by lawyers as advocates, with reference to the manner in which a particular legal dispute was resolved through the conversation for which these lawyers are primarily responsible.[16]

If Sammons's reader is not familiar with *Homo Ludens*, they may well initially imagine that, in calling courtroom action a "game" that we "play," his approach to law lacks due seriousness. If they continue to read and get absorbed (and come to accept that central features of a game can involve lawyerly dispositions, goals, participants, plans, positions, and rules), then they may become disposed to take him seriously playfully and playfully seriously. They may even feel a responsibility to join him in conversation about the "legal conversation" with the hope of enriching it, and making that which "arises" more worthy of the name "justice."

Sammons talks about various aspects of the "legal game," including a possible outcome of a case: "Winning, for lawyers, is achieving that state of affairs in which some authority decides the dispute between the parties by rendering a favorable judgment on a lawyer's persuasive performance on behalf of the client."[17] The "[c]onstitutive rules"–"such as the rules of evidence, procedure, or ethical regulations"–guide the "persuasive means."[18] The constitutive rules emerge in "an ongoing conversation . . . about . . . what it means to play the game well, and how to avoid corruptions of it."[19] We might hope that such rules are the product of fair play, which can lend itself as a model for a particular legal dispute. The stakes in a dispute are significant, for they include the making of humankind:

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15. Jack L. Sammons, *Justice as Play*, 61 MERCER L. REV. 517 (2010).
16. *Id.* at 517-18 (emphasis added).
17. *Id.* at 542-43.
18. *Id.* at 543.
19. *Id.*

> Our lawyers' competing moral arguments move us toward a recognition of each dispute as a *unique* disturbance of our identity–an anomalous situation that we cannot adequately address using resources familiar to us from past usage–because it is our identity itself that is in question. Together the lawyers insist that what they have to say for their clients be truly heard as new, as unique, . . . , and of great value because they are so; and the lawyers do this by summoning all of those methods of poetic fiction Aristotle described. It follows that, if we are to do this right and to do it honestly, we have to admit with Socrates that we start in some essential way from a position of not knowing how to go on. For the lawyers in their competing arguments display for us . . . the limitations of the materials of the law for resolving the dispute . . . and . . . the limitations of language itself. They do so by making the dispute fully human which, ironically, makes our community suddenly alien to itself so that we can, with honesty, decide who we are.[20]

Concerning the "position" from which "we start": lawyers begin with a problem that those involved cannot resolve alone. A reader of Plato's seriously playful Socrates will appreciate that the experience of being in a "position of not knowing how to go on" is sometimes called an "aporia," "without a path." The position is not a passive and empty "not knowing," for the "not knowing" is known; it emerges through a knower with some sense of the problem that enables them to ask about what is problematic. This knowledgeable ignorance comes from a humility–missing from a know-it-all–that stimulates questioning toward the creation of a path that can enable the parties to "go on." The art of the lawyer in formulating questions will influence the quality of the path. Lawyers address the circumstances of people who have experiences that are beyond complete expression due to "the limitations of language." Much of these experiences can be lost in the translation to legal language, creating the danger that clients are not "truly heard," even if the judgment is favorable. A fruitful, "poetic" imagination can help reduce that which may be lost, and can even help productively transform the meaning of the original experiences. A serious play of metaphor can render the "familiar" "alien," and a source of wonder. When opposing lawyers offer fitting, "competing" metaphors for the purpose of judgment, we may experience a new aporia, leading us to wonder "who we are." The passage from Sammons offers to "move us toward a recognition" of the heart of the law: the hearing, in which one story is placed in play against another, with the play calling for a responsible "community"-creating judgment. After a hearing, at its best, we can hope that those in conflict feel "truly heard." While

20. *Id.* at 546-47 (emphasis added).

none of the parties involved in a conflict may welcome a decision that does not give them all that they initially wanted, a simple recognition–an under-standing that one has been under-stood and a respectful acknowledgment of one's claims–should be of immense value.

Further to Sammons's remark about the community becoming "alien to itself": as an ideal, lawyers can aspire to "making ourselves strange to ourselves."[21] Concerning the experience of a valuable estrangement, Sammons puts into play the word "transcendence":

> In the recognition of, the insistence on, our own limits in the legal conversation, we see the beginning of a transcendence of them. We apprehend . . . an appeal to that which is beyond us and yet arises from our experience. And in this appeal, in this trusting of a transcendence, that which is beyond is not understood as a void or a negativity, but as itself a real presence.[22]

If it was common for us to consciously attend to and talk about the various "limits" against which we act, including the limits of our languages to do justice to "our experience," the word "transcendence" (or its companion "beyond") may be used more widely for talking about a central purpose of and experience in "the legal conversation." We might be disposed to imagine justice as an experiential transcendence through a seriously playful "conversation."

* * *

In Sophocles's play *Antigone*,[23] Creon, the new ruler of Thebes, has commanded that the dead revolutionary Polynices is to be left unburied outside of the city, left to the dogs. Polynices's sister, Antigone, believes that Creon is violating the unwritten laws of the gods and that she has a right to bury her brother. Creon has ears but does not hear, partly due to his unshakeable biases against women. There is a clash of rights, each expressed absolutely. The Chorus, who are disposed to probe for common ground, senses that "there is much to be said on both sides."[24] In an essay that connects the play to the legal profession, Sammons sums up the conflict: "[B]oth have corrupted their feelings for other humans and

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21. *Id.* at 547.
22. *Id.* at 549.
23. SOPHOCLES, ANTIGONE, *reprinted in* THE THEBAN PLAY 146 (E.F. Watling trans., 1947).
24. *Id.* at 146.

they see only what they want to see and hear only what they [want] to hear."[25] Sammons playfully stops the play and gets lawyers involved:

> What Creon and Antigone both need is a good lawyer. They need someone who will open up the possibilities of their worlds by . . . asking what it means to bury, what we mean by city boundaries, what this *nomos* truly requires, what it means to serve the city or the family, and by telling the truth to the client (as Teiresias does to Creon near the end of the play). They need the moral distance and moral vision that one not committed to narrow views of the world could bring.[26]

Creon and Antigone, to put it differently, could benefit from someone asking the lawyerly questions that can prod them to identify and reflect on the limits on the rights they assert and to imagine "possibilities" for agreement. The existence of the questions may be some "distance" (the material for transcendence) from "narrow views of the world." Anyone who may be disposed to "open up the possibilities of their worlds" may do well to consider the possibility that neither Creon nor Antigone may welcome the opening, for this could seem unimportant or irrelevant–or even subversive if one questions the identity of who is supreme. As tragedians will tell us, some possibilities may only become intriguing and meaningful at "the end of the play," when a tragedy is irreversible.

For Sammons, Sophocles's play can help open up the possibilities for imagining the life of a lawyer. By suggesting what it can mean to ask lawyerly questions amidst political strife, Sammons helps us to more fully under-stand what lawyers are doing and can do when they are lawyering. In a later essay, which contributes to the rehabilitation of rhetoric as a justice-directed activity,[27] he directs attention to the significance of the question of character:

> [L]et us imagine an Antigone who goes to see a lawyer. . . .
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> . . .
>
> [T]hree lawyerly tasks must be done first. The first is to *listen* to Antigone . . . [who] is the source of whatever wisdom the lawyer as rhetorician will speak. . . .
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> . . .

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25. Jack L. Sammons, *The Professionalism Movement: The Problems Defined*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 269, 293 (1993).

26. *Id.*

27. Rhetoric is commonly imagined as an ignoble art of persuasion. Beginning with *The Legal Imagination: Studies in the Nature of Legal Thought and Expression*, James Boyd White has been a major contributor to redefining rhetoric as, at its best, the noble art of civil government. JAMES B. WHITE, THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION (1973).

> [T]he next lawyerly task is to *prepare to speak* for Antigone. . . . Thus, as one who must speak persuasively for another and seeks to do this well, Antigone's lawyer has no choice but to explore with her who she is and what it means to be who she is in this dispute in these communities with these values. In this conversation with the client, the rhetorician discovers and creates–creates because the conversation will change the client–who the client is and what is to be said for her. To see if the wisdom he heard in the story she brought to him is *her* wisdom and to see if it will be persuasive to the relevant others, the lawyer tests this wisdom against who Antigone is, against who she seems to be becoming in the conversation, against her culture as best he can, and against the morality of the communities in which the dispute must be heard. . . .
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> . . .
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> *All of these rhetorical tasks may change Antigone and the nature of her dispute, as they can change all clients and all disputes, and in ways she may not like.* These changes will be *imposed* upon her, as they are upon all clients, through whatever moral authority she recognizes the practice of law to have over her. The lawyer as rhetorician, listening, preparing to speak, and creation of the conversation, will change Antigone by requiring her to view her dispute as rhetorical. For Antigone came to her lawyer seeking . . . control over her life–either to create it or to have it restored. Thus, she came to him seeking security and yet what he offers is a reminder of her insecurity, a reminder that the control she seeks over her life can only come about honestly through trust in a conversation with others. Clients like Antigone must trust their lawyer, trust the other lawyer, trust the judge, trust the various magistrates of enforcement to perform their roles well, trust the community, trust conversation itself, and, very often, trust the party on the other side.
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> . . .
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> This will be . . . a lesson of frightening limitations: of the limitation of the contingency in which we live, of the limitation of our dependency on others, and of the limitation of uncertainty about our own moral claims.
>
> *Will Antigone listen to any of this?* What the rhetorician asks of her is an extraordinary honesty about herself–an honesty he requires of her so that he can know for whom he speaks. Such an honesty can only happen in the most trustworthy of relationships.[28]

How might we read that passage? Let us first place ourselves in the shoes of an unsympathetic lawyer-critic who inhabits the mindset that

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28. Jack L. Sammons, *Rank Strangers to Me: Shaffer and Cochran's Friendship Model of Moral Counseling in the Law Office*, 18 U. ARK. LITTLE ROCK L. REV. 1, 47, 49, 51-52 (1995).

"rhetoric" is opposed to "logic." Resisting the identity of "lawyer as rhetorician," we ask: "What rhetorical tricks does Sammons employ to persuade me that rhetoric is of real value to the lawyer? Is his main trick the use of a hard case (*Antigone v. Creon*), which is relevant only at the edges of the law, to frame an apparently broad line of inquiry centering on vague concepts such as 'wisdom' and 'trust'? How can 'a lesson of frightening limitations' be of use to the large majority of cases that can be rationally resolved with pre-existing rules and their logical application? What is his theory about 'the practice of law'?" We may sense from the framing of those questions that the serious-minded critic "listened" for combat, not for under-standing. The critic, we might say, has trustfully incorporated a distrustful disposition against "rhetoric." The critic may benefit from an encounter with a good rhetorician who opens up the possibilities of her or his world by asking what Sammons means by the word "conversation." The rhetorician will hope that they fall into an out-of-control conversation about the word, following real questions within unknown answers and becoming lost in the playfully serious inquiry. When disoriented, basic questions of place and identity arise, such as "Where are we?" and "Who are we to each other?" The emergence of those questions may equip the critic to connect to and closely read the passage from Sammons. When doing so, we might trustfully accept the identity of "lawyer as rhetorician," who is continually confronted with basic questions of identity, questions that are concerned with the conditions necessary for a reasonably harmonious community–that is, for serious conversational play. These conditions, which are often taken for granted, centrally concern character virtues such as honesty, trust, and an ability to be open with others–virtues that are associated with the activity of listening and with the establishment of any meaningful relationships. (Sammons is especially interested in "meaningful client participation.").[29] Through a genuine conversation, the lawyer's distance from the client's view of the conflict could help both of them to transcend their own views of it. The experience of transcendence cannot happen in isolation: there is a "dependency on others" for coming to a sound under-standing of "our own moral claims."

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Marking the twenty-fifth anniversary of the founding of the Legal Writing Institute, Sammons offered "an imagined internal monologue,"

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29. *See generally* Jack L. Sammons, *Meaningful Client Participation: An Essay Toward a Moral Understanding of the Practice of Law*, 6 J.L. & RELIGION 61 (1988); *see also* JACK L. SAMMONS, JR., LAWYER PROFESSIONALISM 6 (1988).

coming from a legal writing professor preparing to engage with students.[30] The professor is "waiting to comment on a student's draft fact statement for an appellate brief in a negligence case involving a slip and fall at a restaurant one rainy evening in San Diego."[31] Let us listen to fragments of some "stream of conscious thinking":

> Okay, I think what I'll say to them then is this old standby: We need to make him seem more human. And then perhaps I should suggest describing his style of management as personal, as motivated by his desire to pass the restaurant along to his children as his father had done before him.
>
> . . .
>
> But wait, I can't just say we need to make him seem more human. That's likely to mean different things to different students. What does it mean? . . . Seeing him as human, even if we agreed on what that meant, could evoke many things, couldn't it? It could even be negative–familiarity breeds contempt. . . . I think to see him as more human would mean to see him as vulnerable in some sense.
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> . . .
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> . . . [T]he persuasive value of making him more human arises from uniqueness; each of us is the last one of a species and we need to be careful with each other–something along these lines. What is more important in this then is not what we share but what we do not share.
>
> . . .
>
> Wait a minute! I think I'm saying that a judge would likely care about the defendant's uniqueness because it displays his vulnerability. The more we make this defendant a "person" by increasing the details of our description of him, the more the judge may come to care about him in his vulnerability. . . . I wonder if what we attempt to do in some fashion is to speak their mysteriousness?
>
> But what does this do for us as a legal argument? Uniqueness . . . doesn't really provide the judge with any real resource for decision-making. In fact, it works in the opposite direction. . . . If the "person" is unique, then placing him or her in categories for fairness, for equal treatment, for rule applications, and so forth, is suspect. And yet a lot of our legal arguments work exactly this way, don't they? They take resources away and push the judge, at least ideally perhaps, towards resources that are themselves, well, non-linguistic, non-cognitive perceptions, and . . . uh oh . . . mysterious again. Can this possibly be right? It does seem that good competing arguments on any good legal issue point in this odd direction: to a basis for judgment that is beyond the arguments themselves.

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30. Jack L. Sammons, *Reflections on Legal Writing: Legal Writing Scholarship, Making Strange, and the Aesthetics of Legal Rhetoric*, 61 MERCER L. REV. 925, 926 (2010).

31. *Id.*

> . . .
> . . . I must tell them that we can't forget in all this that we want our fact statement to appear to be submissive to a legal (and moral) narrative form–a required form–and not as creating one. And the question for us is how are we to be submissive to this authority of form while being creative. . .? Other artists, I might say, describe themselves this way all the time.[32]

Who is speaking in that passage? Its actual author, the plural "I" who gets called "Sammons" and who could be attempting to "evoke" his reader's plural I, may be responding to calls for the inclusion of the "human voice" in legal education.[33] Such inclusion would counter the dominant "formal" and "logical" style,[34] which can eliminate the *person* speaking. Sammons, we might say, sounds more human than a conventional legal writer.

Wait! The phrase "sounds more human" is likely to mean different things to different people. Isn't "formal" and "logical" a distinctive and potentially virtuous human personality?

Beware of an "old standby!" Particular care may be called for when we are besieged by clichés. A desire to make a client "seem more human" sounds highly desirable, but we will do well to follow the professor's will to resist imagining that those words have a transparent and fixed meaning. We may sense in the various shifts of voice that the professor is struggling to give meaning to "human" in the context of the law, whatever "the law" might be. The professor, who senses that there is a fragile relation between language and experience, suggests that the "legal" deals with an awkward tension between recognizing the "uniqueness" of a "person" and the need to treat them like others for purposes of "equal treatment." There seems to be, however, a questioner within the professor who seems unsure about the status and significance of this tension. This questioner wants to acknowledge the "mysterious," and takes a movement of transcendence seriously, inviting us to attend to the possibility of a "judgment that is beyond the arguments themselves." While the movement may be partly concealed by "a required form," the professor would have us closely attend to a force that can set it in motion, namely, our capacity to be "creative," with the aim of treating people with "care." (Does justice begin in care?). It seems that the professor is conscious that legal writing is a self- and community-creating process and that he desires his students to reach for the

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32. *Id.* at 927-30, 934.

33. For one such caller, see Julius G. Getman, *Human Voice in Legal Discourse: Voices*, 66 TEX. L. REV. 577, 582 (1988).

34. *Id.* at 578.

"artists" within and to consciously participate in this process with him. Much is at stake, including the making and remaking of the law and our selves.

"Stream of consciousness" expression can prod one to think about the nature of consciousness. What, we might ask, is it? Is consciousness something–uh oh–mysterious that we cannot pin down? If so, shall we compare "it" to . . .?

* * *

What is the nature of law? Many people directly or indirectly respond to that question with what Felix Cohen called "the language of transcendental nonsense."[35] (I have reworded the title of Cohen's article for the title of mine.). He resisted any will to turn humans and their relationships with each other (including those we call "property"), into things–that is, to "thingify"[36] or reify. He sought to demystify legal discourse by alerting us to imagined "supernatural entities" that in actuality "do not have a verifiable existence except to the eyes of faith" and by providing "a logical basis for the redefinition of every legal concept in empirical terms."[37] Like Cohen, Sammons resists a will to "thingify" our social world. (I can imagine a playful Sammons gently removing the "eyes" out of Faith and turning her into a verb.). Unlike Cohen, however, Sammons would resist any claim that we can confine law to the "logical" and "verifiable." In *The Law's Mystery*,[38] he writes,

> [E]verything we might be tempted to think of as law is only evidence of it and not the thing itself. . . . [T]his odd way of our thinking of law [is] reflected in our ordinary speech. It is there, for example, in dissenting opinions when the dissent says that the majority got the "law" wrong. In such speech, we treat law as something immaterial and yet fully external to us as we treat few other things. The odd things we do treat this way in ordinary speech are quite telling: "it was meant to be," we say, or "the muse speaks," or "what fate holds in store for us," or "the character took on a life of her own," or "he found inspiration" (when it retains the sense of something being breathed in to us), or "there's something in the air," just to mention a few.
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> This immaterial and yet external "law" somehow discloses itself to us, we might say, since nothing we can say about it . . . is sufficient to

35. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 812 (1935).

36. *Id.* at 811.

37. *Id.* at 821, 828.

38. Linda L. Berger & Jack L. Sammons, *The Law's Mystery*, 2 BRIT. J. AM. LEGAL STUD. 1 (2013).

> let us know what it is. This is surely mysterious and, because a law that is beyond our conceptions of it is also beyond our control to some extent, it is unsettling in its uncertainty.
>
> This characteristic of "law" as resting upon mystery and uncertainty is, however, also the source of the law's enchantment for us, however little we may now acknowledge it. It is this enchantment that we depend upon for law to be authoritative over us, as we hope it will be, rather than authoritarian and reducible to the political and thus to power. . . . The task this imposes upon us . . . is to explore a way of thinking such "law" without destroying it by concealing from ourselves its mystery or avoiding its uncertainty.
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> To conceal and to avoid these things is certainly very tempting. Our anxieties about law produce in us a very strongly felt need to be its master, to place it conceptually within our control (even if only through self-imposed limits on possible conceptions of it), and to render it subject to our own will. We don't want mystery and uncertainty in other words. We want to think that we are in control, so typically we enframe law conceptually to make it appear that we are.[39]

We might hope for a self-"control" that can resist a "very tempting" will to control "the law" by turning "it" into a "thing." ("It" is not an "it" at all.) By stressing the "beyond our conceptions" dimension of law and disclaiming that we "know what it is," a not-knowing Sammons avoids the nonsense that troubled Cohen. At the same time, however, he does suggest that law has some kind of an independent existence, for "it . . . somehow discloses itself to us." A doubter–who perhaps does not "want mystery and uncertainty"–might reasonably respond: "This is and is not transcendental nonsense!" The difficulty of placing Sammons with the "transcendental" category may make him enchanting for the playfully serious.

Sammons composed *The Law's Mystery* with Linda Berger, who "is skeptical of Jack's approach to law, skeptical . . . of any project that attempts to think the ineffable as his seems to do."[40] (Describing the law as "ineffable" could be valuable in resisting a defective quest for certainty.). Nonetheless, after Sammons's attempt at the start of their article to express his way of imagining law, Berger responded with a careful rhetorical analysis of Justice Harlan's opinion in *Cohen v. California*.[41]

After her analysis, Sammons writes:

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39. *Id.* at 3-4.
40. *Id.* at 3.
41. 403 U.S. 15 (1971).

> It would be common perhaps to think of what Justice Harlan was doing in *Cohen* as balancing; perhaps that is how he thought of it. And yet, it seems to me, after reading Linda's thoughts about the opinion and considering her reactions to it, that we could not possibly make sense of the opinion with a word like "balancing," (with its suggestion that this is something we somehow know how to do when issues get tough). It seems to me, instead, that he acts more upon what might be described as an intuition, one arising from his experience as all intuitions do, but still a rather obscure and quite different mode of thinking made available to him through the presentation of the case. What he then tries to do, I think, is communicate to us his experience of this, an experience of "the law" as I would describe it, through this case in a manner (a way of writing, that is) that permits us to share at least part of the experience for ourselves, including our sharing in the part of the experience remained mysterious to him. The silly little incident presented to him in the case was, for him and the Court, no longer within our ordinary social or political worlds. It was instead there within what I cannot help but describe as a truer *polis* than those are, one in which even such small person-to-person matters necessarily open for us questions of our identity as a people.[42]

Sammons may well hope that his reader's intuition can catch the drift of that which he calls "intuition." He resists allowing a clumsy metaphor–in this case "balancing"–get in the way of acknowledging the "mysterious" when thinking about "what Justice Harlan is doing." (It may be of value to stress that what Harlan is doing is who he is. Is he doing justice?).[43] One potentially immeasurable cost of concealing the mysterious is the elimination of a "mode of thinking made available . . . through the presentation of the case,"[44] a mode that is relevant to all cases and that can "open for us questions of our identity as a people."[45] This is a mode that values "experience" and the wisdom that can come from reflecting on it, a mode that cannot be captured in a formal method–of the kind that has no place for us to transcend ourselves. Sammons is simply trying open up the transcendental possibilities of "our ordinary social or political worlds" by asking what it could mean to perform well the activity of being a judge. The play of law involves a shift of consciousness out of "ordinary" life into another reality, one that

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42. Berger & Sammons, *supra* note 38, at 25-26.

43. Responding to a question on the nature of justice, Sammons said "We create [justice] in the doing." Symposium, *The Theology of the Practice of Law, Roundtable Discussion*, 53 MERCER L. REV. 1087, 1125 (2002).

44. Berger & Sammons, *supra* note 38, at 25-26.

45. *Id.* at 26.

questions the ordinary and, through the questioning, transcends it to a "truer *polis*."

Sammons suggests that Harlan's opinion is a great literary text, a quality that makes it worthy of respect as great law. In *The Lawyer's Moral Obligation to Write Well*,[46] he points to the dangers of unliterary writing:

> What corrupts the law, and renders it unworthy of the trust we give it, is the reification of its language–the rendering of it humanness to the condition of a thing. . . . It is a condition in which the words of advocates are not . . . offered in justification but to foreclose the need for justification at all, not insistent upon judgment but insistent that it is not required. . . .
>
> . . .
>
> . . . We are all too familiar with the reification of the language of the law. . . . We see it in words rendered instrumental, formulaic, and as merely means of communicating rather than as the medium in which we are expressed. Sadly, this is also the language of those whose lives as lawyers or judges . . . encourage others, even impose upon others, their impoverished, alienated, and alienating view of our communal life.[47]

For Sammons, a vital aspiration of the activity we call law is a rich "justification" of "judgment," for doing justice. When practiced playfully seriously, law will be intertwined with justice in a manner that negates any sense of separateness, except for people with a disposition to reify. When we reify "the law," reducing it to "the condition of a thing," we become "alienated" from its "humanness," and from the responsibility for responding to the question of the human, of who we are becoming. If we can strive to transcend any reifying tendencies with living language, we will be on the way to doing justice to ourselves and to others.

II.

In 1820, Ngapuhi leader Hongi Hika visited England, where he met with King George IV. There began an international relationship that would become closer during the next twenty years. In 1831, a collection of leaders, fearing French aggression as well as troublesome British individuals, appealed to King William IV to become a guardian. The Colonial Secretary replied and sent James Busby as British Resident, who was authorized to investigate complaints. In 1835, near Busby's

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46. Jack L. Sammons, *The Lawyer's Moral Obligation to Write Well* (Jan. 20, 2009), THE COMPLETE LAWYER (Feb. 2009), *available at* http://ssrn.com/abstract=1336542.

47. *Id.*

residence, an assembly of tribal leaders signed He Wakaputanga te Rangatiratanga Nu Tireni, A Declaration of the Independence of New Zealand.[48] The Declaration stated that the United Tribes would ask the King to remain as a protector. In 1838, the Church Missionary Society expressed concerns to the Crown about the possible destructive impact on the indigenes of the newly formed New Zealand Association's plan of "systematic colonization." In 1839, the Colonial Office instructed Captain William Hobson "to treat with the Aborigines . . . for the recognition of Her Majesty's sovereign authority."[49]

The negotiations began at Waitangi on February 5, 1840, after translator Rev'd Henry Williams had completed the task of "preserving entire the spirit and tenor of the [Treaty of Waitangi in English]."[50] One account, by Felton Mathew (the Surveyor-General), is as follows:

> [Hobson] pointed out to them the advantage they would derive from this intercourse with the English, and the necessity which existed for the Government to interfere for their protection on account of the number of white people who had already taken up their abode in this country. He then caused to be read to them a treaty which had been prepared, by which the native chiefs agreed to cede the sovereignty of their country to the Queen of England, throwing themselves on her protection but retaining full power over their own people–remaining perfectly independent, but only resigning to the Queen such portion of their country as they might think proper on receiving a fair and suitable consideration for the same. This treaty having been read and explained to them, they were asked to state their opinion on the matter
> . . . .
> . . .
> The speeches occupied about six hours . . . . The manner of the chiefs is exceedingly noble and dignified . . . .
> . . .
> . . . [N]othing was more remarkable than the very apt and pertinent questions which they asked on the subject of the treaty, and the stipulations they made for the preservation of their liberty and perfect independence.[51]

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48. HE WAKAPUTANGA O TE RANGATIRATANGA O NU TIRENI, [DECLARATION OF INDEPENDENCE OF NEW ZEALAND] Oct. 28, 1835, *available at* http://archives.govt.nz/sites/default/files/webfm/Declaration20of20Independence20-20English20transcript.pdf.

49. Letter from the Marquis of Normanby to Captain Hobson (Aug. 14, 1939), *in* 3 BRITISH PARLIAMENTARY PAPERS: COLONIES NEW ZEALAND 85, 86 (Irish Univ. Press 1970).

50. HUGH CARLETON, THE LIFE OF HENRY WILLIAMS 312 (James Elliott ed., 1948).

51. THE FOUNDING OF NEW ZEALAND: THE JOURNALS OF FELTON MATHEW, FIRST SURVEYOR-GENERAL OF NEW ZEALAND, AND HIS WIFE, 1840-1847 34, 38, 39 (J. Rutherford ed., 1940).

Mathew suggests here that British "sovereignty" and Maori "liberty," "full power over their own people," and "perfect independence" ("te tino rangatiratanga" in Williams's text) are concordant. Mathew might have done well to mention if any "very apt and pertinent questions" concerned the meaning of "sovereignty" in relation to "full power over their own people." What connection, for example, did the "rangatiratanga" in He Wakaputanga have to the "rangatiratanga" in Te Tiriti? In a situation of dispute over the meaning of the latter, we might readily imagine competing lawyerly arguments helping us to recognize the dispute as a unique disturbance of identity–a situation that differs in some sense from any other in the past.

Such a situation does not mean that we should not exercise our imaginations and try to establish similarities. Mathew's account brings to mind Edmund Burke's expression of hope, in 1774, that British "sovereignty" and American "liberty" could be "reconciled."[52] He believed that they could. On the matter of "the parliament of Great Britain" being "the sovereign of America":

> That the sovereignty was not in its nature an abstract idea of unity, but was capable of great complexity and infinite modifications, according to the temper of those who are to be governed, and to the circumstances of things; which being infinitely diversified, government ought to be adapted to them, and to conform itself to the nature of things, and not to endeavour to force them.[53]

Burke here resists imagining "sovereignty" as an "abstract" thing with a fixed essence. For him, the meaning of "sovereignty" at any moment will be intimately associated with "circumstances."

Toward the end of the Waitangi negotiations, William Colenso (a Church Missionary Society printer), asked Hobson a question relating to the written addendum, which refers to the "Chiefs . . . having been made to fully to understand the Provisions of the foregoing Treaty":[54]

> *Mr. Colenso:* "May I ask your Excellency whether it is your opinion that these Natives understand the articles of the treaty which they are now called upon to sign? . . ."
> *The Governor [Mr. Hobson]:* "If the Native chiefs do not know the contents of this treaty it is no fault of mine. I wish them fully to understand it. I have done all that I could do to make them understand

52. Edmund Burke, *Speech on American Taxation* (1774), *in* 1 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 382, 423-25 (1883).

53. 18 PARL. HIST. ENG. H.C. (1775) 963, 973-74.

54. MICHAEL KING, THE PENGUIN HISTORY OF NEW ZEALAND 181 (2003) (internal quotation marks omitted).

> the same, and I really don't know how I shall be enabled to get them to do so. They have heard the treaty read by Mr. Williams."
> *Mr. Colenso:* "True, your Excellency; but the Natives are quite children in their ideas. It is no easy matter, I well know, to get them to understand . . . ; still, I think they ought to know somewhat of it to constitute its legality."[55]

Colenso and Hobson both need someone who will open up the possibilities of their worlds by asking, among other questions, what it might mean to "fully understand" the Waitangi transaction. (With the implicit claim that "I understand the Treaty," Hobson uses the word "understand" as an active verb that describes what he is doing at a distance to a passive object–the "contents" of "the Treaty"–without the possibility that he could be acted upon by "it.") If Hobson had adopted a humble "not-knowing" approach to the question of meaning, he could have created an opening for learning through a genuine conversation–for under-standing in the medial sense. Possible prejudices against "children" may have adversely affected his disposition for play, which is exactly what is needed to help us to transcend defective prejudices.

During treaty negotiations at Kaitaia, British officials and Te Rarawa leader, Nopera Panakareao, met to address the question of meaning. In an account of the talk, John Johnson (the Colonial-Surgeon) noted that the officials "endeavoured" to make the word "sovereignty" "intelligible" to him.[56] After the formalities the following day, 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."[57]

An act of metaphor may be the product of an effort to move from part (the "sovereignty" clause) to whole (including the "property" clause). The movement can render the familiar alien and stimulate the question of meaning–specifically here questions of what this "sovereignty" *is* and what it is *not*. We might imagine the metaphor of *sovereignty as shadow* as a creative act of wordplay in an attempt to under-stand the Waitangi transaction.

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55. W. COLENSO, THE AUTHENTIC AND GENUINE HISTORY OF THE SIGNING OF THE TREATY OF WAITANGI 32-33 (Capper Press 1971) (1890) (emphasis added).

56. MICHAEL BELGRAVE, HISTORICAL FRICTIONS: MAORI CLAIMS AND REINVENTED HISTORIES 108 (ebook ed. 2013).

57. *Id.* at 109.

* * *

Tensions between governors and chiefs grew when the former assumed the power to determine who in a tribe had what right to sell land. When the Te Ati Awa leader, Wiremu Kingi, resisted the power, Governor Thomas Gore Browne deemed him to be acting "against Her Majesty's sovereign authority."[58] For Browne, Kingi was "interfering" in a land transaction between Browne and Te Teira Manuka, of Te Ati Awa. Kingi repeatedly claimed that Te Teira, while having a right to use the land at Waitara, did not have a right to alienate: "The land shall not go to the Queen; . . . let Teira keep his land; I will not suffer it to be sold, because though the land is Teira's the power is mine; I am Waitara, let Teira live under my shadow."[59] Shall we playfully compare Kingi's wordplay with Panakareo's? What is the substance of Kingi's shadow?

Kingi resisted Browne's judgment that he was "guilty of rebellion against the Queen."[60] After Browne initiated war, Kingi sought to have an arbitrator settle their differences. He identified Queen Victoria as a possibility. When Browne rejected the lawyerly game of institutionalized wordplay, the Ngati Kahungungu leader, Renata Kawepo, responded:

> It was proposed to leave it to the Queen, to judge between the Governor and William King . . . . Well, does this look in your opinion like a rebellious word in regard to the Queen . . . ? Sir, the Maori does not consider that he is fighting against the Queen; I beg therefore that you will cease to pervert words, and rather consent to our proposal that . . . it may be left for the Queen to decide in this quarrel. . . .[61]

For Kawepo, we might say, Browne's wordplay was foul play. For Browne, Kawepo's question may have been rebellious. Whatever the case, we might say that there were basic differences between them over what the proper constitutive rules should be in the Waitangi game.

Browne might have done well to admit to the two chiefs–and to the Colonial Office–that he was in a position of not knowing how to go on, a position that could start a genuine conversation. Instead, he sought to justify himself to the Colonial Office: "I must either have purchased this land, or recognized a right which would have made William King virtual sovereign of this part of New Zealand, which is the object of his avowed

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58. Thomas Gore Brown, Proclamation (Feb. 22, 1860), *in* 12 BRITISH PARLIAMENTARY PAPERS: COLONIES NEW ZEALAND 6 (Irish Univ. Press 1969) [hereinafter BPP].

59. Address by Mr. Busby, formerly British Resident at New Zealand, to the Native Chiefs (June 1860), *in* BPP, *supra* note 58, at 247.

60. Letter from William Kingi to Lieut.-Col. Murray (Feb. 22, 1860), *in* BPP, *supra* note 58, at 6.

61. WILLIAM SWAINSON, NEW ZEALAND AND THE WAR 34 (Biblio Bazaar 2008) (1862).

ambition."[62] The Colonial Office would have done well to ask: In what sense would Kingi be "virtual sovereign"?

Later in 1860, Browne invited numerous chiefs–not including Kingi and Kawepo–to a Conference of Native Chiefs at Kohimarama to talk about the "advancement of the two Races dwelling in New Zealand."[63] At the outset, he stated: "Her Majesty has instructed the Governors who preceded me, and she will instruct those who come after me, to maintain the stipulations of this Treaty inviolate. . . ."[64] Concerning the disputed land at Waitara, he deemed Wiremu Kingi to have acted "against the Queen's authority."[65] Browne presented "the Treaty" as if its language has a plain meaning, which cannot be questioned. Concerning language more generally:

> The Maori does not understand the Pakeha, and accuses him of saying what he does not mean; and the Pakeha, on the other hand, imagines something very different to what the Maori has said. From this cause they differ with each other and misunderstandings arise. Now, if the language in common use was the same, these difficulties would disappear. Hence the desirability of educating your children in the English tongue.[66]

Let us imagine a Browne who goes to see a good lawyer, who could open a world of options and experiences. After first listening to what Browne has to "say," the lawyer will ask questions to work out what he might "mean." The lawyer will do well to remind him that "the English tongue" does not generate an object-like meaning that every educated person can perfectly grasp. Our meanings can never be exactly the same for any two people, and the inevitability of "misunderstandings" are a source of "difficulties" that can make the life of a lawyer fascinating. (Did Browne "pervert words" on the question of "rebellion" against "the Queen"?) The lawyer, conscious of the limitations of language, could offer him the experience of transcendence if he was disposed to attentively listen for what is alien in the lawyer's image of the world.

At Kohimarama, the Native Secretary spoke of the Waitangi agreement as a "covenant" ("kawenata"), which the Conference reaffirmed.[67]

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62. Letter from Governor T. Gore Browne to the Duke of Newcastle (Mar 22, 1860), *in* BPP, *supra* note 58, at 17.

63. Address by Governor T. Gore Browne to the Maori Chiefs Assembled at Waitemata (July 10, 1860), *in* FURTHER PAPERS RELATIVE TO NATIVE AFFAIRS 34 (Parliament 1861).

64. *Id.*

65. *Id.* at 35.

66. *Proceedings of the Kohimara Conference*, MAORI MESSENGER (July 13, 1860), at 40.

67. For a discussion, see Claudia Orange, *The Covenant of Kohimarama: A Ratification of the Treaty of Waitangi*, 14 NEW ZEALAND J. HIST. 61, 71-73 (1980).

The former British Resident Busby adopted this word in a speech supportive of Browne's position in his dispute with Kingi:

> Then was signed the Treaty of Waitangi, the covenant between the Queen and her Maori people, by which . . . the Queen became the protector of the Maori race. The shadow of the land went to the Queen, the substance of it remained to the Maori race.
>
> . . .
>
> . . . Teira has sold his land to the Queen . . . . In former times, before the Queen's shadow covered the land, when a strong man armed kept his palace, his goods were in peace; but when a stronger than he came he was overcome, and his goods taken from him. This was Maori custom. In those days Wiremu Kingi, being stronger, could overcome Teira; but when the Queen promised to every Maori that he should be as one of her own people, the law came; the law is the strength of the weak man, and the law says "Every man's land is his own, to sell to the Queen or keep; no one shall take it from him because he is weak. . . ." If the Governor allowed Wiremu Kingi to overcome Teira, he would make the Queen false to the promise she made to every Maori man when she entered into the Treaty.[68]

What became of the Queen "when she entered the Treaty"? Busby seems to imagine "the Treaty" as a passive object that we can understand at a distance, without risking change. Kingi may have accepted the image of the shadow of the land going to the Queen, but unwilling to accept that he was disabled from casting shadows. For Kingi, being unable to prevent the land transaction meant that Browne (and later governors) could dismember the tribe. "Protector" for Browne was destructor for Kingi. A key question concerned the constitutive rules for addressing differences. Unless Browne let go of his will to keep the indigenes under his control and turned the dispute over to playful participants in a legal game, there was nothing worthy of that which Busby calls "the law," only uncivilized power. It seems that that which Busby pejoratively calls "Maori custom" is a method that Browne was adopting. Busby failed to identify the possibility that Browne was becoming "a strong man" who seeks to "overcome" Kingi by any means possible. His failure is linked to a failure to imagine plural readings of "the covenant"–and the possibilities of who "the Queen" might have become when "she entered into the Treaty." The existence of plurality would lead a good lawyer and others to ask: who is to read the covenant and how in situations of conflict? What might constitute meaningful indigene participation? Can procedures be constituted to ensure that justice arises?

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68. Address by Mr. Busby, *supra* note 59, at 246-47.

* * *

For Browne and for his successor (Grey), violence was the means to keep the indigenes under control, followed by the Native Lands Act of 1865,[69] which sought "to encourage the extinction of [Maori] proprietary customs."[70] This was an act of cultural imperialism, with colonial officials playing a game of their own, seeking to control every move of the Waitangi game. Chiefs could no longer cast shadows of the kind that Kingi valued.

* * *

In 1877, Ngati Toa leader, Wi Parata, entered the Supreme Court to challenge acts by colonial officials that breached the Waitangi treaty. An ethnocentric 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."[71] In reducing "sovereignty" to the condition of an essential and controllable "thing"–in reifying "it"–the Court committed itself to transcendental nonsense, with no place for connecting to Panakareao's poetic wordplay. In doing so, it corrupted the law by helping the colonial officials in their efforts to keep the indigenes fully under control.

* * *

In 1882, Ngapuhi leader Hirini Taiwhanga went to England to take a petition to Queen Victoria, asking her to appoint a "Royal English Commission" that would inquire into and put right legislative breaches of the treaty. The Secretary of State for the Colonies refused to give Taiwhanga an interview with the Queen. He insisted that the British Crown had no right to interfere in New Zealand's domestic affairs.[72] This meant no responsibility for justice.

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69. The Native Lands Act 1865 (NZ), *available at* http://nzetc.victoria.ac.nz/etexts/Mac02Comp/Mac02Comp393.gif.

70. Quoted and critiqued in DAVID V. WILLIAMS, "TE KOOTI TANGO WHENUA": THE NATIVE LAND COURT 1864-1909 142 (1999).

71. *Wi Parata v The Bishop of Wellington & The Attorney-General* (1877) 3 NZ Jur. SC 72, 78 (NZ). For my further commentary, see RICHARD DAWSON, JUSTICE AS ATTUNEMENT: TRANSFORMING CONSTITUTIONS IN LAW, LITERATURE, ECONOMICS AND THE REST OF LIFE, 136-37 (2014).

72. CLAUDIA ORANGE, THE TREATY OF WAITANGI 205-07 (1987).

* * *

In 1909, Parliament passed paternalistic legislation constituting "Land Boards" that operated as agents for tribes, including Ngati Tuwharetoa. The Aotea Land Board made substantial losses, which, as a result of legislation enacted in 1935, became a £23,500 debt for Tuwharetoa. For tribal leader Hoani Te Heuheu, this was an injustice (added to the paternalistic injustice). The Supreme Court indicated that his judgment was a shared one: "[C]ounsel for the defendant agreed with counsel for the plaintiff that the Natives represented by the plaintiff had cause to feel a sense of injustice."[73] The question of justice, however, got separated from the question of the legal. The Privy Council perpetuated the separation. Viscount Simon wrote:

> The appellant maintained (i) that the Treaty of Waitangi was a solemn compact defining the rights given to the Maori people in respect of their lands; (ii) that the right thus acquired by the Maori people is cognizable in the Courts; . . . (vi) that the Legislature of New Zealand has recognized and adopted the Treaty as part of the municipal law, and that s. 14 of the Native Purposes Act, 1935, derogates from the right conferred by the Second Article of the Treaty in so much as it imposes a charge on the Native lands.
>
> . . .
>
> Under Article the First there had been a complete cession of all the rights and powers of sovereignty of the Chiefs. It is well settled that any rights purporting to be conferred by such a treaty of cession cannot be enforced in the Courts, except in so far as they have been incorporated in the municipal law. The principle laid down in a series of decisions was summarized by *Lord Dunedin* in delivering the judgment of this Board in the Gwailor case . . . .
>
> So far as the appellant invokes the assistance of the Court, it is clear that he cannot rest his claim on the Treaty of Waitangi, and that he must refer the Court to some statutory recognition of the right claimed by him.
>
> . . .
>
> . . . As regards the appellant's argument that the New Zealand Legislature has recognized and adopted the Treaty of Waitangi as part of the municipal law of New Zealand, it is true that there have been references to the Treaty in the statutes, but these appear to have invariably had reference to further legislation in relation to the Native lands, and, in any event, even the statutory incorporation of the Second Article of the Treaty in the municipal law would not deprive the

73. *Te Heuheu Tukino v Aotea Dist. Maori Land Bd.* [1939] NZLR 107 (CA), 112 (1938) (NZ).

> Legislature of its power to alter or amend such a statute by later enactments.[74]

The Privy Council needed someone who could open up the possibilities of its world by asking about the aptness of the metaphor of "incorporation." What might happen to us–and to the law–if we incorporate the metaphor of incorporated without question? To the extent that the metaphor reinforces the sterile image of law as an object-like corpus of rules, rather than a justice-directed playful game, we may do well to question its aptness. We might wonder what metaphors may have emerged had Viscount Simon heard Te Heuheu as saying not "that the Treaty . . . was a solemn compact" but that it *is* one.[75] Might the shift of tense have helped him to assume a playful disposition, speaking in the first person with stream of consciousness thinking, of being inside a "solemn compact" rather than being in a controlling position outside of "it"? A shift in tense might prod us to query the use of the metaphor "adopted" ("the Legislature . . . has . . . adopted the Treaty"). Does the use of "adopted" contribute to the disowning of the Waitangi compact as a living solemn one (as opposed to a static object) that grants the Legislature the authority to exist in New Zealand? Might the Privy Council owe it to the indigenes to invite the Legislature to own the compact (perhaps in partnership with the indigenes)?

With all "its power to alter or amend," it seems to me that the Legislature is part of an authoritarian game in which any vulnerability and any ability to transcend itself–and thus the question of justice–are excluded as possibilities. Concerning a just reading of the Waitangi compact: Notice how the Privy Council treats "Article the First" and "the Second Article" as separate and independent parts. The matter of "sovereignty," that is, has nothing to do with the matter of property ("lands"). Resisting the careless separation–by putting the parts into play with one another–could prompt us to question how "complete" was the "complete cession of all the rights and powers of sovereignty."[76] What, that is, does the word "sovereignty" mean, not abstractly, but in the utterly unique Waitangi transaction, with its placement next to the "guarantee" to the indigenes by the Queen of "the full exclusive and undisturbed possession of their Lands"?[77] Might we consider keeping in play Panakareao's metaphor of sovereignty as shadow? Might the law become a source of enchantment for us? If so, that could help us to open

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74. *Te Heuheu Tukino v Aotea Dist. Maori Land Bd.* [1941] NZLR 590 (PC), 596-97, 599 (1941) (NZ).

75. *Id.* at 596.

76. *Id.*

77. *Id.* (quoting Treaty of Waitangi, art. 2 [1840] (NZ)).

for us questions of our identity as peoples and to decide who we peoples are to one another.

* * *

In 1975, Parliament passed the Treaty of Waitangi Act,[78] which established the Waitangi Tribunal for hearing "claims" by "any Maori . . . that he or any group of Maoris of which he is a member, is or is likely to be prejudicially affected" by any "act or omission" of "the Crown" that is "inconsistent with the principles of the Treaty."[79] This language is far from innocent. Consider these criticisms from Ngai Tahu leader Tipene O'Regan:

> A tribe has no legal personality. It cannot bring any legal action. . . . Claims must be brought before the Tribunal by individual tribal members on behalf of the whole tribal group. But challenges can be mounted against the standing, authority, or competence of one tribal member by another . . . . This is obviously in breach of the Treaty's recognition of rangatiratanga. In the case of a large tribal group like Ngāi Tahu this kind of interference can be devastatingly expensive. . . .
>
> Ngāi Tahu's difficulty is that under the Treaty it is the tribe and not the individual which is the Treaty partner to the Crown. The individual only has standing in terms of the Treaty as a member of the tribe. . . . Yet though the tribe is the Treaty partner it has no legal standing in the present state of New Zealand law, except through surrogates.
>
> One should not think that this apparent tangle is accidental. It is not. It is the direct outcome of deliberate Government policy, now more than a century old, to destroy the collective force of the tribe and to individualize Maori culture, society, and their properties. . . . This policy and its ramifications can only be considered as inconsistent with the principles of the Treaty and, indeed, it is arguable that the requirement on legal standing in the Treaty of the Waitangi Act itself might be inconsistent with the Treaty.[80]

For O'Regan, something is rotten with "the present state of New Zealand law," with the tribes a shadow of what they should be. One element of this is the misuse of the name "Maori." O'Regan might often think of himself as Maori, but not for all purposes, including the pursuit of justice through the Waitangi Tribunal.

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78. Treaty of Waitangi Act 1975 (NZ).

79. Treaty of Waitangi Act 1975, § 6.

80. Tipene O'Regan, *The Ngai Tahu Claim*, *in* WAITANGI: MAORI & PAKEHA PERSPECTIVES OF THE TREATY OF WAITANGI 234, 252-53 (I.H. Kawharu ed., 1989).

Imagine an American outsider reading O'Regan's words. She asks herself: "Did he challenge the constitutionality of the Treaty of Waitangi Act in the courts?" After learning more about New Zealand law, she imagines him answering, "I'd like to do so, but I can't get into court." She has by now familiarized herself with the Privy Council's *Te Heuheu* decision and its weight. In short, we might say that O'Regan has no "standing" for such a challenge.

Did O'Regan consider challenging the *Te Heuheu* decision? What might he say to a lawyer? One possibility is to suggest that the *Te Heuheu* decision is merely evidence of law, with which we can play when coming to a new and more worthy expression of law. Another possibility is to invite the lawyer to talk about "the present state of New Zealand law" with stream of consciousness expression and thereby unsettle what might appear settled. Unsettling the decision may well unsettle those who have a felt need to be law's sovereign master. If the word "sovereign" becomes a shadow of its former self, they may find themselves in a potentially productive position of not knowing how to go on.

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In 2007, Titewhai Harawira initiated a wide-ranging claim to the Waitangi Tribunal, concerning various "impacts" ("political, social, economic" and "cultural and spiritual") on the "wellbeing" of Ngapuhi.[81] During the inquiry, Ngapuhi questioned various procedural processes that controlled the direction of the inquiry. For example, Nuki Aldridge, a descendant of Hongi Hika, remarked in a report commissioned by Ngapuhi leaders:

> The continuing injustice Maori are experiencing is of the political imbalance of the resources available to Nga Hapu o Ngapuhi for their history to be told. We are often told that "Ngapuhi this is your hearing." Yet this statement is often followed by: "here are the rules."
> . . .
> . . . The history of a people is their culture and a culture has expectations that those selected to transfer their history are guided by rules of engagement determined by that culture. . . . [Y]et here we are being bombarded by rules of engagement that are foreign . . . .
>
> When will [we] get the opportunity to be part of the decision making process? . . . [I]t is inequitable where one party to a treaty makes the rules and has access to wealth to prosecute their evidence, while the

81. NGĀPUHI SPEAKS: HE WAKAPUTANGA O TE RANGATIRATANGA O NU TIRENI AND TE TIRITI O WAITANGI–INDEPENDENT REPORT: NGAPUHI NUI TONU CLAIM app'x 1 (2012).

> other party is directed on how and when the resources are available. The availability or the lack of resources then controls the outcome.[82]

A procedural-oriented Aldridge, we might say, longs for the time when "both sides," face-to-face, become playful and fall into an out-of-control conversation about the constitutive "rules of engagement." Perhaps without meaningful participation in a game unworthy of the name, it sounds like the "outcome" of the present claim is not one that Aldridge and others will be willing to call "justice."

Central to the Ngapuhi claim is a resistance to the Crown's talk about the "cession of sovereignty," talk that the claimants imagine as a problematic act:

> Harawira, Hohepa and others called for the Crown to present its case first to justify their claim to sovereignty–not Ngāpuhi having to argue their case first. As Hohepa said, the Crown should be in his place: "they should be here speaking so that we can question them . . . they are the ones who should be here for us to judge." For them, such a shift would have allowed Ngāpuhi to engage fully with the Crown's case.[83]

Let us not stop to wonder if the Crown might invoke the principle that no party should be a "judge" in their own cause. The Crown and Ngapuhi need a lawyer to ask, in the echo of Panakareao, what we mean by sovereignty. Here we might be bring Burke into play and ask in his spirit: "What is the 'sovereignty' at stake in the circumstances of the Waitangi compact? How might the parties to it set about resolving any dispute over that question? Might they turn the dispute over to playful parties in a game worthy of the name 'legal'? Who should judge?"

Whatever game might be played, Ngapuhi wordplay will center on the word "cede," which "was used by the Crown to represent the word 'tuku' in Te Tiriti," a usage that is problematic: "Tuku are about ongoing relationships of reciprocity and not about the alienation of either authority or property."[84] With a shift from "alienation" to "reciprocity," Erima Henare offers to frame the present Ngapuhi claim with these words:

> In Māori terms our case is straightforward. Under Te Tiriti, our Rangatiratanga, our sovereignty, was guaranteed to us, not taken away. . . . At the same time by Te Tiriti our tūpuna bound themselves to the Queen and agreed to the Queen's Governor remaining here to look after her subjects. In pākehā legal terms this seems to present

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82. Nuki Aldridge, *Through Maori Eyes*, Aug. 6, 2012, *in* NGĀPUHI SPEAKS, *supra* note 81, at xi.

83. NGĀPUHI SPEAKS, *supra* note 81, at app'x 9.

84. *Id.* at 220.

> something of a paradox. Sovereignty is seen as all or nothing. For Ngāpuhi Te Tiriti was a solemn commitment, a kawenata, to a relationship with the Queen, the Crown and the Māori side by side with God above. The chiefs' authority was guaranteed. The conversation with the sovereign that began with Hongi Hika in 1820 lives on today.[85]

How might we seek to enrich the "conversation" that "lives on today"? One possibility is to transcend the defective image of sovereignty as "all or nothing." Recall Burke's play with the sovereign, King George III: "the sovereignty was . . . capable of great complexity and infinite modifications, according to the temper of those who are . . . governed, and to the circumstances of things."[86] With no "paradox," we can move toward the same page, as it were, "side by side." Playing with Panakareao's image of sovereignty as shadow could prod us in a fruitful direction.

In 2014, the Waitangi Tribunal released its report, *He Whakaputanga me te Tiriti–The Declaration and the Treaty*,[87] responding to the question of sovereignty as put by Ngapuhi. Concerning the meaning and effect of the treaty at the time of the first signings:

> We have concluded that in February 1840 the rangatira who signed te Tiriti did not cede their sovereignty. That is, they did not cede their authority to make and enforce law over their people or their territories. Rather, they agreed to share power and authority with the Governor. They agreed to a relationship: one in which they and Hobson were to be equal–equal while having different roles and different spheres of influence. In essence, rangatira retained their authority over their hapū and territories, while Hobson was given authority to control Pākehā.[88]

The Tribunal here has simply accepted the image of sovereignty as "all of nothing." It may have been helpful to say, for example, that the rangatira: (i) *did* cede their sovereign power to enter a treaty with France granting that country powers of governance in New Zealand; (ii) *did not* give up their sovereign power to negotiate with the Governor an amendment to the treaty that is more specific about "different roles and different spheres of influence," including the terms on which "Hobson

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85. *Id.* at 273.

86. PARL. HIST. ENG., *supra* note 53, at 973-74.

87. Waitangi Tribunal, *Preliminary Pages–He Wakaputanga me te Tiriti–The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry*, JUSTICE.GOVT.NZ, (2014), *available at* http://www.justice.govt.nz/tribunals/waitangi-tribunal/Reports/he-whakaputanga-me-te-tiriti-the-declaration-and-the-treaty-the-report-on-stage-1-of-the-te-paparahi-o-te-raki-inquiry/preliminary-pages.

88. *Id.*

was given authority to control Pakeha." Saying something like that could make it plain that there is an important sense in which rangatira *did* and "did not cede their sovereignty." This opens up questions about the limits of the Governor's sovereign power, if only in connection to other parts of the treaty. The Tribunal fails to connect the question of the meaning of the sovereignty clause in relation to the other parts of the treaty. This is the very question that Panakareao seemed to be addressing when coming up with his image of sovereignty as shadow.

III.

Will the Crown listen to Ngapuhi? Will the Crown listen to Panakareao's image of sovereignty as shadow? Should anyone listen? Why? In an essay on the role of religious speech in democratic civic arguments, Sammons touches on the neglected activity of listening and connects it to the founding of the United States of America:

> [A]n ability to listen is admirable, for what democracy in its purest form offers to teach of us is recognition. It is good to remember in this context that the complaint the colonists had against King George was not that he governed without their consent; it was that he had refused to listen to their petitions. The historical uniqueness of the liberal democracy these colonists created, prompted by the resentment they felt at not being heard, was that the recognition it provided to each citizen was not one that needed to be earned. It was to be given to all in an identity unshaped by any predefined public role, including religious ones. This ideal is an ideal of rhetoric.[89]

The complaint that the colonists had has parallels in New Zealand, with Crown officials refusing to listen to indigene petitions. There has been, and continues to be, feelings of resentment at not being heard. New Zealand citizens who desire to contribute to a movement towards "democracy in its purest form" will do well to take listening playfully seriously and to grant ourselves the liberty to reconstruct ourselves.

It is through "an ideal of rhetoric" that we equip ourselves to engage in the activity that Sammons has called "making ourselves strange to ourselves." The transcending experience of estrangement can render the ordinary extraordinary and help to open up questions that may have been beyond our horizons. He would have us asking ourselves what it means to be citizens:

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89. Jack L. Sammons, *A Rhetorician's View of Religious Speech in Civic Argument*, 32 SEATTLE U. L. REV. 367, 380 (2009).

> I wonder if there is any stronger commitment one can make to another person than to say to them that you will always listen to and consider what they say when those words "listen" and "consider" are taken seriously. If wedding vows included "I will always listen to you," the wedding party would quietly snicker. So what is asked of us as citizens in a democracy is really something quite extraordinary and very personal.[90]

How might we fittingly listen to that rhetoric about listening? Let us continue with our connecting to Waitangi: if the Waitangi vows included, "Her Majesty will always listen to the Chiefs when they complain of injustice by those who speak in her name," the audience may well have been reminded of something really quite ordinary, namely, that the hearing is the heart of the law, a place where justice can arise in play. It is a place for transcendental sense.

90. Jack L. Sammons, *Some Concluding Reflections–Recovering the Political: The Problem with Our Political Conversations*, 63 MERCER L. REV. 899, 910 n.35 (2012).