

Colonising Concepts of the Good Citizen, Law's Deceptions, and the Treaty of Waitangi

Nan Seuffert

I. Introduction

The dominant story of the founding of New Zealand is a simple one of cession of sovereignty by the indigenous Maori people to the British in the Treaty of Waitangi 1840. One notable aspect of the dominant legal portrayals of the Treaty signing, and subsequent legal cases, is their repression of the glaring discrepancies between the Maori version of the Treaty, signed by most Maori leaders, and the English versions. Historical arguments suggest that this discrepancy is the result of deliberate deception on the part of British missionaries translating the Treaty into Maori (Walker 1990: 91, Walker 1989: 269, Ross 1972: 20, Ross 1972 NZJH: 140-141). I argue that this act of deception was necessary to the colonisation of New Zealand, and to the formation of New Zealand as a unified nation-state. The deceptive, or 'appropriative' mistranslation (Constable 1996: 634-635), of the Treaty was the performance of an ideal of the forward-gazing (white, male) citizen who has successfully shed his history (Davidson 1997: 19, Bernal 1994: 125-127); it served both the individual interests of the citizen/subject translator and the interests of nation-building.

This article traces the subsequent re-enactment of this deceptive translation through the repression of the Maori version

of Treaty in three cases decided between 1847 and 1987 which are pivotal in the re-production and maintenance of a unified New Zealand. This reading foregrounds the repetitions and absences in the law necessary for its maintenance of the fictions of legitimacy, separation and unity.¹ The repetition of precedent opens an ethical space which is used in these pivotal cases to re-enact the deceptive translation of the Treaty. The absences paradoxically make imaginable readings that have been erased (Pether 1998: 116), while highlighting the perpetual crisis of these fictions, both textual and material (Bannerji 1993: 107).

This reading recasts the appropriative mistranslation of the Treaty from part of the rough justice or moral shoddiness of the frontier, individual opportunism, or the inexperience of 'do-it-yourself diplomats' (Rice 1992: 52) to the performance of citizenship necessary and integral to the Empire-building project of colonisation. This act of deception is a strategy, reproduced at pivotal historical moments, that serves necessary purposes of nation building and forms part of the substance of British colonising culture.

II. Abuses in Translation

In this section I argue that the production and legitimation of the dominant story of the founding of New Zealand as a unified nation-state is dependent upon the repression of the appropriative mistranslation of the Treaty of Waitangi into Maori. In the dominant story Maori people cede sovereignty to the British; in 1840 pressure from humanitarians meant that consent to British sovereignty from Maori was necessary to legitimate Britain's

colonisation. However, Maori were unlikely to consent to British rule. While in the English version of the Treaty Maori clearly cede sovereignty to the British, the Maori translation, signed by most Maori people, envisions shared government between British and Maori. The Maori version therefore represents a serious challenge to the founding unity of the nation-state. Repression of the Maori version of the Treaty is therefore necessary to the creation and maintenance of the myth of the unified nation-state.

The British first began to trickle into New Zealand in the 1790s (Rice 1992: 10);² Maori people from various iwi were there for 500-1000 years before that (Rice 1992: 6). The British were soon under pressure from Maori to control their own and from the French (Orange 1987: 92) who threatened to colonise the islands if the British did not. The New Zealand Association (later to become the New Zealand Company) was buying up land from Maori at great rates in the hopes of making large profits (Rice 1992: 50-51, Orange 1987: 33-35). These pressures pushed Britain towards colonisation, but in order to avoid the colony becoming a burden on the British taxpayer, it was to be done on the cheap (Rice 1992: 59). This would be achieved by buying land from Maori and reselling it at 'greatly enhanced' prices to settlers (Rice 1992: 58-59). The profit was to be used to run the colony and to bring a steady stream of settlers to the country.

Political and economic pressures to colonise converged with the concerns of humanitarians to protect indigenous people. By the 1830s humanitarian societies in England had reached a peak of paternalistic protectionism concerned with alleviating the worst aspects of British expansion, including disease and loss of land

(Orange 1987:2, Rice 1992: 58, McHugh 1991: 104, 110-111). The emphasis on protection can be seen as a racket with a price tag of dependence and willingness to follow the protector's rules.³ Humanitarians stressed the *injustice of claiming Aotearoa for England without consent from the Maori* (Orange 1987: 225-26).

The British were therefore operating under a combination of potentially contradictory pressures: first, from ostensibly humanitarian concerns to protect Maori people, which required *voluntary cession of sovereignty in a Treaty*; and contradictorily, under pressure to obtain land inexpensively from the same Maori people who were to be protected. As a legal document, the English version of the Treaty was clearly intended to respond to these two pressures. It provided the Crown with a right of pre-emption on the sale of Maori land which was intended to regularise the acquisition of land by the Crown for settlers (McHugh 1991: 108-112), and it stated that Maori ceded sovereignty to the British, satisfying humanitarians that Maori people had consented to British rule. The two major slippages in the translation which facilitated the misappropriation of Maori control over their people and their land also closely track these two pressures: the mistranslation of sovereignty and the misinterpretation of the pre-emptive right.

The Treaty of Waitangi was drafted and signed in 1840, after a hasty translation into Maori (Ross 1972 NZJH: 133). The story of its translation begins in 1835, in response to a French threat to attempt to claim New Zealand. At that time a missionary named Henry Williams encouraged some Maori representatives to sign a document declaring their national independence and

sovereignty over New Zealand. In this declaration Williams used the Maori term *mana whenua* for 'sovereignty' (Walker 1990: 88).

By 1840 Williams owned 22,000 acres of land that he had purchased directly from Maori. Under the British common law all legitimate title to land is traced back to the Crown (Hackshaw 1989: 99); under British law Williams' title to his land was therefore secure as against the Maori from whom he had purchased, but otherwise potentially uncertain.⁴ Under Maori law, Williams owned his land at the pleasure of the leaders from whom he had purchased, which was subject to withdrawal (Walker 1990: 91). Once Maori ceded sovereignty to the Crown, Williams would have the opportunity to clarify his title (Rice 1992: 58), and he was anxious to do so as he had eleven children for whom he had to provide (Walker 1989: 266). Further, as a missionary, Williams' would have been subject to humanitarian pressure for a Treaty evidencing Maori consent to British rule. The personal and political stakes for all of those involved in the Treaty translation and signing were great; most stood to gain more certain title to between 1,000 and 50,000 acres of land each and stood to maintain and promote their political interests upon its signing (Walker 1990: 87).

Many of the Maori leaders who signed the declaration of independence were also present at the signing of the Treaty. Perhaps as a result of the convergence of these pressures, Williams did not use the recognisable translation of *mana whenua* for sovereignty in the Treaty. Rather, he translated the word 'sovereignty' as *kawanatanga*, a transliteration of 'governor' with

a suffix added to become 'governance' (Walker 1990: 90-92, Ross 1972 NZJH, 140-141).

There is also historical evidence suggesting that Williams was aware of discrepancies between the legal interpretation of a right of pre-emption in British law and the interpretation given to Maori leaders. The English version of the Treaty of Waitangi guaranteed 'exclusive and undisturbed possession' of Maori land and provided the Queen with an exclusive right of preemption should Maori wish to sell. Prices were to be agreed between the Maori owners and representatives of the Queen. This language was arguably consistent with the common law doctrine of native title which provided that the sovereign of an acquiring state had an exclusive right of pre-emption to buy indigenous peoples' land (Hackshaw 1989: 98). This right provides the Crown with exclusive access to purchase cheap land. However, it appears that Williams was aware that 'Maori were told the Queen could have first offer, after which they could sell to whomever they pleased' (Rice 1992: 52, Walker 1989: 265, Ross 1972 NZJH: 143-153). There is no mention in the Maori version of prohibition on selling the land to anyone else after offering it to the Crown. One influential translation of the Maori version states that Maori only agreed to 'sell land to the Queen at a price agreed to' by the two parties (Kawharau 1989: 320), and Maori protested the interpretation that they were not to sell to others if the Crown did not want to buy (Ross 1972 NZJH: 146-147). It has also been suggested that this mistranslation was deliberate (McHugh 1991: 103).⁵

With respect to these two aspects of translation, the failure to use *mana whenua*, and the misinterpretation of the pre-emptive

right, the most recent Oxford History of New Zealand notes that:

In comparing the English with the Maori text it becomes apparent that Henry Williams was not simply trying to translate, but rather to re-write the Treaty into a form that would be acceptable to Maori (Rice 1992: 52).

While the Oxford History also suggests that these mistranslations were blunders rather than deliberate deceptions, that conclusion seems unfounded. The passage quoted suggests that Williams knew that use of *mana whenua* for sovereignty would not have been acceptable to Maori (Ross 1972 NZJH: 141). Williams and the other British officials were under severe pressure to get a Treaty signed hastily (Ross 1972 NZJH: 133-135). His past experience with the declaration of independence made him intimately aware of the position of Maori leaders (Ross 1972 NZJH: 139-141). Further, Williams' interest in gaining more certain title to his land holdings provided him with added urgency and motive for ensuring that the Treaty was signed. The suggestion that his translation amounted to deliberate deception is better supported (Walker 1990: 91, Walker 1989: 269, Ross 1972:20; Ross 1972 NZJH: 140-141). As Ross argues, '[i]t is difficult not to conclude that the omission of *mana* from the text ... was no accidental oversight' (1972 NZJH: 141).

It has been persuasively argued that Maori leaders would not have signed a Treaty granting *mana whenua* to the British Crown. Discussions of Maori representatives surrounding their signing of the Maori version of the Treaty indicate that most did not believe that they were ceding sovereignty, or granting control

of their land to the British (Walker 1990: 91-93). One influential Maori leader at the time described the effect of the Treaty in the debates surrounding the signing as 'the shadow of the land goes to the Queen but the substance remains with us' (Adams 1977: 235). Many Maori saw, heard discussion of, and signed only the Maori version of the Treaty. In addition, the Treaty guarantees Maori *te tino Rangatiratanga*, which can only be loosely translated as Chieftainship over their lands, and control over taonga (treasures) and resources, such as fishing (Walker 1989: 263-269). These guarantees, as well as other copious historical evidence (Walker 1989: 269), further support the argument that Maori did not cede sovereignty to the British (Walker 1989: 278). Rather, it has been argued that British and Maori knew that what the Maori leaders were agreeing to in the Treaty was the British coming into the country to govern the British while Maori retained their traditional control over their land and people (Williams 1989: 79). This is an interpretation of the Treaty that is consistent with the use of *kawanatanga* to indicate governorship.

If Maori leaders would not have ceded *mana whenua* to the British, then Williams' appropriative mistranslation was necessary to the British success in convincing Maori to sign, necessary to the colonisation of Aotearoa, and necessary to its formation into a unified nation-state. At this crucial moment of nation-building, Williams acted in both his own self-interest and in the interests of unifying the nation-state. It has been argued that the ideal conception of the good citizen involves the fulfillment of these dual interests, sometimes overlapping (Moore 1998).⁶ The fulfillment of national and individual interests simultaneously is also reflected in the nineteenth century ideology of 'manliness' which provided 'the essence of civic virtue ... [as

well as] a guide for the little man' (Tosh 1994: 180, Berg 1998: 11-112). Williams' actions mapped his own identity onto a white masculine ideal of the good citizen/subject (Brown 1994: 157). His act is also the performance (Butler 1990: 128-141) and fulfillment of that ideal, and for that moment he closed the gap between his own identity and the ideal (Naffine 1990: 58-77).

Williams' acts both fulfilled an ideal of citizenship and were fraudulent or deceptive (Rice 1992: 58).⁷ This construction highlights the specificity of the construction of the good citizen, the content of the actions of the ideal of the good citizen, and the historical moments at which that ideal is performed. At this historical moment in the context of the colonisation of New Zealand and its associated pressures, the ideal good citizen *was* deceptive and fraudulent, 'tact, flattery, guile, bluff and a dash of subterfuge were all part of the diplomatic equipment' (Orange 1987: 91).⁸ The point is to see Williams' deceptive actions as consistent with the perpetuation of the manner in which the existing historical context constructed the good citizen (Gatens 1996: 40), and therefore as an integral aspect of British colonising culture, not an isolated incident. As I will argue below, not only was deception and fraudulence integral to British colonising culture, the British-based law, in specific contexts of colonisation, was also deceptive and fraudulent (Goodrich 1996: 128).

Erasure of the Maori version of the Treaty, and Maori interpretations of the Treaty is necessary to the unity and closure of the dominant version of the founding of New Zealand. The dominant version of events subsequent to the signing of the Treaty also attempts to legitimate, by erasing, acts of material violence which resulted in the decimation of the Maori population, the

loss of their land and the colonising and appropriation of their culture. This erasure leaves space for the reproduction of Maori people and culture through the prism of the British colonising system (Mikaere 1994), as a worlding of the world (Spivak 1990: 1).

Paradoxically, these erasures also simultaneously open readings of the Treaty that blow apart the myth of the unified nation state, interrupting this momentary closure (Goodrich 1996: 137). The acts of deception in the translation of the Treaty form hairline cracks in the unitary foundation of the nation, capable of splitting apart the foundation. The multiple versions of the Treaty, slippages between the versions, and the fissures opened through translation have provided fertile grounds for over 150 years of crises threatening New Zealand's dominant (imposed) story of unity. The space opened by these interruptions is temporarily closed by each re-enactment of the deceptions and erasures in three pivotal nation-building cases over the next 150 years. All three cases involve textual violence which legitimates material violence, violence both represented by the facts of the cases and occurring generally as part of colonisation. All three cases also reflect ruptures in the fiction of unity that signal perpetual crisis.

III. Law's Deceptions: Repetition With a Difference

In the 150-odd years since the signing of the Treaty, at least three cases represent crisis in the maintenance of the myth of New Zealand as a unified nation-state. Each case maintains the fiction of the unified nation-state, and the corresponding fiction of closure and unity of the law, by erasing and silencing the Maori

version of the Treaty, repressing and thereby re-enacting the deception of its appropriative mistranslation. The nature of the deception changes with the historical context and the particular crisis. Paradoxically, each case also represents the resurgence of the story of deception of the Treaty translation. Re-enactment of the deception in each case is necessary to the repression of the Treaty deception, the maintenance of the unified nation-state, and the continued legitimacy of the British legal system, and the Crown, in New Zealand.

The first two cases represent crisis challenging the on-going project of colonisation in its unstable infancy. In the first case the fiction of closure of the unity of the law is maintained against a challenge from literature at the same time as the violent unity of the state is maintained by repressing the Maori version of the Treaty, both in the interests of colonisation. Contradictorily, the second case illustrates a convergence of law and literature, where law's illusion of closure is adeptly sacrificed in the interests of colonisation, and the Maori version of the Treaty is again violently repressed (Singer 1991: 2-6). The crisis precipitating the third case occurs much more recently, but is also a crisis of legitimacy for the British form of government and its legal system. In this case the Court simultaneously relegates the deceptions of colonisation to the past and represents the emancipatory, victorious present for Maori even while once again re-enacting the appropriative mistranslation of the Treaty.

A. *R v Symonds*

R v Symonds (1847) was ostensibly about protecting Maori from the confiscation of their lands either by open sales to settlers or

through the implementation of the wastelands policy. By 1844 the New Zealand colonial project was in crisis: treasury was bankrupt and under pressure from both colonists wanting to purchase land,⁹ and Maori wanting to sell (Ross 1972 NZJH: 146, Belgrave 1997: 32). The Governor waived the Crown's preemptive right to purchase land and allowed direct sales from Maori to settlers. In 1846 the English Colonial Office issued new policies regarding ownership of land (GBPP 1847/763, 64). The policies drew on Locke's argument that the theoretical justification for ownership of property arises from mixing one's labour with the land (Locke 1955: ss 25-39). Locke himself 'administered and invested in the imperial system in practice and justified it in theory' (Tulley 1995: 71). In a move that was a common tactic of British colonisation, Locke's theoretical argument was translated into a policy that required indigenous people to have cultivated land in order to claim ownership (Tully 1995: 70-78). Any Maori land not directly used for cultivation was classified as 'waste land' belonging to the Crown and stripped of native title (Hackshaw 1989: 103). The policy was a thinly veiled confiscation of Maori land; it declared the Crown owner of Maori land without requiring purchase of the land contrary to the Treaty guarantee of 'exclusive and undisturbed possession'.

In the New Zealand context, where Maori were still a very powerful force, these directives were inflammatory (Orange 1987: 126-132, Hackshaw 1989: 104).¹⁰ By 1846 Maori unrest due to great loss of land and settler influx was widespread (Williams: 1989: 74). Maori still dominated the country and they were increasingly unhappy with the imposition of British colonisation and its implications (Williams 1989: 73, Orange 1987: 126-132).¹¹ At a time when the treasury was bankrupt, Governor

Grey wrote to England warning that any attempt to alienate Maori land without purchasing it was likely to end in disaster (Hackshaw 1989: 104, Belgrave 1997: 31). The project of colonisation was in crisis.

In *Symonds* Governor Grey manufactured a challenge to a title to land issued under the waiver of the Crown's pre-emptive right, ensuring that the sales effected under the waiver would be subject to judicial review. The Court found that the Queen's pre-emptive right to purchase Maori land could not be waived to allow purchases directly by settlers from Maori. The Court declared that this rule was 'founded on the largest humanity' because it protected Maori from the 'evil consequences of the intercourse to which we have introduced them' (*Symonds* 1847: 391). To allow sales openly to anyone would 'be virtually to confiscate the lands of the natives in a very short time' (*Symonds* 1847: 391). The Court further stated that the right of pre-emption was conditional upon Maori agreeing to alienate or sell their land; without Maori consent native title could not be extinguished (1847: 390, 394). This statement highlighted the illegality of the waste lands policy, which extinguished native title without consent.

On one reading, *Symonds* is a story of recognition of the protection due to the Maori people by the Crown and the British courts. Government reports at the time also recognised that Maori owned all of New Zealand land under their own laws. This protection and affirmation is buttressed by an attack of the waste lands policy by the Chief Justice Martin, one of the judges who sat in the case, which acknowledged that Maori 'have been formally recognised as an independent state' (Hackshaw 1989:

108). Martin also declared that Britain's title to New Zealand rested solely on the Treaty:

If ever there was a case where the stronger party was obliged by its position to respect the demands of the weaker, if ever a powerful country was bound by its engagements with a weaker, it was the engagement contracted under ... [the Treaty of Waitangi] with the native chiefs (Martin 1847: 10).

These statements operate to reassure the dominant and restless Maori of protection for their land and respect for their autonomous decisions to sell. The project of colonisation is simultaneously furthered by the quoted statement's emphasis on characterizing the British as the stronger party and the Maori as the weaker, at a time when in fact the British could not have taken the country by force. In a time of crisis in the colonial project, it is likely that such statements were necessary to both the legitimacy and the physical reality of continued British presence in New Zealand.

Symonds is also a story of the integrity of the closure of law in the face of a potential tainting from Locke's political theory, or literature outside of law. The wasteland's policy is directly contradictory to the common law doctrine of native title, yet useful to the project of colonisation. Locke's philosophical theory is *not law*; its potential interpretation into law challenges the law's positivist fiction of closure and unity. As a result of the emphatic language in the *Symonds* case, and the Chief Justice's 'stinging attack' on the wastelands policy, it was suspended, but only for five years (Hackshaw 1989: 108-109).¹²

While *Symonds* may have been a victory for law's fiction of closure, its construction of native title and the Crown's preemptive right were not victories for Maori. The dubious origin of the doctrine of native title is asserted in a paradoxical manner as 'a fundamental maxim of our laws, *springing no doubt* from the feudal origin and nature of our tenures...', a claim that the doctrine is deeply rooted which creates the roots (*Symonds* 1847: 388). The one seemingly clear precedent cited, the United States case of *Johnson v McIntosh* (1823) is not in the direct line of authority for a New Zealand Court, and its lineage is also open to challenge:¹³

Marshall clearly felt the primary determinant to be the conduct of the government. The presumption was made that the government had based its conduct on legal principle and so the relevant principles were to be found in this conduct (McHugh 1991: 106).¹⁴

The presumption that the United States government, or the Supreme Court, based its conduct in relation to first nations people in that country on legal principle is itself questionable (Singer 1991: 3);¹⁵ use of that precedent to legitimate construction of the doctrine of native title in New Zealand builds a house of cards.

Symonds' construction of native title and the right of preemption is actually the imposition of a severe limitation on the right of alienation of Maori land as contemplated by the Maori version of the Treaty (1847: 391, McHugh 1991: 110-111). The doctrine of native title as constructed by the Court strips Maori of full title to their land; its interpretation of the

pre-emptive right resulted in Maori holding title to land that was inferior to the British concept of an estate in fee, or full and absolute dominion over the land (1847: 391). The only reference to the Maori version of the treaty in the case is a passing one in which Chief Justice Martin states:

with the questions raised as to the true meaning of the Treaty of Waitangi as it stands in the native language – whether it does or does not speak of the ‘exclusive right of pre-emption’, or of ‘pre-emption’ at all, or only and simply of ‘purchase’ – we have obviously no concern (1847: 397).

No reason or precedent is given to legitimize this ‘obvious’ point (Williams 1989: 80), this passing statement consigns the Maori version, in which Maori only agreed to provide the Crown with a first option to purchase land, to silence. This silencing re-enacts the deception of the Treaty’s translation. The Chief Justice’s public statement that the British title in New Zealand rested solely on the Treaty clearly did not extend to the Maori version of the Treaty. The Court does state that ‘the plaintiff stands in the Crown’s right as it is in the Crown’ (1847: 397). The legitimacy of the Crown’s right must be based in the legitimacy of the Maori version of the Treaty, signed by Maori, which did not provide the Crown with an exclusive right of pre-emption. It is *only* by repressing the Maori version of the Treaty that the Court can reach its interpretation of native title and the Crown’s pre-emptive right, which rob Maori of full title to their land (Belgrave 1997: 32).¹⁶ The Court insists on the application of the doctrine of native title in order to highlight the illegality of the wastelands policy, which at a moment of crisis in colonisation is necessary to the continued presence of the British in New Zealand.

This reading of *Symonds* foregrounds the deception and theft (Goodrich 1996: 128, 135-136) effected by the law, strategies which are necessary to its positivist insistence on the closure of law and the separation of law from literature, morals and politics. The Court both passively refuses to consider the Maori version of the Treaty, re-enacting the deception necessary to the English version, and simultaneously highlights the illegality of the wastelands policy. Both moves work in the interests of the continuing colonisation project.

B. *Wi Parata v The Bishop of Wellington*

The case of *Wi Parata v The Bishop of Wellington* (1877) also works to close a rupture opened by a crisis in colonisation involving the confiscation of Maori land. Contrary to the precedent set in *Symonds*, in *Wi Parata* the Court rejects a common law native title analysis which may have required the return of land to Maori. Instead it relies on the insistence of a unified conception of a sovereign in positivist legal theory (Davies 1996: 64-65) to justify the confiscation of land. It is the breach of law's fiction of closure by reliance on the literature of legal theory that has prompted recent academic arguments that the case was incorrectly decided.¹⁷

During the first decades after the signing of the Treaty Maori people gifted many pieces of land to churches in trust for the purpose of building schools for the local iwi. Few schools were built. Under the common law of trusts, property placed in trust for a specific purpose may revert back to the donor if it is not used for that purpose. However, at a time when the Government was moving from provincial to national school

systems, culminating in the Education Act 1877 (Cumming 1978: 65-99), the government wanted control over these lands. Gaining control required wresting control from the churches, and eliminating any reversionary rights to the land in the original Maori donors (Hackshaw 1989: 109). Further, the land gifted to church-held charities was only one piece of a much bigger puzzle. By the early 1870s it was clear to Maori that the British were using any means possible, including war as well as measures ostensibly intended to protect them, to prise land from their hold. In response to their dissatisfaction, Maori were encouraged to use the courts. This suggestion was vigorously followed throughout the 1870s and by the 1880s more than one thousand Maori petitions were presented, in many of which the Treaty figured prominently (Orange 1987: 186). The issues raised in *Wi Parata* are therefore representative of another crisis in the colonial project, revealing once again the rift papered over by the deception of the Treaty translation.

Wi Parata was a leader of Ngati Toa who claimed original ownership of one of the pieces of land; this piece had been given to Bishop Selwyn in 1848 for the purposes of educating the Ngati Toa children (*Wi Parata* 1877: 72). In 1850 a Crown grant to the land was made for purposes that Wi Parata saw as inconsistent with the purpose for which the land had originally been donated. He made submissions to a select committee set up to investigate the matter, asking for return of the land. His submissions were ignored. While the Select Committee recommended appointment of a special commissioner to further investigate (Hackshaw 1989: 109), Wi Parata applied to the Supreme Court for a declaration that the grant of the land was void because it hadn't been used for the intended purposes, and therefore that the land should

revert to Ngati Toa (Orange 1987: 186). A favourable result for Ngati Toa may have required return of all land held by similar religious, educational and charitable trusts, and the government was aware of this possibility (Orange 1987: 186). Chief Justice Prendergast concluded that in New Zealand a Crown grant extinguished native title and therefore the land could not revert back to Ngati Toa; this outcome legitimated the Crown in extinguishing Maori title to land without purchasing it.

Prendergast held that the existence of the guarantees to exclusive and undisturbed possession of land in the English version of the Treaty were irrelevant to the outcome of the case. He drew on positivist legal theory to support his conclusion that the Treaty was a 'simple nullity... [because] No body politic existed capable of making session of sovereignty...' (1877: 78). According to Prendergast, Maori people did not constitute an independent political society with a sovereign capable of ceding sovereignty. Austin's legal theory, for example, defines the sovereign as the unlimited ruler of one united independent political society (Austin 1955: 193-194). According to Austin, this means that kinship groups, such as Native Americans, cannot constitute an independent political society, and therefore cannot have a sovereign (Austin 1955: 207-211). Prendergast does not hesitate to state that Maori society did not measure up to Austin's requirements because Maori were 'barbarians':

The Maori tribes were incapable of performing the duties, and therefore of assuming the rights, of a civilised community ... [the] territory [is] thinly populated by barbarians without any form of law or civil government (1877: 77).

The appropriative mistranslation of the Treaty effected an erasure of Maori understandings of the Treaty which was perpetrated by the *Symonds* Court's refusal to consider the Maori version. Prendergast's declaration of the Treaty as a nullity, his insistence on a unitary sovereign, and his construction of Maori as incomprehensible others, again effects an erasure and a simultaneous worlding of the world through British colonial representations (Pocock 1992: 32).

Prendergast's interpretation of native title as extinguished by Crown grant without purchase is made without reference to and apparently in contradiction to *Symonds*; instead of applying recent legal precedent the Court relies on recent developments in positivist legal theory. It is this use of literature in law that commentators have critiqued, one stating that 'instead of reflecting established law, [*Wi Parata*] reflected untested positivist-inspired legal theories...' (Hackshaw 1989: 93). Prendergast has also been critiqued for reliance on 'academic writers' rather than legal precedent (McHugh 1991: 113). In its privileging of positivist legal theory over the law of *Symonds*, *Wi Parata* represents a convergence of law and literature. Paradoxically, Austin's theory is known for its insistence on the separation of law from morals, politics and literature. While *Symonds* expunges Locke's literature from the law, *Wi Parata* opportunistically embraces the literature of legal positivism. Both decisions work in the interests of colonisation.

David Williams (1989: 65-72) makes a persuasive argument that colonial judges throughout the British Empire consistently molded legal doctrine in the interests of colonization, concluding with respect to the *Wi Parata* case:

Modern legal scholars tend to be squeamish about such a transparent molding of legal doctrine to suit the convenience of colonial capitalism, and no doubt the colonial judiciary in the late nineteenth century did 'misunderstand', deliberately or otherwise, the doctrine of aboriginal title. Yet ... colonial judges in many parts of the Empire were adept at reaching decisions convenient for colonial governments which were at the expense of indigenous peoples' rights (Williams 1989: 87).

Williams emphasises that *Wi Parata's* deception was not an isolated mistake, but rather integral to British law. It legitimates the material violence of deception and theft related to land confiscations. *Wi Parata* is decided after the Maori lands wars and other violent government acts dispossessing Maori of land contrary to the Treaty. The return of Ngati Toa land had the potential to unleash a flood of claims not only for the return of mis-used trust land, but for large tracts of land from which Maori had been dispossessed. The case therefore represented a potential crisis in the project of colonisation which required declaring the Treaty a nullity. This case emphasizes that Maori will have no recourse to the Courts, the proclaimed arbiters and protectors of justice within the imposed system, for Treaty breaches. The decision in *Wi Parata* facilitated the ongoing confiscation of Maori land. It legitimated over 100 pieces of legislation to 'legalise' Maori dispossession from Maori land; it has been argued that all of these pieces of legislation were enacted in breach of the Treaty (Jackson 1993: 77).

C. New Zealand Maori Council v Attorney General

Socio-legal and political attempts to relegate the Treaty to history and perpetuate the myth of a unified nation-state throughout

the 19th and first half of the 20th century succeeded in producing a semblance of unity that was interrupted by repeated crisis. Possibly the most significant of these crises occurred in the 1980s, a watershed decade for New Zealand. Political activism on the part of Maori increased and diversified. Their claims included claims to absolute Maori sovereignty made by a number of vocal, articulate and powerful Maori women. These political claims were supported by a growing body of opinion and scholarship recognising the Maori version of the Treaty as a basic constitutional document in which Maori retained the right to govern themselves, 'the question of the origins of the New Zealand state became a matter of national concern' (McHugh 1997:43). As Treaty claims gained purchase among, and support from, the general population, the New Zealand government faced a crisis of legitimacy. This crisis prompted the government and the Court of Appeal to focus on the English version of the Treaty in order to regain legitimacy and re-construct the imposed unity of the nation state.

In 1984 the Labour Party promised to honour the Treaty and to settle grievances resulting from the Treaty, and was consequently elected (Kelsey 1995: 23). In 1985 this government extended the scope of the powers of the Waitangi Tribunal, originally empowered to enquire into grievances occurring from the date of its creation in 1975, to look at the crisis of legitimacy grievances based on the Treaty back to 1840. However, the Tribunal was not given the power to award remedies; it was empowered only to make recommendations to the Government. This Labour government also commenced and accelerated the movement of the New Zealand economy from one of the most highly regulated in the world to one of the least regulated,

dismantling a comprehensive welfare state in the process. In a move contradictory to its Treaty stance but consistent with its monetarist policies, it also commenced the process of privatisation of state owned assets, thereby limiting the State's ability to redress Treaty wrongs.

The *State Owned Enterprises Act 1986* ('SOE' Act) provided for the formation of quasi-private corporations from previously state-owned assets and utilities, to which close to 4 million hectares of land were to be transferred (NZMC 1987: 653). The assets to be transferred had a book value of \$11.8 billion in government accounts in March of 1986 (Kelsey 1990: 81). Spurred by an urgent interim report by the Waitangi Tribunal stating that the 'honour of the Crown was at stake' sections 9 and 27 were inserted into the *SOE Act* (Kelsey 1990: 83-84). Section 9 required that the Crown must not exercise its powers in a manner inconsistent with the 'principles of the Treaty of Waitangi'. Section 27 provided limited protection from complete privatisation for resources under dispute in claims filed with the Waitangi Tribunal prior to passage of the Act, but failed to provide protection for resources that could be the subject of future claims (Kelsey 1993: 253). In *New Zealand Maori Council v Attorney General* [1987] the New Zealand Maori Council, an independent private body, sought a court order to stop the asset transfers. It claimed that by transferring assets potentially subject to future Waitangi Tribunal claims, the Crown was exercising its powers in a manner inconsistent with the principles of the Treaty.¹⁸

At a time when the constructed unity of the nation appeared to be in crisis, the story that the President of the Court of Appeal writes in this case is one of recognition and validation

of the Treaty, placing the mistakes and unfortunate incidents of colonisation in the past (*NZMC* 1987: 660-661). The Court states that a refusal to decide whether Parliament was acting in accordance with the principles of the Treaty, when it was required to do so by section 9 of the Act, 'would be unhappily and unacceptably reminiscent of an attitude, now past, that the Treaty itself is of no value to the Maori people' (*NZMC* 1987: 661). The decision self-consciously represents the emancipatory present, in which Maori receive the respect and victory that they deserve, 'the Maori people have succeeded in this case. Some might speak of a victory, but Courts do not usually use that kind of language' (*NZMC* 1987: 667).

The Court, authorised by section 9 of the Treaty to create/construct the principles of the Treaty, drew on private law principles (McHugh 1997: 50-51) in stating that 'the Treaty signified a partnership between the races' (*NZMC* 1987: 664). This partnership required the determination of 'what steps should be taken by the Crown, as a partner acting towards the Maori partner in the utmost good faith which is the characteristic obligation of partnership' (1987: 664). The partnership created duties 'analogous' to fiduciary duties and these duties extended also to Maori, who had 'undertaken a duty of loyalty to the Queen, full acceptance of her Government through her responsible Ministers, and reasonable co-operation' (1987: 666). The court concluded that if the Crown 'acting reasonably and in good faith' was satisfied that particular assets would not be subject to future claims, then transfer of those assets would not be in breach of the principles of the Treaty (1987: 664). The Court refused to find that there could be a general duty on the government to consult Maori when making decisions under the *SOE Act* (1987: 665).

While the Court explicitly markets the case as progressive, enlightened and a victory for Maori, the Maori version of the Treaty, as in *Symonds* and *Wi Parata*, is irrelevant to its outcome. The Court states:

The principles of the Treaty are to be applied, not the literal words.... The story of the drafting of the Treaty and the procurement of signatures from more than 500 Maori chiefs, including some Maori women of appropriate rank – events in which no lawyer seems to have played a part – is an absorbing one, but not within the ambit of this judgment (1987: 662).

While purporting to interpret the principles of the Treaty, and using the language of partnership, the Court effectively ignored popular and scholarly support for recognition of the Maori version of the Treaty and its vision of dual governments. Maintenance of the fiction of New Zealand as a unified nation-state at an historical moment when the fissures in that unity were showing was crucial. That maintenance required a violent repressing of the earlier deceptions integral to its formation.¹⁹ At an historical moment when the deceptions in the formation of the state are highlighted by the political action of Maori, and the Court is explicitly empowered to consider the Treaty, the opening for the practice of justice in the repetitions of the law is perhaps the widest. This opening provides the Court with an ethical moment in which it chooses to re-enact the deceptions of the Treaty signing by refusing to consider the Maori version. These deceptions are not marginal asides in the dominant story, they are integral to that story – both the building of unity and the maintenance of New Zealand as a nation-state requires violent deception and theft; these are the qualities upon which the state is founded and perpetuated.

IV. Conclusion

The founding moments of New Zealand as a nation state are marked by acts of deception; these acts provide the content of the ideal (white, male) citizen acting in both his own self-interest and interests of nation building. The repression of these acts of deception in pivotal cases become law's deceptions; the resurfacing of the deception in the cases requires repetition but repetition is never only repeating, it always opens space for the exercise of ethical decisions and the practice of justice. Thus the deceptions in the founding moments of the nation state become law's deceptions as the law re-silences and recreates and founding moments and the unified nation state. The deception of the appropriative mistranslation of the Treaty of Waitangi and its reproduction is integral to the project and culture of British colonialism.

The ideal citizen not only acts in both his own and the nation's interests simultaneously, he is also forward gazing, without a history; he is always able to shed his history. The Government of New Zealand is currently in the process of attempting to shed what have been termed 'historical' Treaty grievances through a series of Treaty settlements (Mikaere 1997: 425). The government has marketed this process to non-Maori in part through a promise that 'the finality of the process would enable all New Zealanders to look ahead without the constant threat of Maori claims looming on or over the horizon to interfere with non-Maori and government development' (Mikaere 1997: 425). Annie Mikaere makes a persuasive argument that not only has the New Zealand government claimed to fully and finally settle Treaty grievances in the past without success, but that the

Canadian and American models for the current settlements have been dismal failures (Mikaere 1997). There is no reason to think that application of these models in New Zealand will have different outcomes. She concludes that these settlements are another move in the colonial project of assimilation.

My reading of the Treaty's deceptions and three pivotal cases supports Mikaere's conclusions. The deceptions necessary and integral to the founding of New Zealand have resulted in the Treaty grievances which the government is currently attempting to settle. Those deceptions cannot be addressed fully and finally without revisiting the violent unity that they found and perpetuate. Attempting to settle Treaty grievances with strategies that perpetuate the violent unity of the nation state, a unity based on deceptions, can only result in a unity perpetually in crisis.

Notes

- ¹ '[T]he literary critic must read the literature of the law through the evidence of its absence, through its repetitions and through the failures which indicate the return of that which is repressed in law' (Goodrich 1996: 113).
- ² Captain James Cook's first expedition exploring New Zealand took place in 1769-1770. Sealers, whalers and traders arrived from the 1790s onwards (Rice 1992: 28).
- ³ Protection emerges as a theme not only with respect to justifications for the Treaty, but also in the cases. 'Whether one is dealing with the state, the Mafia, parents, pimps, police or husbands, the heavy price of institutionalized protection is always

a measure of dependence and agreement to abide by the protector's rules' (Brown 1995: 169).

- 4 According to British colonial law the Crown always owns the underlying radical title to land and where feudalism has been introduced, also the legal title to the land (ultimately all title to land is traced to a Crown grant), which is burdened by tribal title. In New Zealand in 1840 settlers were prohibited from purchasing land directly from Maori; all such purchases were in jeopardy from the time that the British began to consider colonisation. A commission was established to investigate and validate purchases directly from Maori that pre-dated the declaration of sovereignty; this investigation was fiercely opposed (McHugh: 1991: 98, 103-104, 109). (But see Tully 1995: 152-154 arguing that the principle that the title to all land can be traced to the Crown is a fiction).
- 5 'It has even been intimated that the Crown's representatives deliberately misused a word normally defined by lawyers as a "right of first refusal" to mean an exclusive right. A right of preemption normally has that former meaning in English law, and there is evidence to suggest that this was the same meaning understood by the signatory chiefs' (McHugh 1991: 103, citing Ross 1972: 129, Orange 1987: 42).
- 6 This theoretical point is well illustrated in the New Zealand context, where settlers' increasing demands for land were satisfied by almost any means, often involving the participation of those with individual interests in land in government-sponsored and legally validated theft, deception and violence, (Rice 1992: 209). 'Maori had lost land by confiscation (Waikato, Bay of Plenty, and Taranaki), by unfair purchase in the South Island, and by the equally improper pressures exerted through the Native Land Court throughout the North Island' (Rice 1992: 290).

- 7 'New Zealand exhibited its share of the mismanagement, both public and private, associated with the exploitation of new European colonies'.
- 8 Orange also quotes a newspaper account at the time, 'For the good people at home, the ... [signing of the Treaty] was made to assume the appearance of one of the purest pieces of philanthropy on the part of England in favour of the natives to protect them against European aggression; but the simple truth is, disguise it as we may, that under this cloak of benevolence, has been practiced the greatest hypocrisy, to obtain the country honestly, if possible, but, nevertheless to obtain it' (1987: 91 citing Bay of Islands Observer, 7 July, 1842).
- 9 As the Crown was increasingly reluctant to colonise new territory in the 19th century due to the costs of administration, budgetary implications were closely scrutinised and Governors of these lands often hard-pressed for cash and under pressure from colonists for land (Hackshaw 1989: 103, Orange 1987: 30-31).
- 10 On the North Island many Pakeha (including Henry Williams) were against the land provisions of the Royal Instructions because they were aware of their injustice and the likely responses of Maori; Orange notes that they were concerned to protect the general welfare of the colony and their own positions and work (Orange 1987: 126-132).
- 11 '[I]n the 840s the political and military power in the hands of Maori tribes severely circumscribed the options available to the government' (Williams 1989: 73).
- 12 Suspension of the waste lands policy was the only manner in which to ensure continued British presence in New Zealand; it was also consistent with Hobson's instructions to use mildness and sincerity to overcome distrust produced by the British encroachment and to at first buy land for British settlers that

the Maori could sell without distress to themselves (Williams 1989: 74; Walker 1990: 90).

- ¹³ “The *first* significant judicial pronouncement on the status of tribal land rights is traditionally accredited to the Supreme Court of American under Chief Justice Marshall. These cases, decided soon after the War of Independence and Confederation, remain important today’ (emphasis added) (McHugh 1991: 106). If the US cases are the first pronouncement, and after the American revolution US Supreme Court cases are not technically precedent for New Zealand courts, then *Symonds* is creating new law. Although a New Zealand official announcing the prohibition of sales directly from Maori to settlers stated, ‘the right of pre-emption by the government was the law of England, and the law also of the colonizing Powers of Europe, before it was the law of the United States; and the Americans themselves *profess* to derive it from the English’ (emphasis added) the word *profess* may be crucial (McHugh 1991: 109).
- ¹⁴ The Court states the basis for the decision: ‘principles of abstract justice, which the Creator of all things has impressed on the mind of his creature Man, ... [and] those principles also which our government has adopted in the particular case, and given us as the rule for our decision’ ((1823) 8 Wheat 543 at 572).
- ¹⁵ Singer notes, for example, that ‘the Supreme Court maintained a fundamental disjunction between legal treatment of Indian and non-Indian property. This distinction has not worked to the benefit of Indian nations or individual tribal members. On the contrary, fee interests owned by non-Indians are subject to various kinds of legal protection which the Court denies to tribal property and to restricted trust allotments owned by tribal members.... The commitment to individual dignity and restraint of tyrannical governmental power purportedly underlying non-Indian property law does not appear to extend fully to Indian owners’.

- ¹⁶ Similarly Governor Grey argued at this time to Earl Grey that 'recognition of broad rights to land was crucial to getting any wastelands for Crown disposal' (Belgrave 1997: 32).
- ¹⁷ '[I]nstead of reflecting established law, [*Wi Parata*] reflected untested positivist-inspired legal theories...' (Hackshaw 1989: 93); '[T]he work done recently by academic writers ... appears to leave no doubt that since the late 1870s successive New Zealand judges have misunderstood the law ... on the whole they did indeed get in wrong' (Brookfield 1989: 10); but compare 'Modern legal scholars tend to be squeamish about such a transparent moulding of legal doctrine to suit the convenience of colonial capitalism, and no doubt the colonial judiciary did 'misunderstand', deliberately or otherwise, the doctrine of aboriginal title ... colonial judges in many parts of the Empire were adept at reaching decisions convenient for colonial Governments which were at the expense of indigenous people's rights' (Williams 1989: 87). Others still argue for *Wi Parata's* interpretation of the Treaty today, 'In its clarity of exposition, and basic soundness of judgment, it is fitting testimony to the quality of that most learned Chief Justice's judicial work' (Chapman 1991: 291).
- ¹⁸ The Court of Appeal required the government to develop a system to protect all assets subject to Waitangi Tribunal claims in the process of privatisation (*NZMC* 1987: 666-668), indicating that the limited protections in section 27 would be sufficient (*NZMC* 1987: 660).
- ¹⁹ '[T]he judge either acts reactively with a resentful passivity towards death and so reproduces a past state of affairs according to 'grave sentences' already handed down, or the judge acts affirmatively and creatively and suspends those sentences so as to do justice in the face of fortune' (Goodrich 1996: 181).

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