

HISTORY, LAW AND LAND:
The Languages of Native Policy
in New Zealand's General Assembly, 1858-62



Samuel D. Carpenter

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Samuel D. Carpenter

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Abstract

This thesis explores the languages of Native policy in New Zealand's General Assembly from 1858 to 1862. It argues, aligning with the scholarship of Peter Mandler and Duncan Bell, that a stadial discourse, which understood history as a progression from savage or barbarian states to those of civility, was the main paradigm in this period. Other discourses have received attention in New Zealand historiography, namely Locke and Vattel's labour theory of land and Wakefield's theory of systematic colonization; but some traditions have not been closely examined, including mid-Victorian Saxonism, the Burkean common law tradition, and the French discourse concerning national character. This thesis seeks to delineate these intellectual contexts that were both European and British, with reference to Imperial and colonial contexts. The thesis comprises a close reading of parliamentary addresses by C. W. Richmond, J. E. FitzGerald and Henry Sewell.

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Images courtesy Alexander Turnbull Library, Wellington New Zealand. Permission of the Alexander Turnbull Library, National Library of New Zealand, Te Puna Matauranga o Aotearoa, must be obtained before any re-use of this image.

Abbreviations

<i>AJHR</i>	<i>Appendices to the Journals of the House of Representatives</i>
<i>DNZB</i>	<i>Dictionary of New Zealand Biography</i> . All of these biographies have been accessed from http://www.dnzb.govt.nz/ , updated 22 June 2007.
HR	House of Representatives
LC	Legislative Council
n.	Footnote reference, usually being a reference to the accompanying text as well
[n.d.]	A publication/document with no date
<i>NZPD</i>	<i>New Zealand Parliamentary Debates</i>
ATL	Alexander Turnbull Library.

Other

All references to an *An Encyclopaedia of New Zealand*, ed. A. H. McLintock (1966) have been accessed from <http://www.teara.govt.nz/1966>.

Notes on Style

Capitalization/Quotations. For authenticity, the basic approach has been to leave capitalized the words capitalized in the debates. In the text generally however, for ease of reading, only a few words such as ‘Native’ have been spelt in upper case.

Spelling. Some words, such as ‘civilization’ I have consistently spelled with a ‘z’ rather than an ‘s’, including amending spelling within citations if necessary.

Introduction

‘How, then, did we raise ourselves from a barbarous state? How were we developed, from a rude, red-haired horde on the banks of the Elbe, into the foremost rank amongst the nations – amongst the first in power, and in all that ennobles and beautifies life?’

Christopher William Richmond (18 May 1858).¹

This thesis explores the discourses of Native policy in New Zealand’s General Assembly from 1858 to 1862. It endeavours to illuminate the nature and meaning of Native policy debates by examining the languages employed by parliamentary protagonists, setting these languages in their intellectual and cultural contexts. These discourse traditions reveal the ways in which nineteenth-century New Zealand politicians conceived of themselves, most significantly as being a British people with a constitutional history in which Britons were the inheritors of civil freedoms and rights of property, and a national history in which Saxon ancestors had brought with them early forms of these constitutional freedoms. The dominance of British Empire underlined the perception that Victorians enjoyed the world’s pre-eminent civilization.

The principal argument of this thesis is that ‘race’ was not the key motif of Native policy discourse or conception in this period, aligning with the scholarship of Duncan Bell and Peter Mandler rather than scholars such as Catherine Hall. ‘Race’ or ‘superior race’ language was used but this should be seen within the tradition of the growth of civilization in societies, from savage or barbarian states to those of civility. This was a paradigm constructed from history, rather than from notions of inherent racial (particularly biological) differentiation. It was a ‘stadial’ or ‘conjectural’ mode of philosophical history, identified in recent

¹ *NZPD* (1858-60): 446.

literature with the Scottish Enlightenment histories of civil society.² This thesis argues that this was the dominant paradigm of Native policy through to 1862, and probably for some years beyond that. This means that ‘fatal impact’ thinking did not, in fact could not, imply a belief in a fundamental divide between British and Māori societies. The stadial paradigm in this mid-Victorian period was joined by the language of Teutonism or Saxonism, which did not modify its essential universalist assumptions but flavoured them with comparisons of national character. The use of Saxon language reflected a mid-to-late Victorian enthusiasm for cultural Saxonism, but its appearance in the debates on Native policy in New Zealand has not been fully addressed in historiographical scholarship.³

Notions of systematic colonization and Native land tenure were perhaps the most highly contested political issues of this period. A more intense focus on this five year period reveals, more than general studies have done, the variety of parliamentary opinion: from Henry Sewell’s clear view, in 1862, that Māori title was not cognizable in English courts, to FitzGerald’s view in the same year, that it was or might soon be cognizable, because Māori tenure practice was adapting itself to English forms. These debates also reveal similar language as that employed in Native governance debates generally, including a Burkean conception of law as a reflection of cultural practice or custom.

In using the methodology of intellectual or cultural history, the thesis does not deny the affects of colonial and imperial policy contexts. As Mark Hickford has written of an earlier period, the nature of Native policy formation was contestable,

² Mark Hickford, ‘“Decidedly the Most Interesting Savages on the Globe”: An Approach to the Intellectual History of Maori Property Rights, 1837-53’, *History of Political Thought* 27 (2006): 122-67; Damen Ward, ‘A Means and Measure of Civilisation: Colonial Authorities and Indigenous Law in Australasia’, *History Compass* 1 (2003): 1-24; Bruce Buchan, ‘The Empire of Political Thought: Civilization, Savagery and Perceptions of Indigenous Government’, *History of the Human Sciences* 18 (2005): 1-22. See also, M. P. K. Sorrenson, ‘How to Civilize Savages: Some “Answers” From Nineteenth Century New Zealand’, *New Zealand Journal of History* 9 (1975): 97-110.

³ Or perhaps, it has not arisen in some instances because the focus was on an earlier period.

its language and practice ‘profoundly entwined’.⁴ The politics of colony and Empire in New Zealand exhibited a number of interests and opinions as to the nature of Māori society and the appropriate policy response. While these colonial and Imperial contexts are examined, the emphasis is on the intellectual contexts of Victorian Britain, as it is these that have been largely passed over in New Zealand historiography. Appraising these intellectual contexts will help achieve a more nuanced interpretation of New Zealand’s mid-nineteenth century General Assembly. In pursuing this line of inquiry, the thesis considers the influence of a ‘culturally imbibed ethnography’ on European administrators and politicians that Kerry Howe believes is ‘too little considered in New Zealand history’.⁵ Colonial parliamentarians had inherited understandings of other races and cultures, but this thesis argues that the influence of stadial views (views pertaining to constructions of their own past) predominated, rather than the specialist learning of nineteenth century ethnology and anthropology.

Most general histories that cover this period have focussed on policies, rather than languages, although historians such as Alan Ward and James Belich have given some attention to Victorian ideas of race.⁶ Other historians have telescoped the language of civilization and savagery in the Victorian world picture and analysed these conceptions in articulations of Native policy. Other studies have examined

⁴ Mark Hickford, ‘Making "Territorial Rights of the Natives": Britain and New Zealand, 1830-1847’ (D. Phil. Thesis, University of Oxford, 1999): 21-23 (for example). See also J. G. A. Pocock, ‘Languages and Their Implications: The Transformation of the Study of Political Thought’ in *Politics, Language and Time. Essays on Political Thought and History* (New York: Atheneum, 1971): 3-41 for the concept of ‘political languages’ or ‘paradigms’. In his more recent work Pocock has employed a ‘series of contexts’ approach to intellectual history, as does this thesis, see J. G. A. Pocock, *Barbarism and Religion. The Enlightenments of Edward Gibbon, 1737-1764*, vol. I (Cambridge: Cambridge University Press, 1999): 10, 12 (in particular).

⁵ K. R. Howe, ‘Two Worlds?’ *New Zealand Journal of History* 37 (2003): 50-61: 53.

⁶ Keith Sinclair, *The Origins of the Maori Wars* (Auckland: Auckland University Press, 1961); Keith Sinclair, *A History of New Zealand* (rev. ed., Harmondsworth: Penguin Books, 1980); B. J. Dalton, *War and Politics in New Zealand, 1855-1870* (Sydney: Sydney University Press, 1967); Claudia Orange, *The Treaty of Waitangi* (Wellington: Bridget Williams, 1987); James Belich, *The New Zealand Wars and the Victorian Interpretation of Racial Conflict* (Auckland: Auckland University Press, 1986); Alan Ward, *A Show of Justice. Racial 'Amalgamation' in Nineteenth Century New Zealand* (Auckland: Auckland University Press, 1973).

land policy and systematic or Wakefieldian colonization schemes.⁷ Still others belong to a more legal-historical literature, emphasizing common law notions of aboriginal title, customary rights, and sovereignty.⁸

However, there was in this period a greater range of discourses concerning Native policy than are analysed by the works just outlined. Some discourses have rightly received considerable attention, namely Scottish stadial history, the Lockean or Vattelian trope of cultivation that delimited Native rights to land, and the Wakefieldian theory of systematic colonization. But there were other traditions including mid-Victorian Saxonism, a Montesquieuan or French tradition concerning national character or *esprit général*, and a Burkean tradition of law as a customary inheritance. These traditions have been little realized. For this reason, and because the intellectual contexts of the Native policy debates were largely Victorian ones, this thesis looks to British and, to a lesser extent, European historiography for interpretive assistance.

The thesis also asks whether languages changed, even through this brief period. This is not an inquiry without foundation – assuming that the material context of colonial politics mattered – for in this period the country moved from a pre-Waitara environment to a post-Waitara environment. If these languages are, at least, the modes in which policy was articulated, then a change in policy should have led to a change of language. However, the stadial language of civilization and barbarism continued to dominate, in which the civilization of Māori was envisioned as both theoretically plausible and practically possible. More

⁷ Erik Olssen, 'Mr Wakefield and New Zealand as an Experiment in Post-Enlightenment Experimental Practice', *New Zealand Journal of History* 31 (1997): 197-218; Michael Belgrave, 'Pre-Emption, the Treaty of Waitangi and the Politics of Crown Purchase', *New Zealand Journal of History* 31 (1997): 23-37; Hickford, 'Making "Territorial Rights of the Natives": Britain and New Zealand, 1830-1847'

⁸ P. G. McHugh, *The Maori Magna Carta. New Zealand Law and the Treaty of Waitangi* (Auckland: Oxford University Press, 1991); P. G. McHugh, *Aboriginal Societies and the Common Law. A History of Sovereignty, Status, and Self-Determination* (Oxford: Oxford University Press, 2004); Michael Belgrave, Merata Kawharu and David Williams, ed., *Waitangi Revisited. Perspectives on the Treaty of Waitangi* (Melbourne: Oxford University Press, 2005).

pessimistic views appeared, emphasizing moral or political differences between Māori and British, but even this language remained universalist, rather than reflecting a belief in fundamental racial or biological differences.

There was, however, a distinct change in the way parliamentarians argued that civilization should be effected. From a policy that provided for Māori assent or self-government and the ‘growth’ of British forms of property and government, Members began to speak of the necessity for forceful imposition of British rule and authority. Civilization by consent succumbed to civilization by conquest. This can be understood as the re-emergence of an older discourse associated with the New Zealand Company, which argued in the early 1840s that coercive forms of British rule might be necessary to exact Māori submission and enable their civilization. However, another older language of humanitarian colonization acquired new clarity as the alternative to colonization by means of war or coercion. FitzGerald forcefully delineated these two choices in his 1862 address. In the same year Sewell also spoke of peaceful resolution. But many others were beginning to argue that conflict was inevitable, if not necessary, if colonization and settlement were to proceed.

As for the main policy parameters themselves, the ultimate objective throughout the period was amalgamation of Māori with British, with divergent views as to how this should be achieved. Richmond's 1858 policy allowed for a time period in which Māori could gradually adopt British institutions of local governance and individual tenure. FitzGerald, in 1862, proposed an almost immediate amalgamation, focussing less on local institutions and advocating that Māori ‘nobility’ be represented in the Assembly and Government. Sewell's 1862 speech⁹ was focused on the tensions between Crown pre-emption led colonization, which could be construed as an expression of older humanitarian ‘Native protectionism’ or of Wakefeldian systematic colonization theory, and the need to devise a new

⁹ Concerning the Native Lands Bill (No. 2).

system of land purchase. The ‘Native protectorate’ was the view that Māori should be civilized slowly prior to their full amalgamation with the European world. This involved acknowledgment of Māori custom on a continuum from almost complete deference except for practices such as cannibalism and infanticide, towards partial recognition only. The Crown’s reasons for rejecting the Native Territorial Rights Act of 1858 probably came the closest in this period to reflecting the Native protectorate view.¹⁰ The policies sanctioned by the General Assembly involved the use of Native districts and Native runanga but tended to amalgamation under British law rather than the continuance of Māori custom. This middle ground position was associated with Grey’s Native Assessors policy. At the other end of the spectrum was the New Zealand Company view that Māori customs should not be deferred to, but that British law should be enforced. This view, as seen in the militaristic policy of the New Zealand wars, was eventually to win out over the more moderate amalgamation view and the humanitarian protectorate position.¹¹ These were the principal political stances on Native policy in the period. Debate and discourse on Native policy was inevitably shaped by the stance adopted but was also modulated by the intellectual and cultural resources and vocabularies which parliamentarians drew upon. The nature of these is outlined below, providing the ‘tools’ with which the debates and speeches will be analysed.

Stadial History

As indicated, the stadial view was a vision of history identified with the Scottish Enlightenment writers of the latter half of the eighteenth century. Its distinguishing features have been well covered by New Zealand authors,¹² but a

¹⁰ See n. 243.

¹¹ C. W. Richmond neatly summarized these various positions, adopting the middle ground position, in his 1858 policy address. See chapter one, nn. 84 to 89.

¹² Among others, Pat Moloney, ‘Savagery and Civilization. Early Victorian Notions’, *New Zealand Journal of History* 35 (2001): 153-76 and Hickford, “‘Decidedly the Most Interesting Savages on the Globe’: An Approach to the Intellectual History of Maori Property Rights, 1837-53’.

recapitulation is useful here. As John Pocock points out in his recent work on the contexts of Gibbon's *Decline and Fall*, this was not history in the standard sense of a narrative concerning the past; rather it was a theoretical construct devised by legal or moral philosophers such as Adam Smith, John Millar and Adam Ferguson, to account for the development or appearance of civil society in history, namely in Europe. These were systems of natural jurisprudence that endeavoured to explain the history of mankind apart from older theological schemes.¹³ Fundamental to these 'conjectural' schemes was an explanation of the development of the human mind and capacities based on the material environment. This was the genesis of the 'four stages theory': savage peoples were hunter-gatherers; barbarian peoples were animal herders; semi-barbarian or semi-civilized peoples were agriculturalists; and civilized peoples were settled trading communities. In essence, changes in the material environment or mode of subsistence were the basis for the development of 'society' and 'civility'. In particular, the contrast was between those peoples who had appropriated property in land (and perhaps animals, as in Smith's version)¹⁴ and those who had not. Once property had been appropriated or claimed (by individuals), law developed to protect those property claims. Following that, money and letters (i.e., writing) developed to better facilitate commercial transactions.¹⁵ In the savage state of wandering vagrants, there was supposed to be little if any division of labour, whereas commercial society was characterised by a settled community with various occupations or professions that, working together, enhanced productivity and the accumulation of resources.¹⁶

These natural histories were closely related to, if not the basis for, the science of political economy in the eighteenth and nineteenth centuries: the study of the

¹³ J. G. A. Pocock, *Barbarism and Religion. Narratives of Civil Government*, vol. II (Cambridge: Cambridge University Press, 1999): 315.

¹⁴ *Ibid*: 316.

¹⁵ J. G. A. Pocock, 'Tangata Whenua and Enlightenment Anthropology' in *The Discovery of Islands. Essays in British History* (Cambridge: Cambridge University Press, 2005).

¹⁶ Moloney, 'Savagery and Civilization. Early Victorian Notions': 154-55.

nature and causes of wealth and poverty among nations. Hence, Smith's *Wealth of Nations* can be related to his earlier jurisprudential or philosophical inquiries, as is partly represented by his *History of Moral Sentiments*. In fact, as Donald Winch points out, Smith defined political economy as 'a branch of the science of a statesman or legislator'.¹⁷ John Stuart Mill, in his treatise *Principles of Political Economy*, published 1848, began with some 'preliminary remarks' in which he outlined the progression from the savage state to the pastoral or nomad state, to Oriental and European (feudal) agricultural states, and finally to European commercial societies. Towards the end of this introductory section he stated: 'But in so far as the causes [of the economical condition or wealth of nations] are moral or psychological, dependent on institutions and social relations, or on the principles of human nature, their investigation belongs not to physical, but to moral and social science, and is the object of what is called Political Economy'.¹⁸ Eighteenth and nineteenth century legislators, New Zealand parliamentarians included, did not compartmentalize history, politics, economics, arts and literature, and psychology. This should be considered when coming to the Native policy language of New Zealand's General Assembly.

It is possible that recent New Zealand literature on Native policy¹⁹ has identified ideas of civilization and savagery too closely with Scottish stadial history, without seeing the presence of other intellectual traditions that were part of a generic civilizational paradigm and contributed to the intellectual and cultural milieu of the mid-nineteenth century. As Pocock has noted, '[i]t is now recognised that various versions of the stadial sequence were common property among European scholars, and were developed by various authors in various ways'.²⁰ Roberto Romani writes that, 'generally speaking, the contrast between barbarous and

¹⁷ Donald Winch, *Riches and Poverty. An Intellectual History of Political Economy in Britain, 1750-1834* (Cambridge: Cambridge University Press, 1996): 21.

¹⁸ John Stuart Mill, *Principles of Political Economy with Some of Their Applications to Social Philosophy* (London: George Routledge and Sons, 1848): 26 (and see 18-26 more generally).

¹⁹ See references at n. 2.

²⁰ Pocock, *Barbarism and Religion. Narratives of Civil Government*: 315 (in footnote).

polite societies underlay much of the “philosophical” thinking in eighteenth-century Britain.’²¹ This generic tradition continued into the nineteenth century, although its emphasis did not remain the same. Peter Mandler has characterized this tradition in the nineteenth century as the ‘civilizational perspective’, which, he argues, was the dominant paradigm, a paradigm in which ‘the ladder of civilization, rather than the branching tree of peoples and nations, remained the dominant metaphor’.²² This universalism remained, even as ideas of national or racial character achieved some prominence.²³

The Parliamentary Library Lists

The parliamentary library lists from this period provide a useful tool to appraise the different intellectual languages from which New Zealand parliamentarians were drawing. The contents of the library were a fair reflection Victorian intellectual culture. The following sections group related works or authors together and outline their associated intellectual languages and traditions.

The earliest extant catalogue was printed in London in 1864,²⁴ and it is thought that this list of works may represent books purchased for the library by Hugh Carleton, when he returned to England in 1861-62.²⁵ Carleton’s interest in Latin and Greek literature may explain why there is an almost exhaustive list of

²¹ Roberto Romani, *National Character and Public Spirit in Britain and France, 1750-1914* (Cambridge: Cambridge University Press, 2002): 117 (in footnote). Romani’s immediate reference here is the Scottish authors.

²² Peter Mandler, “Race” And “Nation” In Mid-Victorian Thought’ in *History, Religion, and Culture. British Intellectual History 1750-1950*, ed. Stefan Collini, Richard Whatmore and Brian Young (Cambridge: Cambridge University Press, 2000): 224-44: 233.

²³ Or perhaps modified it or flavoured its expression – giving it perhaps a greater ethnocentric quality – but without transforming its inherent universalism; which is my argument with respect to Richmond and FitzGerald’s use of this Saxon vocabulary. See Mandler, “Race” And “Nation” In Mid-Victorian Thought’: 227. And see chaps 1 (Richmond) and 2 (FitzGerald).

²⁴ *Catalogue of Books Recently Added to the Library of the General Assembly, New Zealand* (London: F. Guillaume and Co., 1864).

²⁵ This probability was suggested in correspondence with John Martin, historian with the History Group, Ministry for Culture and Heritage and author of John E. Martin, *The House: New Zealand’s House of Representatives 1854–2004* (Palmerston North: Dunmore Press, 2004).

classical texts. However Carleton's fascination for classical literature does not obviate the fact that the classical tradition was an important feature of Victorian intellectual life and would likely have been represented in the library without his influence.²⁶ The next extant catalogue was printed in London in 1866 and is a smaller list of works added to the library.²⁷ A large catalogue, printed in Wellington in 1867, is thought to represent a complete list of the books held in the library at the time.²⁸

Burke and the Common Law Constitution

An 1854 edition of Macaulay's speeches was probably in the library pre-1864,²⁹ while his *History of England* appears as an addition to the 1867 list.³⁰ Edmund Burke merits three listings in 1864, including an 8 volume edition of his 'Works'.³¹

In general terms, Burke and Macaulay represented the Whig tradition of proclaiming the English inheritors of constitutional freedoms and liberties. Collini, Winch and Burrow write that 'a kind of diffused Burkeanism' was often present in the nineteenth-century intellectuals they discuss and is 'best revealed in the commonplaces which later became part of the intellectual stock of Liberals as well as of Whigs and Tories'. These commonplaces included denigration of 'paper constitutions' (i.e., French constitutional variants), respect for tradition as integral to political wisdom, and the notion of successful constitutions being 'built

²⁶ See, for example, Frank M. Turner, *The Greek Heritage in Victorian Britain* (New Haven: Yale University Press, 1981).

²⁷ *Catalogue of Books Relating to New Zealand Recently Added to the Library of the General Assembly New Zealand* (London: F. Guillaume and Co., 1866).

²⁸ *Catalogue of the Library of the General Assembly of New Zealand* (Wellington: George Didsbury, 1867).

²⁹ Listed as 'Macaulay (The Rt. Hon. Lord), Speeches of. London, 1854'.

³⁰ Listed as 'Macaulay (Lord). History of England from the Accession of James the Second. London, 1864'.

³¹ Listed as 'Burke (The Rt. Hon. Edmund). The Works of. 8 vols. London, 1862. Including, Vindication of Natural Society...; Political Miscellanies, - Reflections on the Revolution in France. - Letter to a Member of the National Assembly'.

up by slow accretions'.³² These constitutional notions were also closely related to ideas of the common law itself as ancient and immemorial and yet ever growing and adapting itself to the needs of the people, and ever approaching perfection. This view has been identified with Edmund Burke and became dominant in English legal thought in the second half of the eighteenth century and into the nineteenth century. It was a view of law as customary and inherited, and in legal practice was seen in inductive methods of reasoning from practice and experience or past cases. It was further conceived as a system of remedies for wrongs, rather than a system of positivist rules deduced from principles of natural law or reason.³³ This Burkean language is seen in Richmond's speeches, and in those of many others.

Saxonism

There are a number of Anglo-Saxon references in the 1864 list, including the Anglo-Saxon Chronicle,³⁴ the Life of Alfred the Great³⁵ and an 1856 work by T. Miller entitled *History of the Anglo-Saxons from the earliest period to the Norman Conquest*.³⁶ In the 1867 catalogue there is no reference to the Anglo-Saxon Chronicle but there is a reference to the *Ancient Laws and Institutes of England* comprising laws enacted under the Anglo-Saxon Kings, followed by Edward the Confessor, William the Conqueror, and Henry I, printed in 1840.³⁷

³² Stefan Collini, Donald Winch and John Burrow, *That Noble Science of Politics. A Study in Nineteenth-Century Intellectual History* (Cambridge: Cambridge University Press, 1983): 20.

³³ J. G. A. Pocock, 'Burke and the Ancient Constitution: A Problem in the History of Ideas' in *Politics, Language and Time. Essays on Political Thought and History* (New York: Atheneum, 1971): 202-32; and Michael Lobban, *The Common Law and English Jurisprudence 1760-1850* (Oxford: Clarendon Press, 1991): 1-16.

³⁴ Listed as 'Anglo-Saxon Cronicle [sic], 2 vols. London, 1861'.

³⁵ Listed as 'Alfred the Great, (The Life of), By Dr. Pauli: to which is appended Alfred's Anglo-Saxon version of Orosius; with a literal English Translation and an Anglo-Saxon Alphabet and Glossary. Edited by B. Thorpe, London, 1857'.

³⁶ Listed as 'Miller (T.) History of the Anglo-Saxons from the earliest period to the Norman Conquest. Compiled from the best authorities, including Sharon Turner. London, 1856'.

³⁷ Listed as 'Ancient Laws and Institutes of England, comprising Laws enacted under the Anglo-Saxon Kings, from Æthelbirht to Cnut, with an English translation of the Saxon; the Laws called Edward the Confessor's; the Laws of William the Conqueror, and those ascribed to Henry the First. Also – Monumenta Ecclesiastica Anglicana, from the Seventh to the Tenth Century. 2 vols.

The English Romantics – or the ‘Germano-Coleridgeans’, to use J. S. Mill’s phrase – also warranted inclusion, in the form of Coleridge’s *Biographia Literaria*³⁸ and 16 volumes of Carlyle’s *Collected Works*.³⁹

This list of works is not extensive, nor does it represent the range of works of this nature in the catalogues, but it does reflect the importance of the Saxonist and Romantic traditions for the Victorians. Melman writes that by the end of the eighteenth century the Saxon past of the ancient constitution – of representative government, of English freedoms and of a limited monarchy – survived as rhetoric, not as a mobilizing political language.⁴⁰ It was re-invented as a powerful cultural myth in the Victorian era by Saxonist or ‘Germanist’ writers such as Bulwer Lytton, Carlyle, Stubbs and Freeman.⁴¹ In this literature England was identified with Anglo-Saxon England and the Celt was an anti-type. Saxons such as Harold became heroes. English liberties and freedoms were seen primarily as racial or national characteristics rather than constitutional inheritances. This literature can be seen, in part, as a reaction to the Whig ‘success story’ of the ancient (common law) constitution, at least in its ‘new’ scientific or utilitarian guise, often identified with political economy.⁴²

Peter Mandler traces a slightly different line of nineteenth-century scholarship, emphasizing political rather than cultural forms of Teutonism. Similarly to Melman, though, he notes that the ‘long plebeian-radical tradition’ of democratic

Royal 8vo. Printed under the direction of the Commissioners on the Public Records of the Kingdom. Folio. London, 1840’. We may speculate that this text was held by the library in the pre-1864 period and probably the pre-1860 period, having regard to its nature, the publication date and the fact that the library was in existence probably from 1854, see Martin, *The House: New Zealand’s House of Representatives 1854–2004*: 56.

³⁸ Listed as ‘Biographia Literaria or, Biographical Sketches of My Literary Life and Opinions by Samuel Taylor Coleridge, 2 vols [no date?]’.

³⁹ Listed as ‘Carlyle (Thomas), The Collected Works of. 16 vols. London, 1858’.

⁴⁰ Billie Melman, ‘Claiming the Nation’s Past: The Invention of an Anglo-Saxon Tradition’, *Journal of Contemporary History* 26 (1991): 575-95: 578 (citing Christopher Hill).

⁴¹ For a similar point, see Colin Kidd, *British Identities before Nationalism. Ethnicity and Nationhood in the Atlantic World, 1600-1800* (Cambridge: Cambridge University Press, 1999): 265-66.

⁴² Melman, ‘Claiming the Nation’s Past: The Invention of an Anglo-Saxon Tradition’: 588.

Teutonism – ‘of extolling the Anglo-Saxon’s ancient love of liberty and bemoaning its subjection to the Norman yoke’ – was fading by the early nineteenth century. However, it was revived by what Mandler refers to as ‘German-inspired scholarship in Anglo-Saxon language and laws’. These writings combined with the democratic-liberal impulses of the ‘University Liberals’ (followers of John Stuart Mill). J. M. Kemble’s *Saxons in England* (1849) was the platform text. In Kemble’s vision, England’s customs of ‘right and justice’ were privileged over institutions, the Teutons possessing the earliest and purest form of these customs. Democratic Teutonism was later developed by luminaries such as E. A. Freeman. These ‘Germano-Coleridgean’ modes of thinking tended to emphasize either racial (Anglo-Saxon) or national (English) character over legal and political institutions in the development of civilization (or democracy). Mandler argues that these modes were departures from the principal ‘civilizational perspective’ embodied, in different forms, in the Whiggism of Macaulay and the Toryism of Disraeli, where the institutions rather than the people were ‘the hero of the English story’. The emphasis on the character of Teutonic forbears tended to down-play the ability of other people groups to improve and progress; although even in the ‘ultra-Teutonism’ of Freeman there remained a residual universalism. Mandler writes that the mid-Victorian fashion for Teutonism faded by the end of the period and the dominant conservative or Whig discourse of institutional inheritance and improvement enjoyed continued hegemony.⁴³

French National Character and Institutions

The listings for French writers in the parliamentary catalogues are significant. There are five listings for Guizot, including his *History of Civilization in Europe*.⁴⁴ Tocqueville merits three mentions, including his *Democracy in*

⁴³ Mandler, “Race” And “Nation” In Mid-Victorian Thought’: 227, 36-44.

⁴⁴ Listed as ‘The History of Civilization from the Fall of the Roman Empire to the French Revolution. Translated by William Hazlitt. 3 vols. London, 1858’.

America,⁴⁵ and Sismondi two.⁴⁶ Another source of evidence for the importance of French authors to the mid-Victorians were the lists of recommended reading in the ancient universities. Guizot and Montesquieu appear in an early 1860s list for the Cambridge Moral Sciences Tripos.⁴⁷ Guizot also appears in the 1859 reading list for the Oxford ‘fourth School’ syllabus.⁴⁸

Montesquieu was an important figure in eighteenth and nineteenth century political thought. His *de l’Esprit des Lois* (the Spirit of the Laws), originally published in 1748, explored the relationship between the climate or physical environment, the customs (manners or mores), religion and laws of a people, and how these various factors formed the *esprit général* (general spirit) or character of a nation. A passage indicating the general nature of his speculations reads: ‘Nature and the climate rule almost alone over the savages; customs govern the Chinese; the laws tyrannize in Japan; morals had formerly all their influence at Sparta; maxims of government, and the ancient simplicity of manners, once prevailed at Rome’.⁴⁹ Montesquieu emphasized the affects of climate above other factors on national character formation. Tocqueville, writing around 85 years later, changed this emphasis. He wrote that ‘the maintenance of democratic institutions in the United States is attributable to the [physical] circumstances, the laws, and the customs of that country’. Of these three causes however he attributed most influence to customs, and more to laws than to climate. He defined customs as ‘the moral and intellectual characteristics of men in society’.⁵⁰ John Stuart Mill was influenced by Guizot and Tocqueville and took up these

⁴⁵ Listed as ‘Tocqueville (Alexis de). *Democracy in America*. Translated by H. Reeve, with an Introductory Note by the Translator. 2 vols. London, 1862’.

⁴⁶ Sismondi was referred to by Carleton in 1854 as ‘the political economist upon whom I pin my faith’, see *NZPD* (1854-55): 393.

⁴⁷ Peter R. H. Slee, *Learning and a Liberal Education. The Study of Modern History in the Universities of Oxford, Cambridge and Manchester, 1800-1914* (Manchester: Manchester University Press, 1986): 34.

⁴⁸ *Ibid*: 40-41.

⁴⁹ Baron de Montesquieu, *The Spirit of the Laws*, ed. Franz Neumann (New York: Hafner, 1949): 294.

⁵⁰ Alexis de Tocqueville, *Democracy in America*, ed. Alan Ryan (London: Everyman, 1994 (1835)): 319.

themes in his own work.⁵¹ Mill represented a middle ground between those who emphasized the efficacy of institutions in shaping national character (as did the Whigs) and those who emphasized the efficacy of the latter in shaping the former (as did the Romantics and Saxonists). Mill, in his important work *A System of Logic* (1843), used ‘character’ in perhaps the same sense as Tocqueville used ‘customs’:

The character, that is, the opinions, feelings, and habits, of the people, though greatly the results of the state of society which precedes them, are also greatly the causes of the state of society which follows them; and are the power by which all those of the circumstances of society which are artificial, laws and customs for instance, are altogether moulded.⁵²

Georgios Varouxakis confirms that in Victorian Britain the language of national character became ‘all pervasive’ and was one of the ‘major pre-occupations’ of intellectuals such as Mill, Carlyle and Matthew Arnold.⁵³

This tradition of national character or *esprit général* has not received much attention in New Zealand historiography. Yet this Victorian intellectual context may explain much of the language used by Richmond, FitzGerald and others in articulating their Native policy. It will be argued, in fact, that the comparison of Māori and British national character or characteristics can be understood as sharing in this discourse. It will also be argued that the Saxon and Celtic references were being used by parliamentarians within this national character framework, hence the French and Saxonist discourses were conflated.

⁵¹ Georgios Varouxakis, ‘Guizot’s Historical Works and J.S. Mill’s Reception of Tocqueville’, *History of Political Thought* 20 (1999): 292-312; John Stuart Mill, *Autobiography*, ed. John M. Robson (London: Penguin, 1989 (1873)): 149-51.

⁵² Cited by Romani, *National Character and Public Spirit in Britain and France, 1750-1914*: 237-39.

⁵³ Georgios Varouxakis, *Victorian Political Thought on France and the French* (Hampshire: Palgrave, 2002): 104.

Lockean and Vattelien Property

John Locke has two significant listings of his works in the 1864 catalogue.⁵⁴ Vattel's *The Law of Nations* appears in the 1867 list.⁵⁵

John Locke is important for the purposes of this thesis, less for his contractarian view of the basis for government than for his theory of property rights. In the Lockean trope, 'cultivation' was the prerequisite for 'proprietaryship' or ownership. Mark Hickford traces how these Lockean notions were carried into the early to mid-nineteenth century by the writings of Vattel, whose work was published in English by the jurist Chitty in 1834, and by Blackstone's *Commentaries*.⁵⁶ Hickford argues that the New Zealand Company tried to entrench a Vattelien and United States jurisprudential view of Native rights; that they relied on occupation and/or cultivation only.⁵⁷ Hickford is dealing with an earlier period, (1837-53), but similar conceptions can be seen in a number of parliamentary speeches in the period 1858-62. Since Māori did not extensively cultivate large tracts of 'waste' land, Henry Sewell deemed their title to it illusory or 'imaginary'. Sewell also incorporated some stadial notions into his account, referring to the Māori as 'semi-barbarous inhabitants scattered thinly over the country', the phrase 'scattered thinly' revealing the stadial prejudice towards agricultural or commercial societies with high densities of population. (Hickford also makes a connection between Lockean/Vattelien and stadial conceptions.)⁵⁸ At the same time, Sewell appeared reluctant to give up the principle of Crown

⁵⁴ Listed as 'Locke (John), The Life and Letters of; with Extracts from his Journals and Common-place Books, by Lord King. London, 1858' and 'Locke (John), The Philosophical Works of; with a Preliminary Essay and Notes, by J. A. St. John. 2 vols. London, 1862'.

⁵⁵ Listed as 'Vattel (Monsieur de), The Law of Nations; or, Principles of the Law of Nature, applied to the Conduct and Affairs of Nations and Sovereigns, from the French of. By Joseph Chitty, London, 1834'. This is the same edition referred to by Mark Hickford, see n. 56.

⁵⁶ Hickford, "'Decidedly the Most Interesting Savages on the Globe": An Approach to the Intellectual History of Maori Property Rights, 1837-53': 133-34. Vattel's *The Law of Nations* was originally published in French in 1758; Blackstone's *Commentaries on the Laws of England* was first published 1765-9. It is somewhat odd that there are no listings for Blackstone in any of the three library catalogues.

⁵⁷ Ibid: 135-38,143-49,159-66.

⁵⁸ Ibid: 134.

purchase or pre-emption, and affirmed that the Treaty of Waitangi had guaranteed Māori title even to the ‘waste’ lands, such lands as only the Crown (under its Treaty relationship with Māori) could purchase.⁵⁹

Stadial History and Other Interrelations

Concerning Scottish stadial history, there were further webs of interrelation with the other languages of Native policy. First, it should be pointed out that Montesquieu’s national character discourse influenced the Scottish writers on civil society and political economy.⁶⁰ As well as writing on climate and its affects on national character, Montesquieu wrote on the relationship between climate, commerce, manners, forms of government, and liberty. Such passages as the following reveal stadial conceptions: ‘The savages are generally hunters; the barbarians are herdsmen and shepherds’;⁶¹ ‘let us see in what proportion countries are peopled where the inhabitants do not cultivate the earth’;⁶² ‘commercial laws, it may be said, improve manners for the same reason that they destroy them’.⁶³

The writings of Montesquieu, Guizot, Tocqueville and many others, also underscore the fact that concepts of civilization, savagery and barbarism were a generic European tradition, not a product of Scottish or English cultural projections. In fact they were part of the classical historical tradition of contrasting Roman or Greek society with the barbarians of the North and the Orient.⁶⁴ Gibbon’s *Decline and Fall* stands in this tradition of historiography. Montesquieu quoted Tacitus on the manners of the Germans. Gibbon quoted both

⁵⁹ At least under the old view of systematic colonization, see *NZPD* (1861-63): 690, and see ch 5.

⁶⁰ See Collini, *That Noble Science of Politics. A Study in Nineteenth-Century Intellectual History*: 16-21; and George W. Stocking Jr., *Victorian Anthropology* (New York: Free Press, 1987): 13-14. Stocking likewise notes Montesquieu’s influence, but argues that Montesquieu conceptualised the historical development of nations in terms of ‘repeated patterns of growth and degeneration, rather than of unilineal progress’, the latter of course to characterize the Scottish stadial models.

⁶¹ Montesquieu, *The Spirit of the Laws*: 276.

⁶² *Ibid*: 275.

⁶³ *Ibid*: 316.

⁶⁴ J. G. A. Pocock, *Barbarism and Religion. Barbarians, Savages and Empires*, vol. IV (Cambridge: Cambridge University Press, 2005): 159.

Tacitus and Montesquieu. Gibbon also borrowed some concepts from the Scottish stadial writers (many of whom were both his contemporaries and correspondents), notably the concept of barbarian peoples as shepherds or pastoralists.⁶⁵

The parliamentary library catalogues do not include the works of various Scottish Enlightenment authors. This may indicate that this school was not as influential in the intellectual firmament of the mid-nineteenth century as it had been in the eighteenth and early nineteenth centuries. Adam Smith's *Wealth of Nations*⁶⁶ and *Moral Sentiments*⁶⁷ are listed, but there are no works by John Millar or Adam Ferguson. Dugald Stewart merits one listing in 1867; two if the 'Memoir' of Adam Smith by him is included.⁶⁸ Stewart, Professor of Moral Philosophy at the University of Edinburgh from 1785 to 1810, is identified by Donald Winch as the bridge between Smith, Ferguson, Millar and others, and the Scottish intellectuals (Stewart's students at Edinburgh) who founded the *Edinburgh Review*, the 'leading intellectual periodical of the day'.⁶⁹ Stocking argues that the conjectural or stadial tradition began declining in influence in the last decade of the eighteenth century and that Stewart, whom Stocking calls 'the residuary legatee' of this tradition, directed his efforts more to the study of psychology and political economy.⁷⁰ However, while classic stadial writers do not appear in the

⁶⁵ Ibid: 2, 79-80 (in his narrative of the German, Gothic and Scythian invasions of the Roman borders, the Germans in particular).

⁶⁶ Listed as 'Smith (Adam). An Inquiry into the Nature of Causes of the Wealth of Nations; with a Life of the Author, an Introductory Discourse, Notes, and Supplemental Dissertations, by J. R. McCulloch. Edinburgh, 1861'.

⁶⁷ Listed as 'Smith (Adam). The Theory of Moral Sentiments; or, an Essay towards the Analysis of the Principles by which Men naturally judge concerning the Conduct and Character, first of neighbours, and afterwards of themselves; to which is added, a Dissertation on the Origin of Languages; with a Memoir of the Author, by Dugald Stewart. London, 1853'.

⁶⁸ See n. 67.

⁶⁹ Donald Winch, 'The System of the North: Dugald Stewart and His Pupils' in *That Noble Science of Politics. A Study in Nineteenth-Century Intellectual History*, ed. Stefan Collini, Donald Winch and John Burrow (Cambridge: Cambridge University Press, 1983): 25. The rivals of the *Edinburgh Review* were the Tory *Quarterly Review* and the Philosophic Radical *Westminster Review*. Henry Sewell's journal records receiving copies of the *Edinburgh* and *Quarterly* reviews, see W. David McIntyre, ed., *The Journal of Henry Sewell 1853-7.*, vol. II (Christchurch: Whitcoulls, 1980): 171.

⁷⁰ Stocking Jr., *Victorian Anthropology*: 31.

parliamentary catalogues to a great extent, evidence of their influence is clear in the parliamentary speeches of the period.

Philosophic Radicals or Utilitarians, who were almost invariably political economists, occupy some space in the catalogues. Jeremy Bentham's eleven volume 'Works' appear as one entry.⁷¹ An 1851 edition of James Mill's nine volume *History of British India* appears in the 1867 list,⁷² but was probably present in the library pre-1864.⁷³ His son, J. S. Mill, has a number of entries in both the 1864 and 1867 lists, including most of his major works. Another writer of some Victorian standing but today little known, was Sir George Cornwall Lewis, second baronet, born in the same year as J. S. Mill and likewise an author and politician. While occupying the post of Home Secretary he corresponded with Governor Gore Browne on at least one occasion.⁷⁴ Four of his works are listed in the 1864 catalogue and a further one in the 1867 catalogue. At least three of these – *An Essay on the Government of Dependencies* (1841), *An Essay on the Influence of Authority in Matters of Opinion* (1849), and *An Enquiry into the Credibility of the Early Roman History* (2 vols., 1855),⁷⁵ together with his editorship of the *Edinburgh Review*, 'confirmed Lewis' place at the centre of early Victorian Liberal politics and letters'.⁷⁶ He was also, like J. S. Mill, an admirer of Tocqueville.⁷⁷ The first of these works was quoted a number of times by New Zealand parliamentarians of the period under discussion. It also reveals

⁷¹ Listed as 'Bentham, Jeremy. The Works of. 11 vols. Edinburgh, 1843'.

⁷² Listed as 'Mill (Jas.) History of British India. By Wilson. 9 vols. London, 1851'.

⁷³ On the basis that the 1864 list was not a complete list and the library itself dated from much earlier, as does this edition of James Mill's work.

⁷⁴ On the subject of the Bill introduced into the Commons 'to authorize the appointment of a Council for the conduct of Native Affairs', see *AJHR* (1860): E-No. 6B.

⁷⁵ All three works were published in London and the dates shown in the Parliamentary catalogue and above (in the text) are the original publication dates.

⁷⁶ D. A. Smith, 'Sir George Cornwall Lewis, Second Baronet (1806-1863)' in *Oxford Dictionary of National Biography: In Association with the British Academy: From the Earliest Times to the Year 2000*, vol. 1, ed. H. C. G. Matthew and Brian Harrison (Oxford: Oxford University Press, 2004): 611-15: 613.

⁷⁷ *Ibid*: 613.

the influence of Bentham and John Austin,⁷⁸ being distinctly positivist, and was cited by Richmond in 1860 to oppose Sewell's proposal for a Native Council.⁷⁹

Structure of Thesis

The thesis is divided into two parts, the first dealing with ideas of Native governance generally, the second with ideas of Native land tenure. Three principle debates or speeches comprise the core material analysed. The first is Richmond's presentation of the Stafford Government's Native policy in 1858. The second is FitzGerald's 1862 address and resolutions which advocated, among other things, Native representation in the Assembly and Government. The last is Sewell's speech in 1862 with respect to the Native Land's Bill (No. 2). This core material is compared with speeches from other Members. The subject matter of both Richmond and FitzGerald's addresses spans Parts I and II, while Sewell's speech was confined primarily to the issue of land and so appears only in Part II. Supplementary material from the *Appendices to the Journals* is also analysed where relevant.

⁷⁸ Lewis, in fact, attended John Austin's lectures in jurisprudence at London University in 1829 and 1830, *ibid*: 611.

⁷⁹ *NZPD* (1858-60): 374.

PART I: HISTORY AND LAW



1. **Richmond's 1858 Address: *Saxon Courts & Native Self-Government***

‘The most civilised nations of modern Europe issued from the woods of Germany, and in the rude institutions of those barbarians we may still distinguish the original principles of our present laws and manners.’

Edward Gibbon (1776).⁸⁰

‘These are striking coincidences with the qualities that have ever distinguished the race from which we ourselves sprang – striking resemblances to the Teutonic peoples.’

Christopher William Richmond (18 May 1858).⁸¹

‘Primitive Institutions’ for a ‘Primitive People’

In the House of Representatives on 17 May 1858, Native Minister Christopher William Richmond⁸² moved the first reading of the Native Circuit Courts Bill and the Native Districts Regulation Bill. Both were to deal with the perceived need to introduce law into Native districts. The Courts Bill allowed the Governor to appoint Native districts and set up courts in those districts with a European Magistrate assisted by Native Assessors and juries of Māori (the Bill would apply

⁸⁰ Edward Gibbon, *The Decline and Fall of the Roman Empire*, vol. I, ed. Hugh Trevor-Roper (London: Everyman, 1993 (1776)).

⁸¹ *NZPD* (1856-58): 447.

⁸² Christopher William Richmond (1821-1895) was one of the leading minds of New Zealand's General Assembly in the period under examination. After entering the House of Representatives as Member for the Town of New Plymouth in the Second Parliament of 1856 he soon rose to prominence as a Minister in Stafford's government, as Colonial Treasurer (1856-61) and Minister of Native Affairs (1858-60). He was from a well-known Unitarian family and was the life-long friend of Richard Hutton, headmaster of a prominent Unitarian school in Britain and, later, editor of the *Spectator*. He was also a member of the Richmond and Atkinson ‘mob’ that exerted some considerable influence in Taranaki (and New Zealand) life and politics. Richmond was called to the bar of the Middle Temple in 1847 and after his parliamentary career became a Judge of New Zealand's Supreme Court; he also sat on the Court of Appeal. His brother James Crowe Richmond (1822-1898), an engineer, also became a Member of the House in the 1860s. See Keith Sinclair, ‘Richmond, Christopher William 1821 - 1895’ in *DNZB* (1990); and Austin Graham Bagnall, ‘Richmond, Christopher William’ in *An Encyclopaedia of New Zealand*, ed. A. H. McLintock (1966).

to Native districts and disputes between Natives only, with one or two exceptions). The Regulation Bill allowed the Governor to make regulations or by-laws for Native districts particularly suited to the needs of those districts, even to the extent of sanctioning regulations proposed by Māori, but without giving direct legislative power.⁸³

Richmond considered three options for governing Native matters: the first, to recognize Native customs, advocated by Lord Stanley and Protector George Clarke,⁸⁴ the second, to enforce British law, advocated by Captain Grey's⁸⁵ early paper on Australia and the 1844 Report of the Select Committee of the House of Commons;⁸⁶ the third, 'to insinuate or induce the acceptance of British law',⁸⁷ being Sir George Grey's revised notions with respect to New Zealand, sourced from his first governorship.⁸⁸ Richmond reviewed these different systems and argued that the third was best. The first was criticised on the basis that 'barbarous laws perpetuate barbarism'. The second was condemned or discounted on the basis that it was 'neither humane nor practicable', involving as it would the 'subjugation of the aborigines'.⁸⁹

Relying on Hallam's account of early Saxon history and the early Saxon court system, Richmond argued that, at this time, the English were still some way from civilization and therefore the early Saxon County Court – the 'Hundred Court' or 'Public Leet' – would serve as a helpful model for a Native court system, the Natives not having attained the 'civilized' state. Our own 'primitive institutions', said Richmond, were better suited to Māori needs than our 'modern improvements'. One of these improvements was the summary jurisdiction of Justices of the Peace, not properly an English institution (which made Blackstone

⁸³ *NZPD* (1856-58): 446-448.

⁸⁴ *Ibid*: 443.

⁸⁵ The early Sir George Grey.

⁸⁶ *NZPD* (1856-58): 443.

⁸⁷ *Ibid*: 445.

⁸⁸ *Ibid*: 444-45.

⁸⁹ *Ibid*: 445.

‘jealous’ of it). However Richmond believed this jurisdiction would not inspire confidence in a ‘primitive people’ in view of their ‘habits and temper’. Hence, for his Native policy, Richmond reverted to the historical Leet Court, with the jury system a key feature.⁹⁰

These measures were to be introduced, in part at least, in response to Māori demand for law. Richmond referred to correspondence to this effect from Taupiri and other places, and a visit he himself took to the Waikato. He related the quite remarkable story of how the speech of a radical – to the effect of eliminating all Pakeha – was (almost literally) snuffed out, when an astute chief quietly started to extinguish candles until the speaker stopped in absolute darkness.⁹¹ According to Richmond, these new laws would only be introduced if Māori wanted them. He employed the idea of law or government by consent as integral to Englishness, and spoke as if addressing the Native people:

You yourselves must enforce the law against great and small. To you it is committed, and, if you break faith, we shall withdraw our Magistrate. This is the way we English do. Every man reverences the law and aids the constable, and this is what you must do if you intend to become like us.⁹²

Richmond argued that law must be introduced to promote the civilisation of the Native race and that Native matters could not be left to personalities, a reference to Grey’s administration. Richmond summarised this section of his address by paraphrasing a native chief and George Grey in quick succession: ‘ “law first, growth afterwards” [and] “barbarous laws perpetuate barbarism”. If we want to civilize these people we must give them institutions’.⁹³

⁹⁰ Ibid: 446.

⁹¹ Ibid: 448-449.

⁹² Ibid: 447.

⁹³ Ibid: 449.

Richmond acknowledged the colony's debt to missionaries in respect of Native matters and recorded that he had consulted them on these measures. The ends of Church and State are one, said Richmond, though their means are different. 'For I hold no man a statesman who maintains that anything short of the highest welfare of man can be the ultimate object of the State. Christianity and civilization must go hand in hand.'⁹⁴ These comments reflect a general consensus that Christianity was important for a people's advancement in civilization. That was generally believed to be the evidence of British (and European) history. However, they were statements peripheral to Richmond's articulation of his Native policy. The civil institutions he was discussing were clearly within the sphere of 'State'.

Fenton and the New Institutions

It is evident that the general policy approach articulated in Richmond's speech, and even some of the specific language used, had been worked out in conjunction with the other members of the Stafford Ministry, as well as with Governor Gore Browne, and that it was influenced by an important memorandum of F. D. Fenton, the Resident Magistrate appointed to the Waikato.⁹⁵ Fenton's memorandum of March 1857 to Governor Gore Browne⁹⁶ sketched out in some detail the developing plans among Māori towards self-organization and the King movement, particularly in the Waikato district. Fenton argued that these movements should not be ignored and that a prudent statesman would be proactive.⁹⁷ Moreover, he did not believe in the policy of *laissez faire* and believed the Government had the opportunity to direct these movements for good.⁹⁸ He advocated local self-government by Māori within their villages,

⁹⁴ Ibid: 449.

⁹⁵ Sinclair says as much, referring to *NZPD* (1860): 587-588, see Sinclair, *The Origins of the Maori Wars*: 100.

⁹⁶ *AJHR* (1860): E-No. 1c: 1-13. It appears Fenton was not officially a Resident Magistrate at the time he wrote the memorandum; his appointment was in May of 1857, see *AJHR* (1860): E-No. 1c: 13 (letter from Under-Secretary W. Gisborne to Fenton, 11 May 1857).

⁹⁷ Ibid: 3.

⁹⁸ Ibid: 12-13.

including legislative (the making of by-laws) and executive or judicial functions; thus would ‘a continued progress be made in their political education; their thoughts will be occupied, their minds elevated, and their ambition satisfied’.⁹⁹ In a key passage, Fenton argued that the politicians who were most against separate Māori laws for Māori districts (and the use of clause 71 of the Constitution Act 1852 providing for the creation of such districts), fearing an *imperium in imperio* (a state or authority within a state), were also those who took a non-interference stance.¹⁰⁰ What good is the law, asked Fenton, if it does not control human action? He asserted that Māori themselves wanted the English law and it should be introduced among them through the vehicle of their own deliberations, under the guidance of a Government officer. He articulated (in a manner reminiscent of Burke and reflecting a stadial view of societal progress) the view that civilized British law was not immediately suited to a people emerging from barbarism: ‘It is impossible that the laws of an ancient and most elaborate civilization, which have gradually approached perfection through long ages of experience and amendment, can be applicable to the conditions of the moral and social position of a people recently removed from the lowest grade of barbarism’. Hence, the English law should be modified as was necessary to suit the circumstances of Māori. Indeed for some matters (for example, defining the title to an eel pa, or protecting the rights of the owners of a pipi bed) the English law may simply not be applicable.¹⁰¹

Almost immediately following the Fenton memorandum Richmond visited the Waikato with Gore Browne (in March or April 1857) and witnessed some of these developments first hand, in particular through meetings with various chiefs.¹⁰²

⁹⁹ Ibid: 7.

¹⁰⁰ This may be an implied reference to Fenton’s antagonist Donald McLean who advised Gore Browne to take a non-interference line in respect of the King movement. However, writes Sinclair, ‘there was much hostility beneath [McLean and others’] apparent indifference’. See Sinclair, *The Origins of the Maori Wars*: 104.

¹⁰¹ *AJHR* (1860): E–No. 1c: 1-13: 8.

¹⁰² See *AJHR* (1858): E–No. 5: 7-8; and *AJHR* (1860): F–No. 3: 53-54. Richmond, of course, refers to this in his address, see n. 91.

A memorandum by Ministers to the Governor, dated 6 May 1857,¹⁰³ was almost certainly influenced by Fenton's memorandum, and perhaps Richmond's Waikato visit. The memorandum was signed by Edward Stafford but was almost certainly a collaborative effort.¹⁰⁴ Perhaps with slightly differing emphasis from Fenton,¹⁰⁵ Stafford, Richmond and company noted the policy that had applied up until that time, namely that the Natives 'should for the present be left politically to themselves' and that they would gradually but surely adopt British law, as their experience would show it superior to their own usages. In place of such a policy, the Ministers advocated extending to Native Districts 'a social organization suited to their actual condition'. With the same civilizational overlay as Fenton, this social or institutional (legal) organization would provide for a 'transition state', for 'it is not reasonable to expect that a barbarous race should be able to adopt, *per saltum*, the complex institutions of a free British Colony'. This being so, 'special treatment' by way of institutions taking 'the actual condition of the Aboriginal population as the point of departure' was the most appropriate approach; and, in time, these institutions could be developed 'into the full measure of British liberty'.

The Ministers went on to cite the grounds for their belief that Māori were 'fully capable of institutions of the character above described; of institutions, that is, containing the germ of British freedom'. Then, in words closely resembling the words Richmond used in his address to the House (but lacking a comparison with the Teutonic character of the British)¹⁰⁶ the memorandum stated:

They are, to an extent, surprising in an uncivilized people, habitually influenced by reason rather than by passion; are naturally venerator of law, and uneasy

¹⁰³ *AJHR* (1858): E–No. 5: 8-10.

¹⁰⁴ It refers to 'we, the Responsible Advisers of the Crown in New Zealand, have the honour to indicate our views...'

¹⁰⁵ The Ministers' memorandum does not mention the concept of *imperium in imperio* nor, directly, the clause 71 Constitution Act power.

¹⁰⁶ See n. 147.

when contravening recognized obligations; are without the spirit of caste, there being no sharp line of demarkation [sic] between chiefs and people; and have at all times been used to the free discussion of their affairs in public assemblies of the Tribes.¹⁰⁷

Richmond's speech listed in effect all these characteristics, but did not include the point about Māori lacking a caste system; he did though use the phrase 'aristocratic, verging upon democratic'.¹⁰⁸ The memorandum continued: 'To these essential qualities are joined an enterprising spirit, a strong passion for gain, and a growing taste for European comforts and luxuries'. It concluded that 'such a people, impossible to govern by any external force, promises to become readily amenable to laws enacted with their own consent'. The notion of consent was important and was used a number of times; any introduction of institutions could only be achieved on that basis.

The Ministers also discussed in general terms a policy for Circuit Courts (with juries) in both a judicial and quasi-legislative capacity, it being premature to concede 'direct legislative power' to Native Assemblies; although their resolutions (or 'by-laws') could later receive legal sanction by the Governor in Council. The memorandum thus contained the essential policy proposals developed further in Richmond's address.¹⁰⁹ It also closely reflected Fenton's discussion on the same topics. The ultimate end conveyed by all these articulations of Native policy was amalgamation with the British colonists under English law, although gradually and with Māori consent – the notion of consent being critical, both in theory and, as it would prove, in practice.¹¹⁰ Richmond expressed this amalgamation objective as a 'Policy of Fusion' in a later Memorandum concerning the 1858 legislation. He believed that was the only

¹⁰⁷ *AJHR* (1858): E–No. 5: 9.

¹⁰⁸ See n. 147.

¹⁰⁹ Although not the land policy contained in the Native Territorial Rights Bill, considered in Part II, chap 3.

¹¹⁰ As the Waikato institutions and magistrate were, eventually, rejected by Waikato hapu and iwi.

means of preserving Māori from extinction,¹¹¹ granting them ‘self-governing’ institutions, though as with Fenton, it necessitated European guidance.¹¹²

Stadial History

What evidence is there that Richmond was thinking in terms of the stadial paradigm? In introducing the task before the House in legislating on the ‘Native question’, Richmond stated that it was a subject on which there was no experience. ‘For where have cultivated men been able to observe the development of a barbarous race into a civilized nation? We ourselves have been so raised; but there was none to stand by and mark the process.’ Richmond next employed the metaphor of raising or educating a child. The task before the Assembly, he said, was ‘the education of a race’.¹¹³ To compare savage or barbarian races with children was a common analogy amongst Scottish Enlightenment authors. In accordance with the picture of historical development, the state of savagery itself was considered akin to the ‘childhood’ of more advanced nations. Adam Ferguson articulated this notion with reference to the American Indians:

it is in their present condition, that we are to behold, as in a mirrour [sic], the features of our own progenitors.... If, in advanced years, we would form a just notion of our progress from the cradle, we must have recourse to the nursery, and from the example of those who are still in the period of life we mean to describe, take our representation of past manners, that cannot, in any other way, be recalled.¹¹⁴

Richmond also spoke of different races at different stages of civilization. He observed that Sir George Grey did not try to apply to Māori a strict policy of enforcing British law, even though that was his position with respect to Australia:

¹¹¹ *AJHR* (1860): E–No. 1: 5, 11.

¹¹² *Ibid.*: 5.

¹¹³ *NZPD* (1858-60): 442-43.

¹¹⁴ Adam Ferguson, *An Essay on the History of Civil Society* (1767), cited in Moloney, ‘Savagery and Civilization. Early Victorian Notions’: 156.

‘He saw at once the vast difference between New Zealand and Australia, between the aborigines of Australia and our Natives’.¹¹⁵ Richmond did not elaborate on what he meant by ‘vast difference’, but it is possible that he had in mind (at least as one prominent aspect of difference) different modes of subsistence: the Māori being in part agriculturalists; the Aborigines being hunter-gatherers. A memorandum by Richmond on this Native legislation provides further interpretive assistance and more clearly reveals the stadial connection between modes of subsistence, forms of government and civilization. In describing the proposed operations of the Native Districts Regulation Act he stated:

It will be at once apparent how essential to any advancement in civilization it is, that some suitable law should exist upon many of the subjects just enumerated. A Native has no inducement to raise his condition by erecting a house, by cultivation of the land, or by acquiring property in live stock, if the customs of his people afford him no protection; if his neighbours’ horses and pigs consume his growing corn, and the half-wild dogs, which swarm in every Pa, worry his sheep; or, what is by far the worst evil, if a Native Taua, under pretext of some real or pretended injury committed by some of his relations, is allowed, at one swoop, to despoil him of all his acquisitions.¹¹⁶

Māori were here described as living without property and without law. Richmond asserted that there was no appropriation of property in cattle or in agriculture because Native life and customs were inimical to the preservation and accumulation of such property. Here the emphasis is placed on law as a pre-condition of property, in that the appropriate legal protections for property would provide an incentive to acquire property. The stadial trope usually emphasized property appropriation by individuals as a pre-condition for the development of legal forums in which disputes over that property could be adjudicated on. It is clear, however, that Richmond equated civilization with a state in which property in animals and land was acquired (by individuals rather than tribes) and protected

¹¹⁵ *NZPD* (1858-60): 444.

¹¹⁶ *AJHR* (1860): E-No. 1: 6.

by law. And since Māori customs did not support the ownership of property they could not be recognised, as they did not perform the functions of civilized law. Hence, the basic components of the stadial model were present in Richmond's conception.

Later in his speech, Richmond referred to the 'Hindoos' and Chinese as examples of a 'low civilization', in contrast to which Māori were 'a race of primitive barbarians' in a state of 'pure barbarism'. It would be possible, Richmond indicated, to apply a policy of recognizing the customs of these races, but not to the New Zealand Natives.¹¹⁷ In placing Asiatic or Oriental races above Māori, Richmond was likely borrowing from classical and eighteenth century discourses. Gibbon spoke of the 'barbarians' of the east as both 'civilized and corrupted'. In Aristotle's vision, they were ruled as slaves by 'god-kings' living in palaces. Some European philosophers of the eighteenth century, such as Montesquieu, characterised them as 'the servile and effeminate' subjects of an 'oriental despot', as they did not enjoy legal possession of their own freehold properties. By contrast the independent warrior-shepherd barbarians of the North (the Goths and Germans) brought with them elements of modern Europe's allodial or feudal free tenures that combined with Roman legal forms.¹¹⁸ The Oriental contrast is seen in Hallam's *Middle Ages*: 'To the feudal law it is owing that the very names of right and privilege were not swept away, as in Asia, by the desolating hand of power.... So far as the sphere of feudality extended, it diffused the spirit of liberty and the notions of private right'. Hallam also contrasted the feudal relation of loyalty to a superior with 'the stupid devotion of Eastern slaves'.¹¹⁹ Other writers rejected the concept of oriental despotism, among them Edmund Burke and William Jones.¹²⁰ Most of these eastern societies had agricultural economies and systems of

¹¹⁷ *NZPD* (1858-60): 445.

¹¹⁸ Pocock, *Barbarism and Religion. Barbarians, Savages and Empires*: 11-12, 21-22, 24-25, 246-47.

¹¹⁹ Henry Hallam, *View of the State of Europe During the Middle Ages*, vol. I, ed. George Lincoln Burr (New York: D. Appleton, 1904 (1818)): 178-79.

¹²⁰ Pocock, *Barbarism and Religion. Barbarians, Savages and Empires*: 202, 67, 338.

government and law (many in fact were monarchies). This would place them ‘above’ the Northern barbarians if stadial criteria were applied.¹²¹ Why exactly Richmond placed the Indians and Chinese above the New Zealand Natives is difficult to determine; he does not say why the former were partially civilized while the latter were barbarians.

Frederick Whitaker, in presenting the Government’s Native policy in the Legislative Council, provided a clear application of Scottish stadial history. In a fascinating speech he began by stating that Māori were the most advanced of barbarous nations, being agricultural rather than nomadic or hunters, and so were most capable of being advanced in the scale of civilisation, even to the extent that ‘they might be made settlers, that they might be treated as Europeans in every particular; and to this great end the efforts of the present Government were directed’. He aligned himself with Richmond in saying that it would not be desirable to enforce British law, and even if desirable, it would not be ‘practicable’. He too emphasized that it was not intended that the Government’s legislation regulating Native customs¹²² be imposed; it would be carried out only with the consent of the Natives.¹²³

While Richmond appeared to down play the civilizational state of Māori, Whitaker’s approach was to raise Māori to the status of agriculturalists. Richmond argued that Māori and their customs were not civilized enough for legal recognition. Whitaker argued that Māori were civilized enough to justify a policy of amalgamation with Europeans. By that he meant bringing Māori within the jurisdiction of colonial government and law. This was essentially Richmond’s policy as well; however both acknowledged that direct and complete application of English law was not realistic, nor indeed humane. Hence, characterizations of the Natives’ civilizational state can be seen as at least partly rhetorical; as

¹²¹ Ibid: 246-47.

¹²² The Native Districts Regulation Bill, the Native Circuit Courts Bill, the Native Territorial Rights Bill, and also, the Bay of Islands Settlement Bill.

¹²³ *NZPD* (1858-60): 577-583 (5 July 1858).

subordinate to, or in the service of, policy objectives – ultimately, the objective of amalgamation. However all was not rhetorical. Characterizations of Māori as agriculturalists were not inconsistent with earlier British approaches in relation to the annexation of New Zealand.¹²⁴ Moreover, both Members' characterizations of Māori fitted within the stadial schema: they were more advanced barbarians than simple hunters or herdsmen (Whitaker's point), but were less advanced than monarchical Asian kingdoms (Richmond's point).

The relationship between discourse and policy can be clearly seen in the linking of civilizational ranking with policy approach. Richmond explained the various approaches as follows: British law could be strictly enforced against Aborigines; concerning Māori, British law and legal forms could be introduced gradually; the customs of Indians and Chinese could be recognised.¹²⁵ These policy outcomes were ostensibly the result of the prior assessment of civilizational advance. J. S. Mill suggested that savage societies, due to their characteristics of personal independence, the absence of a developed social life and a lack of discipline either for unexciting work or for submission to laws – needed to be subjected to 'despotic' (or non-democratic) government in order to improve their civilizational state. In Mill's view, representative government was only an appropriate form of government for civilized nations.¹²⁶ In strongly associating civilizational development with forms of government J. S. Mill was following his father James Mill who, in his *History of British India* (1817), wrote that 'no scheme of government can happily conduce to the ends of government unless it is adapted to the state of the people for whose use it is intended'. James Mill, who set out the Smithian four stages of civilizational development in his *History*, believed (by contrast with most of his predecessors, including William Jones) that Indian society was not characterized by an advanced civilization. This 'fact', for the

¹²⁴ See Lord John Russell's instructions to Hobson, December 1840, cited in Moloney, 'Savagery and Civilization. Early Victorian Notions': 159.

¹²⁵ *NZPD* (1858-60): 445, and see nn. 84-89.

¹²⁶ Beate Jahn, 'Barbarian Thoughts: Imperialism in the Philosophy of John Stuart Mill', *Review of International Studies* 31 (2005): 599-618: 601-02.

Mills, justified British rule of India, in particular through the East India Company.¹²⁷ Richmond's view, entailing the possibility of simply recognising Indian customs, would appear inconsistent with James Mill's view.

Overall, there does appear to be some ambiguity in New Zealand parliamentarians' views of Māori and their civilizational state. This could lead to different policies being advocated or adopted. As Mark Hickford has written of the period 1837-53:

stadial theory was a many-edged sword: It did not furnish doctrinally settled answers. In this sense, stadial theory admitted a modicum of subtlety in permitting policy-makers to perceive and to discuss gradations of those in an allegedly less than "civilized" state while not entailing any political or legal consensus on the matter.¹²⁸

In a debate of July 1861, John Cracroft Wilson referred to his experiences during the Indian Mutiny, arguing that Māori were very similar in nature to Indians.¹²⁹ These remarks provoked several replies. William Fox stated that 'the New Zealander is as different from the Asiatic as light from darkness'. Fox elaborated on the distinctiveness of the New Zealand situation, exhibiting an appreciation of the two different 'policy' contexts:

It was a great mistake also to suppose that experience in India, however long, qualified a man to understand the New Zealand question. The problem in India had not been, as the honourable member for Christchurch [Cracroft Wilson] had stated on a previous occasion, to induce Asiatics and Europeans to live together, but to induce two hundred million of Asiatics to submit to be governed by a handful of paid officials and a hired army chiefly composed of men of their own

¹²⁷ Ibid: 612.

¹²⁸ Hickford, "Decidedly the Most Interesting Savages on the Globe": An Approach to the Intellectual History of Maori Property Rights, 1837-53': 126.

¹²⁹ *NZPD* (1861-63): 115-16. See also Bernard John Foster, 'Wilson, Sir John Cracroft, K.C.S.I., C.B.' in *An Encyclopaedia of New Zealand*, ed. A. H. McLintock (1966).

blood. In New Zealand the problem was the amalgamation of the races in pretty nearly equal numbers, and how to induce them to live together in amity in the occupation of the same soil.¹³⁰

Hugh Carleton's response was quite different, but was focused, like Fox's, on the issue of an appropriate Native policy. Carleton also thought Cracroft Wilson in error in applying his Indian experiences to the Māori:

The Māori no more resembled the Asiatics of India than he did the negro or the European. He belonged to a different race of men.... The Māori had what the Asiatic had not – the keenest natural sense of justice. By appealing to that, you could do what you would with him, when neither force nor harshness would avail.¹³¹

Related to stadial theory was the older view of 'oriental despotism' and Montesquieu's theory of the North-South divide, relating forms of government specifically to climate. Montesquieu wrote that Asiatics from hot climates would be 'effete' and lazy, whereas peoples from milder or colder climates – such as England – would be more likely to develop a 'spirit of liberty'. This climate-based assessment of national character informed the belief that Asiatics would naturally be ruled by despotic governments (a view echoed in J. S. Mill's remarks concerning 'savage' societies).¹³² Romani confirms this: 'The idea that Asiatic peoples were political slaves by nature was a commonplace in antiquity and was allied to the widely accepted assumption of a fundamental difference in the national characters of Northern and Southern peoples'.¹³³ Evidence of this North-South concept is seen towards the end of Richmond's speech, when he warned the House against being over optimistic concerning the success of the measures he was putting forward: 'One danger I greatly dread is Native indolence, perhaps an

¹³⁰ *NZPD* (1861-63): 168.

¹³¹ *Ibid*: 125.

¹³² See n. 126.

¹³³ Romani, *National Character and Public Spirit in Britain and France, 1750-1914*: 28-30.

incident of the tropical origin of the race’; ¹³⁴ (an observation only, not affecting the nature of Richmond’s policy, by contrast with the Saxon comparison which will shortly be considered).

Carleton did not elaborate on his view that Māori had, by contrast with Indians, ‘the keenest sense of natural justice’. Was it based on classical notions of climate? New Zealand being a colder place than the Asiatic regions, and Carleton the arch-classicist, this account would fit. Was it based on Saxonist or Teutonist notions of some racial or national predisposition to liberty, as Richmond’s Teuton-Māori comparisons might suggest? Or perhaps, Carleton’s strong association with and support for the low-church Church Missionary Society might suggest a more basic humanitarian, even evangelical, desire to establish civil equality for Māori. As with William Fox’s language of Asiatic submission to British rule contrasted with ‘amalgamation’ of Māori, Carleton’s comments may suggest a privileging of Māori over Indian, in terms of civilization and the appropriate governmental response. Richmond’s placing of Indians as higher on the scale of civilization than Māori would thus be inconsistent with Carleton and Fox’s views.

Henry Sewell, in August 1860, deplored the term ‘savages’ being applied to Māori. By contrast with the harsh racial vocabulary he was criticizing, his belief in civilization or societal progress as a universal category was obvious: ‘We speak of them with an arrogance of race of which I strongly disapprove: we should remember the beginnings from which we ourselves sprang’. He went on to quote a passage from Gibbon, which included remarks on Scots, Picts, and Saxons, and tales of past cannibalism contrasted with the modern commercial and literary town of Glasgow. Gibbon imagined a philosophical historian emerging from New Zealand’s new civilization: ‘Such reflections tend to enlarge the circle of our ideas, and to encourage the pleasing hope that New Zealand may produce in some

¹³⁴ NZPD (1856-58): 450.

future age the Hume of the Southern Hemisphere'.¹³⁵ Skilton suggests that this passage drew from 'the renaissance tradition of the world turned upside down' and was informed by eighteenth-century stadial history. The passage also alludes to a significant motif in the Britain of 1770 to 1870 concerning the eventual fall of empire. Macaulay graphically depicted this also in his 1840 picture of a 'traveller from New Zealand' (possibly Māori) standing at some future time on London bridge viewing the ruins of St. Paul's, just as eighteenth-century Britons visited the ruins of Rome.¹³⁶ Sewell's use of Gibbon, and Gibbon and Macaulay's various eighteenth and nineteenth century intellectual contexts, demonstrate that civilizational language in the nineteenth-century was an amalgam of separate but connected traditions.

A Burkean Common Law

In his address Richmond cited, with apparent approval, Grey's despatch of 1849:

The utmost, therefore, that any Government could hope to do was to establish institutions which might imperceptibly but certainly lead to so complete a change of manners in a barbarous nation as was contemplated, and to secure these institutions by such laws and by such a constitution as appeared to afford a reasonable guarantee for their perpetuity.¹³⁷

¹³⁵ *NZPD* (1860): 279.

¹³⁶ The Hume reference appeared in the second volume of the *Decline and Fall* (1781) and was a tribute to Gibbon's friend, David Hume, who had died in 1776. See David Skilton, 'Tourists at the Ruins of London: The Metropolis and the Struggle for Empire', *Cercles* 17 (2007): 93-119: 96-98. The full sentence from Thomas Babington Macaulay, 'Von Ranke' in *Critical and Historical Essays Contributed to the Edinburgh Review*, vol. III (5th edn; London: Longman, Brown, Green, and Longmans, 1848 (1840)) reads: 'She [the Roman Catholic Church] was great and respected before the Saxon had set foot on Britain, before the Frank had passed the Rhine, when Grecian eloquence still flourished in Antioch, when idols were still worshipped in the temple of Mecca. And she may still exist in undiminished vigour when some traveller from New Zealand shall, in the midst of a vast solitude, take his stand on a broken arch of London Bridge to sketch the ruins of St. Paul's'.

¹³⁷ *NZPD* (1856-58): 444.

Richmond approved of Grey's Resident Magistrate's Court and the institution of the Native Assessors.¹³⁸ But he stated his view that Native disputes were still too often resolved by the 'primitive methods of the tomahawk and the musket'.¹³⁹ Hence, there was still a great work to do and it was law that must accomplish the 'change of manners' referred to by Grey.¹⁴⁰

This notion of imperceptible or gradual change in manners or customs was developed in other passages of his address. Richmond argued that British law could be extended to the Natives but not applied wholesale. 'British law' and 'English institutions' (the terms appear interchangeable) must be adapted to meet Māori needs. By extending British law to the Natives, Richmond meant 'the great foundation principles of British law and its free spirit'. In speaking this way he was articulating the notion of British law being adapted to different circumstances. He argued that the settlers had done so, therefore, why could the same not be done for Māori?¹⁴¹ This language is redolent of Burkean or ancient constitutionalism; the notion that the common law was ever changing and adaptable and yet, somehow, permanent. This language appeared again in Richmond's speeches on the Native Territorial Rights Bill, considered in Part II of the thesis.

National Character and the Jury as a Political Institution

Richmond argued that the jury system had an educative function. In his view this was a reflection of its participatory features, involving people in the work of justice, even though it may not have been the best instrument for determining the effect of evidence. Likewise, government by representative institutions or

¹³⁸ Ibid: 444.

¹³⁹ Ibid: 445.

¹⁴⁰ Ibid: 444.

¹⁴¹ Ibid: 446. The notion of the 'free spirit' of English law, was similar to the concept articulated in the Stafford memorandum of May 1857 which mentioned introducing institutions containing 'the germ of British freedom, see n. 106.

Ministerial government was valuable because of the 'educational discipline' it carried with it. It was proposed that if people were responsible for applying justice then they would be less likely to thwart the outcome. Thus, representative government and juries both trained and constrained people by inducing a 'popular confidence' in the administration of justice. They were democratic institutions: '...the people feel that they are the judge'.¹⁴² The nature of Richmond's comments bears remarkable similarity to those of Tocqueville in his remarks on the operation of the jury system in America. Tocqueville said that the jury system was not a mere judicial system, but above all a political institution. It was rule by the governed: 'He who punishes the criminal is therefore the real master of society'. If selected from all classes of society, it would approximate universal suffrage. The civil jury was believed to be the soundest preparation for free institutions. This reasoning was related to Tocqueville's view of the relation between customs and laws: 'laws are always unstable unless they are founded upon the customs of a nation'. Hence, his insistence that the jury system should also be used for civil cases as it 'affects all the interests of the community; everyone cooperates in its work: it thus penetrates into all the usages of life, it fashions the mind to its peculiar forms, and is gradually associated with the idea of justice itself'.¹⁴³ Although Tocqueville emphasized customs over laws or institutions, implicit in his argument was that institutions can effect customary change, or perhaps, that they can become so woven into the fabric of a society that they are identified with that people's way of life or customs. This was Richmond's objective as well. He hoped that Native juries would induce Māori to adopt British forms of justice. Borrowing from Tocqueville's phraseology, it may be said that Richmond believed the jury was a 'political institution'. This is implied in his speech, for example in the statement that: 'it is true of several English institutions that the immediate and visible end of the institution is not its most important effect'.¹⁴⁴ Richmond clearly had in mind the contrast that Tocqueville rather more pointedly

¹⁴² Ibid: 447.

¹⁴³ Tocqueville, *Democracy in America*: 282-84.

¹⁴⁴ *NZPD* (1856-58): 447.

made between the judicial purpose and the political purpose of the jury system. Whether Richmond read Tocqueville cannot be ascertained. He certainly read J. S. Mill, who was influenced by Tocqueville's *Democracy in America* and who reviewed volume one of the work in 1835 in the *London Review* and the second volume in 1840 in the *Edinburgh Review*.¹⁴⁵ Regardless, a Tocquevillean emphasis on the jury system as a political institution of 'responsible local self-government' can be seen in Richmond's comments.¹⁴⁶

Saxonism Applied

The stadial character of many of Richmond's observations has been established. Burkean and Tocquevillean influences have been indicated. But one major aspect of Richmond's language still to be examined is his analysis of Māori character. He noted three specific characteristics: they are a reasoning people; they acknowledge and respect the notion of law; the structure of their society is 'aristocratic, verging upon democratic' and they do not accept 'despotic rule', it being customary for them 'to debate their affairs in popular assemblies'. He went on to say:

These are striking coincidences with the qualities that have ever distinguished the race from which we ourselves sprang – striking resemblances to the Teutonic peoples. I know there are also wide differences; but the resemblance is such that I say we ought not to decide that there is any antecedent impossibility in the case. We are, then, to suppose the Māoris capable of elevation to our level, and of union with us. How, then, did we raise ourselves from a barbarous state? How were we developed, from a rude, red-haired horde on the banks of the Elbe, into the foremost rank amongst the nations – amongst the first in power, and in all that ennobles and beautifies life? What was the road we followed? – for, if these

¹⁴⁵ Mill also reviewed Guizot's works, including his *Civilization in Europe*, in the *London Review* (1836) and the *Edinburgh Review* (1845), see Varouxakis, 'Guizot's Historical Works and J.S. Mill's Reception of Tocqueville': 295.

¹⁴⁶ See Collini, *That Noble Science of Politics. A Study in Nineteenth-Century Intellectual History*: 202-04.

people can ever join us, it must be by the way we took. I do not say that they ever can; but, if they can, this must be the way.¹⁴⁷

In this passage, Richmond compared Māori with his Teuton ancestors and introduced the theme of amalgamation or ‘union’. The stadial nature of the phrase ‘elevation to our level’ is apparent, as is the idea of a ‘rank’ of nations. The comparison with barbarian ancestors and the prescription that followed were equally important. If Māori were to ‘join’ the British as the leading race or nation of the world then the same influences that worked on their Teuton forebears must also be allowed to work on Māori. Richmond proposed the Saxon County Court or Leet Court as a model, a model that involved the jury system. His analysis reveals a civilizational framework with decidedly Saxonist cladding.

Some of Richmond’s language appears to be drawn directly from Hallam’s *Middle Ages*. Hallam had stated that this Saxon County Court:

seems to have had nothing to recommend it but, what indeed is no trifling matter, its security from corruption and tyranny; and in the practical jurisprudence of our Saxon ancestors, even at the beginning of the eleventh century, we perceive no advance of civility and skill from the state of their own savage progenitors on the banks of the Elbe.¹⁴⁸

Hallam’s description of the County Court confirms Richmond’s description of it as a ‘primitive institution’ of the English.¹⁴⁹ Richmond also referred to Hallam’s statement that it was to this court ‘that an English freeman [landowner or freeholder] looked for the maintenance of his civil rights’.¹⁵⁰ Hallam’s introduction of this subject stated:

¹⁴⁷ *NZPD* (1856-58): 446.

¹⁴⁸ Henry Hallam, *View of the State of Europe During the Middle Ages*, vol. II, ed. George Lincoln Burr (New York: D. Appleton, 1904 (1818)): 518.

¹⁴⁹ *NZPD* (1856-58): 446.

¹⁵⁰ Hallam, *View of the State of Europe During the Middle Ages*: 516.

The liberties of these Anglo-Saxon thanes [landowners or freeholders] were chiefly secured, next to their swords and their free spirits, by the inestimable right of deciding civil and criminal suits in their own county court; an institution which, having survived the [Norman] conquest, and contributed in no small degree to fix the liberties of England upon a broad a popular basis, by limiting the feudal aristocracy, deserves attention in following the history of the British constitution.¹⁵¹

This significant passage from Hallam justified Richmond in arguing that, although primitive, this court with its jury system had secured civil liberties and advanced civilization in England, and would therefore have the same effect in Māori society.¹⁵² Also in this passage can be seen the picture of Saxon warriors with ‘free spirits’, a trait that was important for the development of civil freedoms themselves, as will be analysed shortly.

Some important mid-century connections between French and Germano-English discourses, indicated in the Introduction, need to be discussed more fully. Democratic Teutonism was a vision of the English as a self-governing people; an historical perspective that was applied by J. S. Mill’s ‘University Liberal’ followers to arguments for extension of the franchise.¹⁵³ Mill was influenced as much (if not more) by French thought as by German. And it is in Tocqueville that we see clear observations of an English and American polity characterised by institutions of local self-government rather than a centralized bureaucracy or monarchy (as was the case in France at the time). It was the primary importance of customs of self-governance or democratic government that Tocqueville accentuated as the distinguishing feature of the New England Anglo-Americans, as opposed to their Western American cousins (or any other people), and which enabled them to support the institutions of democratic government. Institutions or laws followed customs, opinions and ‘forms of social intercourse’.¹⁵⁴ The

¹⁵¹ Ibid: 514.

¹⁵² See n. 147.

importance of the jury system to local democracy or self-government has already been outlined, with reference to Tocqueville's analysis.

It was those same customs of local self-government that were identified in the Saxonist literature as deriving from the early institutions of the German barbarians (if not the exact forms of local self-government, then its essential elements). Guizot in his *History of Civilization in Europe* can be seen to delineate these. The first was the sentiment of personal independence, the second the social bond between individuals, or 'warrior fidelity'.¹⁵⁵ In Guizot's vision, these were the two elements which the barbarian invaders of the Roman Empire bequeathed to European civilization (the other two influences on modern civilization being the Romans and the Christian church).¹⁵⁶ In a review of this work in 1845, J. S. Mill described the modern 'spirit of liberty' as deriving from this barbarian character. Mill wrote:

It [the modern spirit of liberty] is in fact the self-will of the savage, moderated and limited by the demands of civilized life; and M. Guizot is not mistaken in believing that it came to us, not from ancient civilization, but from the savage element infused into that enervated civilization by its barbarous conquerors. He adds, that together with this spirit of liberty, the invaders brought also the spirit of voluntary association [the second element]; the institution of military patronage, the bond between followers and a leader of their own choice, which afterwards ripened into feudality.

Mill endorsed Guizot's perspective of a Germanic barbarian 'spirit of liberty' and a warrior relation of 'protection and service', the latter giving rise eventually to

¹⁵³ Mandler, "'Race' And 'Nation' In Mid-Victorian Thought": 240.

¹⁵⁴ Tocqueville, *Democracy in America*: 321-22.

¹⁵⁵ Francois Guizot, *The History of Civilization in Europe*, ed. Larry Siedentop trans. William Hazlitt (London: Penguin, 1997 (1828)): 43-45. Guizot does not use the words 'warrior' and 'fidelity' together in the same phrase, but he does use them separately in the same passage.

¹⁵⁶ See generally 'Lecture Two' of Guizot, *The History of Civilization in Europe*: 27-46.

feudalism.¹⁵⁷ Hence, Mandler notes these ‘traces of Teutonism’ in ‘the purer civilizational perspective’ of both Guizot and Mill.¹⁵⁸

Guizot both read and edited Gibbon’s *Decline and Fall*. In the ‘rude institutions’ of the German barbarians, said Gibbon, ‘we may still distinguish the original principles of our present laws and manners’.¹⁵⁹ Gibbon, writing a half century before Guizot, described the savage state of the Germans as enabling them to enjoy their ‘liberty’ and their ‘form of government’ as a ‘voluntary organization’ – the exact words used by J. S. Mill – and further, as a ‘military commonwealth’ conducted by an ‘assembly of the warriors of the tribe’. Gibbon also described the nature of their ‘political society’ as ‘a democracy tempered indeed, and controlled, not so much by general and positive laws, as by the occasional ascendant of birth or valour, of eloquence or superstition’.¹⁶⁰ That is, their polity was a voluntary association of free individuals who nonetheless recognized a kind of natural hierarchy based on ancestry, courage in battle or in the capacity to wield words and command spirits. Guizot described an equality of individual warriors who ‘nevertheless founded an hierarchical subordination, and gave birth to that aristocratical organization, which afterwards became feudalism’.¹⁶¹ Hallam, whose writings Richmond certainly read, had a similar characterisation: ‘But the power of each [king/chief] was greatly limited; and the decision of all leading questions, though subject to the previous deliberation of the chieftains, sprang from the free voice of a popular assembly’.¹⁶² In other words, the Germanic barbarians were self-governing, deciding their affairs by public assembly.

¹⁵⁷ John Stuart Mill, ‘Guizot’s Essays and Lectures on History’ in *The Collected Works of John Stuart Mill*, ed. John M. Robson (Toronto: University of Toronto Press, 1985 (1845)).

¹⁵⁸ Mandler, “Race” And “Nation” In Mid-Victorian Thought’: 239 (footnote 58).

¹⁵⁹ Gibbon, *The Decline and Fall of the Roman Empire*: 237.

¹⁶⁰ *Ibid*: 248-49.

¹⁶¹ Guizot, *The History of Civilization in Europe*: 45.

¹⁶² Hallam, *View of the State of Europe During the Middle Ages*: 81.

These texts must form part of the intellectual context for Richmond's appraisal of Māori character. In comparing Māori with his Teutonic ancestors, calling the structure of their society 'aristocratic, verging upon democratic', he echoed Gibbon and Guizot. Teutonic aversion to despotic rule echoed the notions of individual liberty or independence, or Hallam's greatly limited power of the chiefs. As an outworking of these characteristics, it was their custom 'to debate their affairs in popular assemblies' – a possible direct use of Hallam's phrase, or a reflection of Gibbon's phrase 'assembly of the warriors of the tribe'. These were not mere comparisons; they formed the basis of Richmond's Native policy in which self-government or assent to the institutions proffered by the Government was a key element,¹⁶³ and in which the jury system of the Saxon County Court was perhaps the keystone. Hence, the policy prescription can be viewed as reflecting the prior association of Saxon traits with Māori ones.¹⁶⁴

Other nuances can be seen in Richmond's text. Since these Māori barbarians did not accept 'despotic rule', a contrast with the old nations of the east is at least implied. Second they acknowledged, in fact venerated, 'law'. Richmond noted – correctly in terms of a stadial model – that this was unusual for a savage people. Law usually proceeded from property. However, as seen in the contrast between 'oriental despotism' and 'barbarian liberty', it was the barbarian element, combined with Roman influences, which led eventually in Europe to the development of legal protections for property.¹⁶⁵ Third, Richmond described Māori as 'a reasoning and a reasonable people, little swayed by passion when not under extraordinary excitement'. Gibbon's discussion of the 'assembly of warriors' had described the way in which the 'magistrates might deliberate and persuade, the people only could resolve and execute', however:

¹⁶³ See his emphasis on 'assent' at *NZPD* (1856-1858): 447, re the Native Districts Regulation Bill.

¹⁶⁴ Maloney refers to a 'common comparison of Maori to the Anglo-Saxons of Britain', a comparison that was sometimes rebuffed, but does not necessarily link such comparisons to particular policy approaches or proposals, see Moloney, 'Savagery and Civilization. Early Victorian Notions': 158.

¹⁶⁵ See n. 118.

the resolutions of the Germans were for the most part hasty and violent. Barbarians accustomed to place their freedom in gratifying the present passion, and their courage in overlooking all future consequences, turned away with indignant contempt from the remonstrance of justice and policy, and it was the practice to signify by a hollow murmur their dislike of such timid counsels.¹⁶⁶

In Richmond's view, Māori were to some extent exempt from such barbarian 'passions', although the phrase 'little swayed by passion when not under extraordinary excitement' is somewhat ambiguous.

Historicising the Māori

As well as employing a Saxonist paradigm, Richmond can be seen to borrow from the French discourse of the relationship between national character and a people's customs. Burke had also emphasized the customary nature of institutions. Burrow and Collini draw a close connection between Tocqueville and Burke. They refer to an 1867 work in which the author expressly followed Tocqueville in the view that 'a political system or form of government is nothing, and acquires a meaning only when it is regarded as the result and efflux of national life'. They note that this remark, though attributed to Tocqueville's influence, could equally have been ascribed to Burke, or even Adam Smith or John Millar.¹⁶⁷ In Richmond's conception, institutional change would lead to change in Native custom. It might be said that Richmond put greater faith in institutions to effect change than Tocqueville or Burke did. But this statement requires caution, for Richmond understood legal institutions in very much a customary way. Care must be taken not to impose present day positivist notions of law onto a mid-nineteenth century

¹⁶⁶ Gibbon, *The Decline and Fall of the Roman Empire*: 250.

¹⁶⁷ John Burrow, and Stefan Collini, 'The Clue to the Maze: The Appeal of the Comparative Method' in *That Noble Science of Politics. A Study in Nineteenth-Century Intellectual History*, ed. Stefan Collini, Donald Winch and John Burrow (Cambridge: Cambridge University Press, 1983): 207-46, citing a work by Bryce entitled 'The Historical Aspect of Democracy'.

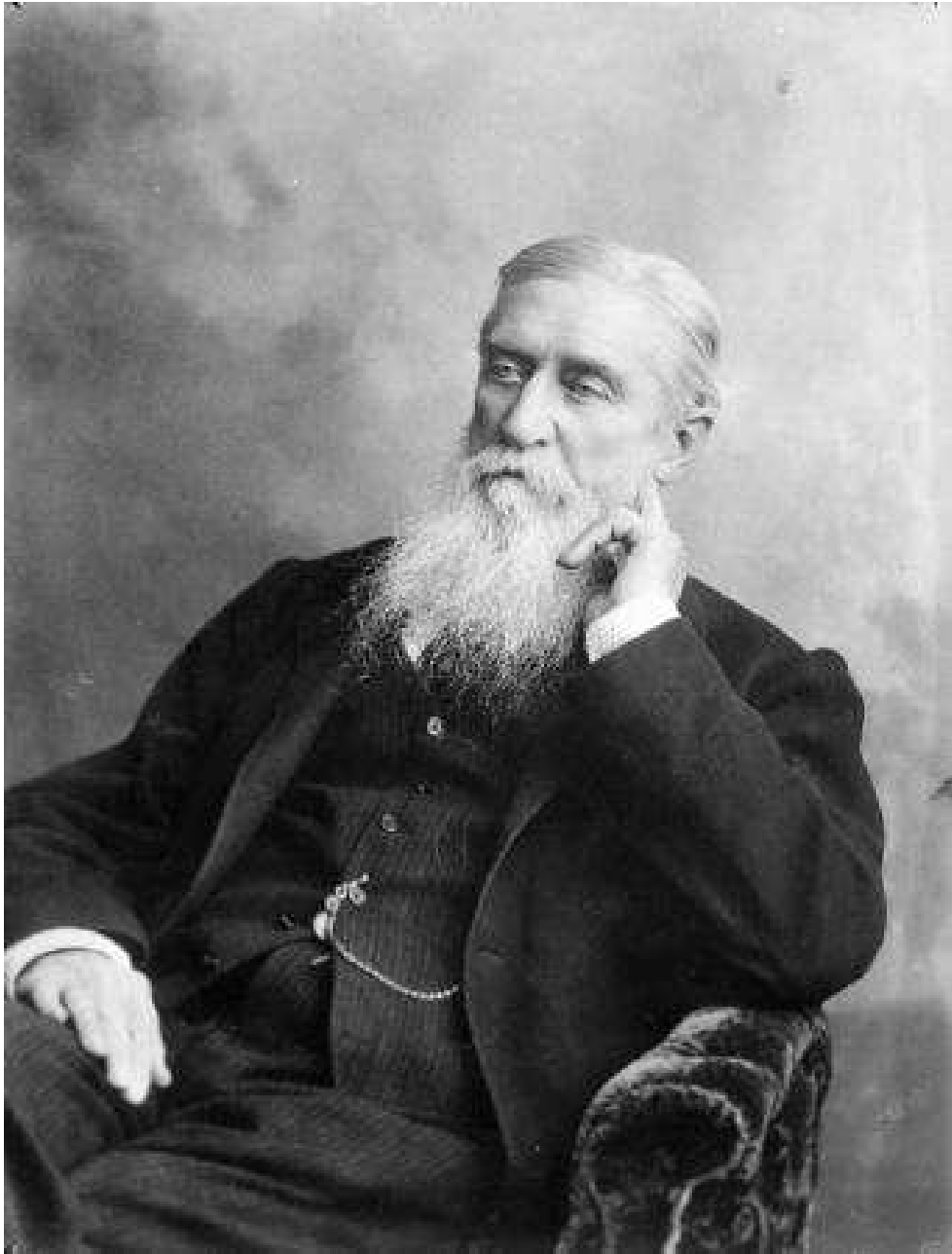
politician. Overall, Richmond's discourse was built around a framework that was essentially stadial: he quite clearly advocated various 'levels' of civilizational development, not 'the branching tree of peoples and nations'.¹⁶⁸

The import of Saxonist language requires further elaboration. In characterizing the Māori in this way, was Richmond (as Peter Gibbons says of the colonists) 'produc[ing] (or invent[ing]) "the Māori", making them picturesque, quaint, largely ahistorical, and,...manageable'?¹⁶⁹ To some extent, perhaps, as the Saxonist tradition was a romanticised picture of the English past, in which independent warriors forged a free society in the English landscape. However, though a romanticised history, the Saxon story was still a history, and by identifying Māori as possessing the qualities of the ancestral British, Richmond was placing Māori in English history or, at least, within the framework of English history. In many ways he was historicising the Māori – bringing them into history, and seeking to inaugurate for them the law that marked the beginnings of history – a civilized British law. It could be argued that this process of identification enabled Richmond to make Māori 'manageable'; in imposing the familiar onto an unfamiliar culture he was providing an historical justification for an essentially amalgamationist vision. Perhaps Richmond's speech can be construed in this way. In context, he was arguing against the two alternative policy options: to simply recognise Native customs, or to enforce British law wholesale. But in the light of this same colonial policy context, this Saxonist identification can be seen as markedly generous. It allowed Richmond to envisage Māori with qualities that could enable them to become civilized through the adaptation of British legal forms to Māori circumstances, rather than through a wholesale imposition. Indeed, it was the Burkean vision of the British as a people of the common law or custom, which enabled this policy vision. The affect of the Saxonist discourse on this Burkean picture was perhaps to emphasize custom, local custom in particular,

¹⁶⁸ See n. 22.

¹⁶⁹ Peter Gibbons, 'Cultural Colonization and National Identity', *New Zealand Journal of History* 36 (2002): 5-17: 13. It should be pointed out that Gibbons' focus in this article is on the 1890s and early twentieth century, and on the culture of colonists born in New Zealand.

rather than the growth of liberties represented in the growth of a centralized Parliament, as in the Whig-Macaulayite tradition.



2. FitzGerald's 1862 Address: *Saxons, Celts & Native Representation*

'The two races [English Saxon and Irish Celt] blended together may well be expected to produce a great and gifted nation; and it probably would detract from our greatness and from the richness of our national gifts if the Keltic [sic] element of the united people should be too much drained away by unlimited emigration.'

Goldwin Smith (1861).¹⁷⁰

'This is the only thing which will solve the great mystery; we must get the Māori to recognize the idea of law – to have confidence in our laws: and one great means to that end is to admit him into this House, and so to persuade him that, if we make laws for him, he makes laws for himself and also for us.'

James Edward FitzGerald (6 Aug 1862).¹⁷¹

A Policy of Amalgamation

On 6 August 1862, James Edward FitzGerald¹⁷² moved five resolutions with respect to Native affairs.¹⁷³ In brief, the resolutions were: first, that the amalgamation of Māori and British ('all Her Majesty's subjects') be the objective

¹⁷⁰ Goldwin Smith, *Irish History and Irish Character* (Oxford: J. H. & Jas. Parker, 1861): 14.

¹⁷¹ *NZPD* (1861-63): 509.

¹⁷² FitzGerald (1818 – 1896) was an Anglo-Irishman (his father was landlord of Kilminchy, Queen's County, Ireland) of famous Irish ancestry, a fact he treasured. He was educated in England at Bath and at Christ's College Cambridge, where he graduated BA in 1842. In the 1840s he wrote on relieving the Irish famine and was associated with various notables, including Gladstone, Lord Lyttelton, John Godley, and Richard Cobden in the Colonial Reform Society. He considered a scheme of fostering colonization in India but eventually became associated with Edward Gibbon Wakefield, becoming secretary of the Canterbury Association in 1849. He was the first to leap ashore from the *Charlotte Jane* in December 1850 at Lyttelton; the first superintendent of Canterbury province in 1852, and moved the Address in Reply at the first session of the General Assembly in 1854. He was briefly Minister of Native affairs in 1865. He was undoubtedly one of the most intellectually talented of New Zealand's early parliamentarians. McIntyre writes that 'he could be volatile and impetuous, but also charming and persuasive'. A true 'Romantic', he went on walking tours of Scotland and Ireland in the early 1840s, sketching the people he met. See Edmund Bohan, *"Blest Madman" Fitzgerald of Canterbury* (Christchurch: Canterbury University Press, 1998); and W. David McIntyre, 'Fitzgerald, James Edward 1818 - 1896' in *DNZB* (1990).

¹⁷³ Set out in full at *NZPD* (1861-63): 483-84.

of the House in all its policy-making and law-making. The House passed this resolution.¹⁷⁴ Second, that all laws passed by the House conform with the principle of equal civil and political privileges for all races. This resolution was also passed.¹⁷⁵ Third, that the ‘Māori nobility’ be represented in the Legislative Council, in the House, and in the administration of the Government. The House divided 20-17 against this third resolution.¹⁷⁶ Fourth, that the same principle (of representation) be respected in all subordinate legislative bodies and in the Courts of law. Fifth, that the Governor bring the above policies into operation with the least possible delay. Resolutions four and five were withdrawn.¹⁷⁷

Having moved the above resolutions, FitzGerald began a characteristically grandiose oration. His first argument was that Native policy must be based on the fact that Māori share a ‘common humanity’ with the British colonists, rather than on their particular characteristics or customs. Great and true statesmanship, implied FitzGerald, recognized this principle.¹⁷⁸ This was the starting point of his address and it largely dictated the nature of the whole. If Māori shared a common humanity then the answer to New Zealand’s future lay in a policy of ‘amalgamation’ not of ‘disunion and severance’.¹⁷⁹

FitzGerald took the opportunity to comment on the contributions of various parties to the colonization project. He derided the missionary, and more so the Home Government, opposition to colonization, saying that this ‘hostile’ attitude had ‘created and induced a policy of disunion and severance between the two races’. There had been, in effect, two Governments in the colony – one for the colonists (the parliament) and one for Māori (‘the absolute will of the Governor’). He condemned the politicians ‘who thought that a form of arbitrary government in

¹⁷⁴ *NZPD* (1861-63): 510.

¹⁷⁵ *Ibid*: 510.

¹⁷⁶ *Ibid*: 513.

¹⁷⁷ *Ibid*: 513.

¹⁷⁸ *Ibid*: 484.

¹⁷⁹ *Ibid*: 486.

the hands of a governor was a satisfactory and, indeed, an enduring form of Anglo-Saxon society'¹⁸⁰ – an expression that reflects the 'Democratic Teutonist' discourse of a Saxon free spirit and its expression in a free constitution or self-government.¹⁸¹ But, declared FitzGerald, 'more sagacious men perceived that the time must come when the word "government" would only mean the will of the British inhabitants of these Islands'. He continued by critiquing the land policy of Crown purchase, saying it had separated the races; Europeans lived in one part of the colony, Māori in another. The 'policy of disunion' was further provided for by the power, in various versions of the colony's Constitution and the 1852 Constitution Act, to create Māori districts in which English law would not apply. FitzGerald was critical of the 1858 policy of Richmond as having this same tendency.¹⁸²

FitzGerald cited the intermarriage of Māori and English to prove that 'there is no personal antipathy or antagonism existing between the two races'.¹⁸³ He demonstrated some insight perhaps into the way that Māori viewed the colonists; 'He looks upon us sometimes even now as useful mechanics, who make his guns and blankets for him; but he has no personal respect for us as a superior race, or personal fear of us as an enemy'. Even so, said FitzGerald, remarkable friendships appeared to have grown up between the two races and the animosity between them, even in the context of the recent Taranaki war, was considerably less than it would be 'between two English counties, or...between two Irish factions, or between two Highland clans'. This was further proof in his eyes of the potential for union between the two races.¹⁸⁴

¹⁸⁰ Ibid: 487.

¹⁸¹ See n. 43 and 153.

¹⁸² *NZPD* (1861-63): 487-88.

¹⁸³ Ibid: 487.

¹⁸⁴ Ibid: 486.

Together with his emphasis on amalgamation, FitzGerald's great theme was 'equality before the law'.¹⁸⁵ FitzGerald discussed some points with particular detail. He was against the 'village runangas [sic]', because they created uneasy divisions of authority with the local Assessor's courts, and risked confusing legislative and judicial functions. He was not, however, against the larger 'district runangas [sic]' per se, as long as they exercised the authority of the Government within that district, and so long as their jurisdiction was coextensive with their geographic area. This reiterated FitzGerald's concern about different laws for different districts based on different ownership of land or, as he expressed it in this passage, different laws even within the same district. He presented the idea that one district could be made the district of the Māori king, and the king himself could be made the superintendent; hence, this Native district would be akin to a province of the colonists, with the 'influential chiefs' being members of the runanga. In FitzGerald's vision, therefore, it was not a question of who was exercising the power (as the resolutions he was proposing reflect), so much as a question of the law they were exercising: it must be English law, exercised within the governing system of the colonists. The great point to instil into the Native mind was 'equality of all men in the eye of the law', for there was something superior to all authorities, 'the abstract majesty of the law itself, to which all must bow, from the Queen on her throne to the beggar in the streets'. But he reasserted that if the Government were to teach the Natives this, they must 'purify' these institutions from all taint of different laws, different authorities and conflicting jurisdictions.¹⁸⁶

¹⁸⁵ Not FitzGerald's exact phrase, but the essence of what he says.

¹⁸⁶ *NZPD* (1861-63): 490-91.

Civilization by sword or suasion

FitzGerald made this speech at a time when Grey had been re-installed as Governor for just under a year,¹⁸⁷ Alfred Domett had just been made premier, and Dillon Bell had likewise just been installed as Native Minister.¹⁸⁸ The first Taranaki war, following the disputed purchase of the Waitara, did not result in any clear victory for either side. The Waitara issue remained unresolved. A state of armed truce, rather than peace, reigned.¹⁸⁹

FitzGerald was keenly aware of this context and it coloured the language he chose. His summation revealed this context most explicitly, with soaring oration. He cast before the House two possible futures: they must win the confidence of the Māori race, or they ‘must be prepared to destroy them’. But to obtain peace the Government must go further than it had yet gone: ‘You have never yet offered the Natives that price which they will accept, or ought to accept – I mean free institutions and equal laws with yourselves’. Offer this honestly, he said, but offer it also with a warning that if they do not ‘unite their destiny with ours’ then ‘no human power can avert their coming doom’. You must, he urged, ‘absorb this king movement into your own government’ otherwise ‘you will come into collision with it’, which would lead to a ‘war of races’. You will be compelled, said FitzGerald, as other nations had been before, to destroy the Natives; ‘of course you will conquer; but it will be the conquest of the tomb. Two or three years of war will eradicate every particle of civilization from the Native mind, and will elicit all the fiercest instincts of his old savage nature’.¹⁹⁰ He went on:

¹⁸⁷ He had arrived in September 1861, but did not call the Parliament again until July 1862, see *NZPD* (1861-63): 390-92; Orange, *The Treaty of Waitangi*: 160.

¹⁸⁸ In fact, the Domett Ministry had just been installed in office that same day (6 August 1862).

¹⁸⁹ See Orange, *The Treaty of Waitangi*: 159-60.

¹⁹⁰ *NZPD* (1861-63): 493.

I am here to-night to appeal against so miserable, so inhuman a consummation. We are here this evening standing on the threshold of the future, holding the issues of peace and war, of life and death, in our hands.

To the view of government through conquest he replied, with ever intensifying poetical rhythm, that great men would be able to find a peaceful resolution, eschewing the 'sword'. He cited 'the great Cardinal' and 'the government of Him who "taketh up the simple out of the dust and lifteth the poor out of the mire"'. He appealed 'to you as citizens of that nation which, deaf to the predictions of the sordid and the timid, dared to give liberty to her slaves'. He painted war as a last resort stating that he did not want his son standing at some future time at the monument to a dead race, blushing 'with the ignominy of feeling that, after all, the memorial of the Christian lawgiver is but copied from that of the cannibal and the savage'. In closing Fitzgerald advocated a policy that would be in nature and effect, a 'Magna Charter' for the Māori people.¹⁹¹

The British were keenly aware of other empires that had shaped the world, notably the Roman and the Greek empires. They identified themselves with these empires, especially the Roman.¹⁹² The history of Britain itself was a succession of conquests to varying degrees of geographic coverage and institutional revolution. The Britons had succumbed to the Saxons, except on the periphery. A portion of the Saxons had succumbed to the Danes. And the Normans had absorbed the Saxons, although adopting some of their institutions (notably the jury system).¹⁹³ In this light, FitzGerald's warning to his colleagues that unless they did not absorb the King Movement they would come into collision with it, was realistic. If there was any lesson from this history it was that the 'superior' nation (or empire) took control and any opposition to it was overcome. If the customs of the previous inhabitants remained it was because the conquerors accepted their continuance or

¹⁹¹ Ibid: 494.

¹⁹² See n. 136.

¹⁹³ For an account of this see chap 8 of Hallam, *View of the State of Europe During the Middle Ages*: 505-731.

because the conquered retreated to the margins where they lived in isolation. FitzGerald's comments can be construed as an example of 'fatal impact' thinking, but 'fatal impact' should in this context be interpreted in the light of the history inherited by the British at this time.

Of course, there was much that was rhetorical in FitzGerald's speech. He painted the options of peace and war in stark terms. But there was also considerable humanitarian sentiment. He was clearly borrowing from the humanitarian tradition that acted as a check on the excesses of empire. Britain might be an empire nation but that did not mean a rapacious unjust empire taking no account of the interests of other peoples. FitzGerald's personality is also obvious here. His biography reveals the way that he relished defining moments and sought to be the one defining them.¹⁹⁴ Nevertheless, there is a real sense in which FitzGerald believed in the moral choice of peace or war and was advocating the former, if at all possible. However, he saw peace as attainable only if Māori were 'absorbed' or amalgamated into the British system. That policy would be for Māori a 'Magna Carta';¹⁹⁵ this reference is a clear indication that he was drawing on the resources of British history.

In following FitzGerald's address, Dillon Bell demurred, stating that FitzGerald was really in agreement with the essential policy of Governor Grey and the present Ministry. While appearing to concur with FitzGerald on the policy of the union of the races under one law, he implied that FitzGerald had overlooked the distinct statements, from Wiremu Tamihana and others, that expressed a desire to establish a separate nationality, making conflict inevitable.¹⁹⁶

Bell argued that FitzGerald had mistaken the import of the 1858 legislation (the Richmond legislation): it was ultimately about amalgamation, but it also

¹⁹⁴ See Bohan, "*Blest Madman*" *Fitzgerald of Canterbury* .

¹⁹⁵ The debates spell it 'Magna Charter', *NZPD* (1861-63): 494.

¹⁹⁶ *Ibid*: 494-96.

recognised that all laws that applied to settlers could not apply to Native districts, nor was it necessarily a sound principle that they do.¹⁹⁷ Bell explained (echoing C. W. Richmond),¹⁹⁸ that in other countries different laws existed for different areas, for example the law of Scotland was different from that of England within the United Kingdom. Moreover, ‘there is special legislation in every session of the Imperial Parliament for different phases of society and for different associations and traditions’. Bell went on to consider the idea that law was not ultimately imposed; in Britain it had ‘grown up’. He declared that recognition of British authority came first, then over time Māori custom could ultimately merge with British law.¹⁹⁹ Days later, in a Ministry statement, Domett supported Bell’s statements on the ‘growth’ of institutions among the Natives rather than the imposition of them, citing Burke.²⁰⁰ This reference makes explicit Richmond, Bell and Domett’s Burkean paradigm. Amalgamation was the goal, but it would take time. Bell’s characterization of Richmond’s 1858 address was most probably a correct one.

FitzGerald believed that while Bell had ostensibly agreed with everything in his resolutions, the Domett-Bell Government was not committing itself to actual implementation. He stated that Bell used the supposed ‘spirit of anarchy’ amongst the tribes as a basis for taking an aggressive stance towards them.²⁰¹ Bell had also spoken of the ‘antagonism of race’.²⁰² In opposition to this approach, FitzGerald reiterated his main message that the Government must give Māori privileges in order for them to learn duties and responsibilities, not the reverse. The law was paramount and must be enforced against all alike:

¹⁹⁷ Ibid: 497.

¹⁹⁸ See n. 141, although Richmond was comparing British/ English law with that law adapted by the colonists; but the basic idea of adaptation to different circumstances, and, in other parts of Richmond’s 1858 speeches, to different stages or ‘phases’ of civilization or society is also present in Bell’s articulation here.

¹⁹⁹ *NZPD* (1861-63): 498-99.

²⁰⁰ Ibid: 517.

²⁰¹ Ibid: 508-509.

²⁰² Ibid: 502.

This is the only thing which will solve the great mystery; we must get the Māori to recognize the idea of law – to have confidence in our laws: and one great means to that end is to admit him into this House, and so to persuade him that, if we make laws for him, he makes laws for himself and also for us. The time will then shortly arrive when the Māori will have a thorough and entire trust in our laws, and we shall have no difficulty in enforcing them all over the country.²⁰³

As an overall comment on this debate and FitzGerald's resolutions, Bell and Domett's approach regarding the gradualist introduction of British law (amalgamation over time) could be interpreted as an excuse for passivity. Thus, when the introduction of that law was opposed, coercive measures could be justified in response. That was precisely how things unfolded with the Waikato wars and ensuing confiscations. By contrast FitzGerald, who was for immediate amalgamation and universal application of British law, appeared to uphold the idea of Māori exercising real authority, as with his proposal for the Māori King to be made a superintendent of a province, provided it was British law he enforced.²⁰⁴ As a general comment on the policy context, there does seem to be a tension in the policy debates of the time between introducing local institutions of self-government (designated by both Sinclair and Orange as a form of 'indirect rule'²⁰⁵ – in other words, Richmond's 1858 policy), and granting Māori some measure of participation in central government (as in FitzGerald's advocacy of Māori representation in the Assembly and provincial government).

A Romanticized Stadial History

To prove his point that amalgamation was already a practical reality, being outworked in New Zealand society in spite of 'a policy of disunion and severance

²⁰³ Ibid: 509.

²⁰⁴ See again, Fenton's comments, at n. 100.

²⁰⁵ See Sinclair, *The Origins of the Maori Wars*: 97-98, who notes the importance of the struggle for power between McLean and the Responsible Ministry; and Orange, *The Treaty of Waitangi*: 162, although Orange is here referring to Grey's attempted application of the 1858 Acts, in the absence of a Stafford-Richmond Ministry and post-Waitara.

on the part of our Government', FitzGerald listed a number of factors to illustrate that Māori had already adopted 'our manners, habits, and customs'. These included material things, (European animals, clothing, tools and luxuries such as sugar and tobacco), and immaterial things, notably the Māori adoption of Christianity, which FitzGerald referred to as one of the new 'intellectual conditions' of Māori existence.²⁰⁶ Stadial theory, especially under the influence of nineteenth century political economy and utilitarianism, tended to emphasize material changes as key to societal development, in particular the growth of agricultural and commercial economies. Commercial society was 'polite society' although paradoxically, because self-interest was emphasized as the leading human motivation, laws existed to restrain that self-interest (and at the same time 'maximise pleasure and minimise pain'). Laws were hence less a reflection of the customs, habits and manners of a people (to borrow FitzGerald's words) than a product of positive legislative intervention to effect change and keep self interest in check. The Romantics (Carlyle, Coleridge and others) reacted to this utilitarian 'mechanism' and articulated a broader vision of human nature and potentiality in which the sympathies, the imagination and the character were to be cultivated through arts, religion and education.²⁰⁷ J. S. Mill was famously influenced by the Romantics, which softened the hard edge of his Philosophic Radical upbringing; and he was to make the distinction between civilization 'in the narrow sense' of material and institutional (external) change and civilization in the wider sense which included individual (internal) cultivation.²⁰⁸ There is a sense in which FitzGerald's conception of civilization and his language can be seen as sharing in this Romanticism. He emphasized the importance of Christianity and, as it were, internal change: '...how readily [the Māori has] grasped the mysteries of a lofty faith, and to how great a degree [he has] accommodated his conduct to the

²⁰⁶ *NZPD* (1861-63): 486.

²⁰⁷ See Colin Heydt, 'Mill, Bentham and 'Internal Culture'', *British Journal for the History of Philosophy* 14 (2006): 275-301.

²⁰⁸ See John Stuart Mill, 'Civilization' in *The Collected Works of John Stuart Mill*, ed. John M. Robson (Toronto: University of Toronto Press, 1977 (1836)): para 493.

requirements of his new belief...'.²⁰⁹ He also spoke of one of the 'intellectual' causes of Māori 'decay' (or why their advance in civilization had been checked); he surmised that they were aware of their inferior position while longing for something more, yet not knowing how to attain it. Concerning this situation, FitzGerald likened Māori to children: 'They are growing, and we have not provided for their growth'. (According to FitzGerald, the 'food' that the Government should have been feeding Māori was new institutions. He implied that this explained the Land League and King Movement.)²¹⁰ Richmond had also employed the metaphor of raising and educating a child,²¹¹ a common analogy of the stadial view of history where nations were in their infancy in terms of civilizational development. But FitzGerald's references to 'intellectual' changes in Māori society demonstrate that his conception of civilization was some way removed from a narrow materialist version of stadial history and political economy.

Richmond had also said that the King Movement did not develop from a desire for law, but for a separate nationality. FitzGerald agreed that Māori wanted a separate nationality:

But is not this pining for a nationality the offspring of a desire for law and order? Is not the desire for a higher political and social organization the very soul of nationality? Is it not the want of all that machinery which is involved in the idea of the word "nation" which is the very characteristic of savage tribes as opposed to a nation.

FitzGerald hailed this pining for law and institutions of nationhood as a 'great sign of growth in their national life'; at the same time he bemoaned the failure of the Government to perceive this at an earlier time. His answer was, once again, an amalgamationist vision declared in lofty tones: 'The Natives wanted nationality.

²⁰⁹ *NZPD* (1861-63): 485.

²¹⁰ *Ibid*: 488-89.

²¹¹ See n. 113.

Say to them, “Accept our nationality, accept a far higher and nobler nationality growing up around you than any which you can create for yourselves”.”²¹² Again, this language of organic growth of constitutions and national institutions was reminiscent of Burke.

Saxons, Celts and Victorian ‘fusion’

Towards the beginning of his speech, FitzGerald was concerned to establish that legislators must not forget ‘those great elements of human character common to all men in virtue of their common humanity’.²¹³ He next discussed some ‘general outlines of Māori character’, to a degree reminiscent of Richmond’s 1858 address, and which encapsulated FitzGerald’s idea that the institutions the Government may wish to fashion for Māori must be based on an appreciation of their general character – though not their specific traditions or customs. FitzGerald noted the great ‘capacity’ of Māori ‘for intellectual and social improvement’, citing their grasp of the Christian faith, their aptitude for commerce and industry (in spite of their ‘constitutional lassitude’), their ‘generous and courageous disposition...strong and vivid imagination, considerable power of reasoning, great political aptitude, and great diplomatic capacity’. He cited recent speeches and letters ‘that would have done justice to any diplomatist in any country in the world’. Māori were, furthermore, ‘a remarkably justice-loving people’; FitzGerald objected to comparisons with Algerine corsairs and Chinese pirates, saying these people committed crimes all the while knowing ‘right and law’, whereas if the Māori opposed the colonists it was because ‘he believes he is right’.²¹⁴

FitzGerald clearly based his policy propositions, among other factors, on his assessment of Māori character. He identified in Māori traits of both the Celt and the Saxon, implying that, just as the British were a combination of Celtic

²¹² *NZPD* (1861-63): 488-90.

²¹³ *Ibid*: 484.

²¹⁴ *Ibid*: 484-85.

characteristics ('constitutional infirmity') and Saxon characteristics ('power of bargaining and making money'), so Māori shared these same characteristics.²¹⁵ He was participating in a discourse on national character common in the Victorian age – amongst not only English but also French and other European thinkers. FitzGerald's appraisal of Māori character, as already noted, bore some close similarities with Richmond's appraisal in 1858. Richmond called them 'a reasoning and reasonable people', while FitzGerald noted their 'considerable power of reasoning'. Richmond saw Māori as 'by nature venerators of law', while FitzGerald stated that Māori were a 'justice-loving people', disagreeing with you only when they believed they were right. Richmond perceived that 'the structure of their society is aristocratic, verging upon democratic.... they have always been accustomed to debate their affairs in popular assemblies', comparing with FitzGerald's observation of the 'great diplomatic capacity' of Māori and their 'independent capacity of weighing motives and actions'.²¹⁶ Of the two speeches, FitzGerald's exposition was the more detailed. He emphasized Māori commercial aptitude, which Richmond did not.

More important than any particular similarities or differences between Richmond and FitzGerald was the fact that they based their policy propositions on comparisons of national character. Of note was their identification in Māori of character features belonging to themselves. The Māori 'Other' was a reflection of the national 'self' they once were. While FitzGerald had emphasized 'common humanity' as the basis of his policy, with many of the features he discussed being quite generic, his ascription of Celtic and Saxon features to Māori corresponded with Richmond finding 'Teutonic' qualities in Māori. Richmond did not include Celtic references, and this may be a reflection of his English heritage as opposed to FitzGerald's Anglo-Irish background.

²¹⁵ Ibid: 485-86.

²¹⁶ Ibid: 485.

FitzGerald's reference to Māori having both Celtic and Saxon characteristics was significant for it articulated an important theme in Victorian thought: the desirability of combining the Celtic and Saxon peoples, with their different, but what were considered complementary, characters. The fusion of diverse national 'spirits' was the central idea, with Victorian discussions focussed on the Irish and the French, both considered Celtic or Gaelic. The 1861 citation from Goldwin Smith²¹⁷ (in the epigraph of this chapter), clearly illustrates this Victorian discourse. One feature of this discussion (a 'commonplace' of the time, according to Georgios Varouxakis) was the attribution of feminine qualities to the Celt and masculine qualities to the Teuton or Saxon.²¹⁸ FitzGerald's notions of Māori 'constitutional infirmity' (or lassitude) may be a reflection of this. Or it may reflect a more generic stadial discourse concerning barbarian races being languid (only exerting themselves in small bursts during hunting or warfare). Alternatively, it may reflect the influence of Montesquieu and his discourse on the effects of warm climate on character.²¹⁹

Varouxakis takes issue with post-colonial scholars who dismiss the language of Celtic and Saxon racial fusion as merely a justification for unionist policies or Irish subjugation. He says that such a rigid or narrow interpretation would be to 'impoverish our understanding of Victorian thought irreparably', one reason being that these ideas of racial diversity and fusion were subjects of serious intellectual discussion at the time. Among others he cites Matthew Arnold, Mill, Walter Bagehot and Lord Acton as proponents of these ideas, and identifies Guizot as influential.²²⁰

²¹⁷ Regius Professor of Modern History at the University of Oxford from 1858-66.

²¹⁸ Varouxakis, *Victorian Political Thought on France and the French*: 10-14.

²¹⁹ See also Richmond's comments at n. 134.

²²⁰ Varouxakis, *Victorian Political Thought on France and the French*: 10-14. The reference to Guizot is to *The History of Civilization in Europe* (1828), probably a reference to Guizot's theory about civilization being a product of combined Roman, Christian and Germanic/barbarian elements.

Although diversity was important, Varouxakis also shows how most Victorians believed in the superiority of their Teutonic (or Saxon) civilization and polity over that of the Celtic French and Irish, sharing, ‘with more or less extremism’ E. A. Freeman’s ‘Teutomaniac’ attitudes towards these other white races.²²¹ This is consistent with the discussions on Saxonism above. Lord Acton expressed a widely held view when he wrote, in an 1862 review of Goldwin Smith’s *Irish History*,²²² that the French had ‘exhibited to the world an unparalleled political incapacity’. The Irish and the French, as Celtic races, were therefore viewed as inferior to the British in this respect.²²³

It should be noted that Acton’s comments were made in the same year as FitzGerald’s and in an environment where Celtic parallels and comparisons were the ‘stock-in-trade of Victorian national characterology’.²²⁴ If Victorian thinkers often took such a view of their Celtic neighbours, then where did Māori stand in the equation? It is in light of these currents of thought that FitzGerald’s attribution of Saxon and Celtic traits to Māori must be placed. To ascribe to Māori any Saxon attributes is presumed to have been a significant compliment. And for FitzGerald, with his Irish heritage, perhaps the ascription of Celtic traits was something of a compliment as well (overlooking the immediate description of ‘constitutional infirmity’). Of course, it also served a definite rhetorical purpose in his argument for the amalgamation of Māori and British.

This discourse on nation and race, or national character, should not be underestimated as a language of identity or as a meaningful category of political analysis. The assessment of similarities in national character traits provided a basis, or at least a political justification, for applying particular policy arguments.

²²¹ Ibid., 114.

²²² See n. 170.

²²³ John Emerich Edward Dalberg Lord Acton, ‘Mr. Goldwin Smith’s *Irish History*’ in *The History of Freedom and Other Essays*, ed. John Neville Figgis and Reginald Vere Laurence (London: Macmillan, 1907 (1862)).

²²⁴ Varouxakis, *Victorian Political Thought on France and the French*: 114.

In FitzGerald's case, this was the argument that Māori were capable of participating in both central and regional government. Along with Varouxakis, Stapleton also notes the importance of the concept of 'nation' among Victorian intellectuals after 1850.²²⁵ While the Saxonist discourse was essentially a national one, in which the English were envisioned as the descendants of a band of independent warriors, in FitzGerald's case they become commercially gifted individuals. To FitzGerald, commercial aptitude was one critical illustration of Māori capacity to join the new nation of British colonists. He did not fear Māori aspirations for a distinct nationality. Rather he saw this as an opportunity to invite them to become part of the new British nation. And although FitzGerald's Celtic comparison could be construed as negative, the Celtic character was also seen by contemporaries as variously possessing a certain 'poetic' quality, rhetorical ability,²²⁶ and 'great individual energy',²²⁷ even if it was incapable of deriving enduring political freedoms. But Māori had both Saxon and Celtic traits and this meant they could be brought into history by a policy of amalgamation. Just after he had made the Saxon and Celtic comparison, FitzGerald asked the question:

is the Māori a man capable of being raised to the same rank of civilization in which we stand? and the answer I give is that, however we may be blinded by the unfortunate antagonism of our position, posterity will derive sufficient from the history of these times to decide that the Māori is a man who might have been and ought to have been raised to that stage of civilization which we ourselves enjoy...²²⁸

²²⁵ Julia Stapleton, *Political Intellectuals and Public Identities in Britain since 1850* (Manchester: Manchester University Press, 2001): 24-27.

²²⁶ These two qualities described by Smith, *Irish History and Irish Character*: 11.

²²⁷ J. S. Mill, 'Considerations on Representative Government' in *The Collected Works of John Stuart Mill*, vol. XIX, ed. John M. Robson (Toronto: University of Toronto Press, 1977 (1861)): para 190. This quality, said Mill, 'though less persistent and more intermittent than in the self-helping and struggling Anglo-Saxons, has nevertheless manifested itself among the French in nearly every direction in which the operation of their institutions has been favourable to it'.

²²⁸ *NZPD* (1861-63): 486.

From a twenty-first century perspective it is easy to label policies of amalgamation as merely the ethnocentric agenda of a parliament blinded by self-interest. Perhaps that would be a complete description of some Members. But FitzGerald spoke with the assurance that this was the only objective that would enable Māori to share in the fruits of European civilization. The desirability of European civilization was something that FitzGerald, along with most of his contemporaries, clearly took as normative. And he believed amalgamation was already taking place, in view of the adoption by Māori of European values and goods.²²⁹

²²⁹ See n. 206.

PART II: HISTORY AND LAND

3. **Richmond's 1858 Policy: *The 'Growth' of British Tenure & Native Territorial Rights***

'It [the sale of lands at a price] was a beneficial check upon the tendency of a population of colonists to adopt the tastes and inclinations of savage life, and to disperse so widely as to lose all the advantages of commerce, of markets, of separation of employments and combination of labour.'

John Stuart Mill (1848).²³⁰

'Very few of the Natives were as yet ready for that privilege [of individual titles], for it was a matter of experience that the old Native communistic title would grow over even Crown grants, thus showing that the Natives did not yet, as a race, appreciate the rights conferred by a legal title.'

Christopher William Richmond (15 June 1858).²³¹

Conjoining Pre-emption and Direct Purchase

On 1 June 1858, Richmond moved for leave to bring in the third Bill of his Native policy, the Native Territorial Rights Bill.²³² On 15 June, during the Bill's second reading, he added further remarks in clarification of the Bill's purposes.²³³ The first purpose was to establish a voluntary registry of Native title, where rights to land might be registered. The second was to allow the Governor to issue Crown grants to Natives. The basic character of the Bill was to provide an intermediate

²³⁰ Mill, *Principles of Political Economy with Some of Their Applications to Social Philosophy*: 624.

²³¹ *NZPD* (1856-58): 527.

²³² *Ibid*: 474-76. There was also the Bay of Islands Settlement Bill, which involved a type of a model settlement, incorporating both a Maori and Pakeha populace. This Bill was to apply to the circumstances of a 'mixed district', 'where Natives and Europeans were jumbled up together in variable proportions'. According to Richmond, the Bay of Islands needed a settlement 'in which Natives and Europeans could meet upon absolutely equal terms, and be governed in reality by the same laws. This would go far towards raising the whole district from the stagnant, unprogressive state into which it had lapsed'. See *NZPD* (1856-58): 515.

²³³ *Ibid*: 526-28.

stage between Native communal or ‘communistic’ title and British individual fee-simple title.

The first part of the Bill provided for the issue of simple certificates of title to individuals (issued by the Governor in Council). These would operate to confirm and define Native rights to particular allotments. They would not translate ‘Native title’ into Crown or British title. That was the purpose of the second section of the Bill regarding Crown grants. These grants might be alienable or inalienable to Europeans. The reasons for making some of these grants inalienable are discussed below. As for the alienable grants these would come with a caveat that on sale of such land the European purchaser would be required to pay 10 shillings an acre into the Treasury. This system would, in time, replace the system of Crown purchase (or pre-emption) followed by sale to settlers at an increased rate, with the sale proceeds paying for public works and colonial administration (referred to below as the ‘Land Fund’). Richmond was careful to say that this new system was not the Government’s preferred method of settlers obtaining land, but that if it worked well then ‘facilities in this direction might be extended’.²³⁴

There emerged in the debates on the Bill an argument concerning the relative merits of Crown purchase and individual settler purchase from Natives. These tensions dated from the Treaty of Waitangi, and the issue had attracted discussion within Parliament at least as early as 1856.²³⁵ This debate recalled the larger question as to how colonization should take place: whether systematically (usually associated with Crown pre-emption) or unsystematically (usually associated with free-market or private enterprise-led settlement). Richmond’s proposed system of direct sale to Europeans lay somewhere in between systematic and unsystematic approaches: systematic in that Native title would first be determined and the European purchaser would pay 10 shillings per acre, but

²³⁴ Ibid: 475.

²³⁵ Ibid: 335-36 (LC), 352 (HR).

unsystematic in that it would open up the market to the land speculator, as before the Treaty of Waitangi.

Mindful of Imperial concerns and interests, Richmond took care to position himself in the systematic colonization camp: ‘... for without a Land Fund orderly settlement of the country and the advance in civilization of the inhabitants was impossible’. In support of his position he cited two authorities. The first was Chief Justice Martin in the case of *The Queen v Symonds* (1847) who maintained, according to Richmond, that ‘colonization was a matter of national concernment and should be left in the hands of the Government, which was alone capable of dealing with it successfully’. The second was ‘that philosophical writer, Mr J.S. Mill’, apparently for the same proposition, although the debates do not record that Richmond quoted any particular passage of Mill.²³⁶ This was not the last time Richmond cited Mill. About ten days later, in an associated debate on the Bay of Islands Settlement Bill, Richmond again stated that he ‘was strongly impressed with the opinion that colonization ought to be systematic, and therefore the work of a Government’. The debates simply record: ‘(Here the honourable member quoted to that effect from the works of John Stuart Mill)’.²³⁷ It is very likely that the work Richmond was referring to was Mill’s *Principles of Political Economy*,²³⁸ which first appeared in 1848 and went through a number of editions over the succeeding years.²³⁹ Towards the end of *Political Economy* Mill dealt with the ‘grounds and limits of the laissez-faire or non-interference principle’ and in this section argued that colonization was one of the matters in which governments may legitimately interfere or, more correctly, promote.²⁴⁰ Mill employed the rationale of political economy to explain the necessity of colonization being undertaken by government ‘or by some combination of

²³⁶ Ibid: 475-76.

²³⁷ Ibid: 516.

²³⁸ Mill, *Principles of Political Economy with Some of Their Applications to Social Philosophy*.

²³⁹ See *Autobiography*: 178-79.

²⁴⁰ It is also well known that, in the Indian context, he supported the government of India by the East India Company, rather than the Crown, see Jahn, ‘Barbarian Thoughts: Imperialism in the Philosophy of John Stuart Mill’: 612.

individuals in complete understanding with the government'. The key problem was how to make colonization self-sustaining and ensure the efficient deployment of both labour and capital in the new lands. As the answer to this dilemma, Mill cited approvingly Edward Gibbon Wakefield's scheme of 'putting a price on all unoccupied land, and devoting the proceeds to emigration'. If this mechanism was not in place, then emigrants could too easily obtain land, leading to the dispersal of labour rather than its concentration in settlements. He believed the latter was necessary if the prosperity of the settlement was to be attained. If those with capital knew they could procure a labour force then they would invest in land and industry. The proceeds from the sale of land to these 'capitalists' could be used by the government to fund further emigration. The involvement of government was thus central to the scheme, in particular setting the price of unoccupied lands, preventing squatters and reinvesting the proceeds of sale in emigration expenses. The reasoning of political economy, and underlying this, stadial history, was clearly seen in Mill's argument (in the epigraph of this chapter) that placing a sufficient price on land would ensure civilized commercial settlements characterised by the combination of labour. In accordance with the basically materialist focus of the stadial picture, the 'savage life' was here equated with a mode of existence or subsistence – that is, an unsettled wandering existence, in contrast with a settled civilized one.²⁴¹

In his discussion of colonization generally, Mill made this recommendation: 'It would therefore be worth while, to the mother country, to accelerate the early stages of this progression [the exponential increase of emigrants], by loans to the colonies for the purpose of emigration, repayable from the fund formed by the sales of land'. Similar arrangements applied in New Zealand. It was this that made Richmond wary of undoing Crown pre-emption completely. He explicitly acknowledged that it was the Crown's right of pre-emption which was the real source of the Land Fund – 'the goose which laid the golden eggs'. Furthermore,

²⁴¹ Mill, *Principles of Political Economy with Some of Their Applications to Social Philosophy*: 622-26.

the Land Fund had been used as security for loans from the Imperial Government and this 'goose' could not be 'cut...open' without breaching that contract. In any event, the Imperial Government was not likely to risk its security by forgoing its control of land purchase, and with it, substantial control of Native affairs. Richmond's home audience at the Colonial Office are a key to understanding the context of this debate and why he was so careful to deal with these concerns. 'It would be necessary to reserve the Act for the Royal assent', said Richmond, something he had not troubled to apply to the former two Native Bills.²⁴²

Richmond's careful positioning on the Bill was, however, of little effect. The Native Territorial Rights Act, passed by the General Assembly, was disallowed by the Home Government. In his despatch to Governor Gore Browne, the Earl of Carnarvon identified a number of objections. One was that if the Natives resisted a decision of the Governor in Council on titles, would the British Government in that event be expected to support the colonial government; and if not, would the Natives respect a colonial government that was powerless to enforce its own decisions? Carnarvon clearly supported the current land purchase system of Crown pre-emption and envisaged the colonial government purchasing 'territories' rather than individuals purchasing 'properties', and that within those territories European law would prevail, while on Native lands remaining unsold, Native 'usages' would continue to apply. Ultimately he was not prepared to countenance a transfer of authority over Native affairs from the Imperial Government to the colonists, as the Act proposed. He stated that for the sake of the colonists, the Natives and the Imperial authorities, the present chain of command must remain in place so that the goal of 'complete civilization and consolidation of the Native race with the English Colonists' could be effected. As long as the British Parliament remained responsible for the Military and Naval protection of the Colony and the better management of the Native race, and the related expense of this, they must remain responsible for Native affairs. This was

²⁴² *NZPD* (1856-58): 476.

an issue ‘intimately connected with the security of the Colony, the justice due to Native claims, and the issues of Peace and War itself’.²⁴³

Carnarvon’s despatch of 1859 illustrated the tendency of Crown policy at this time towards the Natives developing in separate districts, employing their own customs or ‘usages’, until such time as their civilized state allowed for their amalgamation or ‘consolidation’ with the colonists. The connections between this and land policy or systematic colonization are clear; settlers should not be allowed to purchase directly from the natives, as this would lead to a confusing ‘intermixture’ of European and Native lands. The Government must continue to lead the project of colonization. Only in that way could Native territories remain distinct from European territories, allowing Native ‘usages to subsist’. Amalgamation was the ultimate objective, but in the Crown’s vision this involved the continuation of a ‘Native protectionism’ policy. This was in marked contrast to FitzGerald’s vision of amalgamation, in which he condemned the policy of keeping Native and English land areas distinct with different systems of law (FitzGerald’s conception of Native title is further delineated in the next chapter). Richmond attempted to maintain Crown pre-emption as the basis for ‘the regular and orderly occupation of the lands of the colony’,²⁴⁴ while at the same time providing a mechanism for direct settler purchase. With his organic or Burkean view of law, Richmond saw Native tenure as gradually modifying itself to British forms through wise legislative intervention (though not imposition). Hence, amalgamation for Richmond was probably more immediate than in Carnarvon’s picture, but definitely less immediate than in FitzGerald’s. FitzGerald also used Burkean language in speaking about Native custom, but had a less gradualist view

²⁴³ *AJHR* (1860): E–No. 1: 36–38. Alan Ward writes that the Native Territorial Rights Bill was ‘a serious attempt to meet the needs of all parties’. Keith Sinclair was less approving, seeing it as an expression of trader and settler wishes to procure land from Maori more easily. See Alan Ward, *An Unsettled History. Treaty Claims in New Zealand Today* (Wellington: Bridget Williams Books, 1999): 123–24; and Sinclair, *The Origins of the Maori Wars*: 98. See also Ward, *A Show of Justice. Racial 'Amalgamation' in Nineteenth Century New Zealand*, where Ward emphasized the basic amalgamation objective of the Bill.

²⁴⁴ *NZPD* (1856–58): 475.

of customary change (as the next chapter will examine). This illustrates that to some extent these languages were malleable and their use did not mean that a particular policy outcome would be advocated. The language of Baconian experimentation was used by Richmond in introducing the Courts and Regulations Bills;²⁴⁵ it remained in presenting the Territorial Rights Bill and was combined with stadial language: ‘...he would remind the House of the purely experimental nature of the measure, - and, indeed, it was the greatest experiment a Government could engage in, that of elevating a whole race’.²⁴⁶

Legal Change through Customary Change

In issuing certificates of title to Māori and laying the foundation of a complete registry of title throughout the country, Richmond thought it ‘might be possible, without extinguishing the Native title, to modify it insensibly with a view to its ultimate commutation into English title’.²⁴⁷ Richmond was critical of those against individualization of title who said that the Government should wait until Māori understood and appreciated British law.²⁴⁸ He was also critical of those who wanted immediate conversion of Native title to fee-simple titles as it would raise various difficult questions relating to the law of legitimacy, marriage, inheritance and a number of others: ‘...the Government wished to introduce measures that would take root in the country and grow, and therefore they were not going to propose any such sham...’.²⁴⁹ This language was suggestive of Burkean or common law constitutionalism. Law was organic, modifying itself to the local situation but without its fundamental essence changing.

²⁴⁵ Ibid: 442.

²⁴⁶ Ibid: 527.

²⁴⁷ Ibid: 474.

²⁴⁸ Consider George Clarke and Lord Stanley’s view, as cited by Richmond, see n. 84. By contrast, those who wanted immediate conversion of titles were probably those more likely to agree with the 1844 Report of the Select Committee of the House of Commons, see n. 86, which called for immediate application of British law to Maori.

²⁴⁹ *NZPD* (1856-58): 527.

Individual property heralded the creation of law to protect that property. Since Māori did not have individual property, no court of law could decide questions arising between Māori themselves.²⁵⁰ The reason was that courts of law only recognized legal objects or things; a communistic title was not a thing at law and, moreover, was not capable of being ‘owned’. Therefore, if it could not be defined in accordance with British legal forms it could not be protected, as it did not in any real sense exist. Richmond did not delineate this picture but it was inherent in his conviction that Māori property was not cognisable by courts of law (there was, in fact, a declaration to this effect in the Bill). This, he believed, was the state of the law at that time, ‘for settling a title by digestion was a method unknown in English law-courts, and was a matter which would puzzle the big-wigs...’²⁵¹ What exactly he meant by ‘digestion’ is difficult to decipher. It may have meant that, since there was no ‘digest’ or methodical summary of Native title, to carry out a process of compiling such a summary by a series of particular cases would not be an appropriate way to ‘settle’ the nature of Native title or disputes over Native title.²⁵² This was the reason why Native courts were proposed under this legislation, to determine rights to property and disputes over those rights. On the other hand Richmond suggested that while the normal courts of the colony were not able to adjudicate on disputes between Natives concerning land, they might be able to protect Native lands from Europeans on the basis that Native rights were protected by the Treaty or the law of nations (*jus gentium*).²⁵³ Richmond took a neutral stance as to the basis of Māori rights – whether the Treaty of Waitangi or the law of nations – but he did say that he believed the Crown’s right of pre-emption stood on the same ground.²⁵⁴ To summarize these points, Richmond saw the property rights of a native people as a matter between the Crown and the

²⁵⁰ Ibid: 474.

²⁵¹ Ibid: 527.

²⁵² A ‘digest’ is ‘(a) a methodical summary esp. of a body of laws. (b) (**the Digest**) the compendium of Roman law compiled in the reign of Justinian (6th c. AD)’: Della Thompson, ed., *The Concise Oxford Dictionary of Current English* (9th edn; Oxford: Oxford University Press, 1995).

²⁵³ *NZPD* (1856-58): 474-75.

²⁵⁴ Ibid: 475,527.

particular people concerned. In other words, Native property was governed by treaty or by the law pertaining to nations generally. This was at least partly because Native land customs were not those which English domestic courts of law could recognize as they did not fit into any of the available categories of English property law.²⁵⁵

Carleton challenged Richmond on his comments concerning the basis of Crown pre-emption. His arguments are worth reviewing because they demonstrate the range of views on the subject of Native land title. Carleton argued that Crown pre-emption could not be based on *jus gentium* (by right of discovery or occupation) in the North Island because of the Treaty. But there was also the problem, he continued, that in the North Island some tribes had not signed the treaty. Carleton was implying that the Crown had no rights in these cases, either by Treaty, because these tribes had not signed, or by *jus gentium*, because the North Island had never been taken possession of by either discovery or occupation. Carleton appears to have believed that the Treaty, as a treaty of cession, superseded a generic law of nations such that the generic rules of discovery or occupation did not apply. This provided some foundation for his argument that Fitzroy's relaxing of the Crown's pre-emptive right was well grounded; especially when many Māori were calling for this. That is to say, it provided the basis for an argument that direct settler purchase from Māori was a legitimate legal option. That did not mean however that Carleton was advocating for the entire waiver of pre-emption, substituting for it an unregulated free market in Māori land purchases. He denied this. Instead he applauded the Government for in effect proposing what he had 'for so many years' advocated: a voluntary system of registration whereby Natives who could prove their 'individual right' would be able to buy and sell with Europeans.²⁵⁶

²⁵⁵ Richmond's view was essentially that of Henry Sewell's, considered in chap 5.

²⁵⁶ *NZPD* (1856-58): 528-29.

Richmond's speech also noted opinions expressed in the *Times* newspaper concerning the Natives becoming like the gipsies of Europe. He did not believe these fears had any 'substantial foundation', however it was the duty of the Government to protect against such a possibility. They would do so by the mechanism of making some Crown grants to Natives inalienable. If this was not provided for, there might 'grow up' such a gipsy class of 'wandering vagrants', 'without fixed habitations, and uninfluenced by those principles and institutions which would gradually civilize them, and prepare them for the enjoyment of their rights and privileges as British subjects.'²⁵⁷ Hence, settled communities were viewed as harbours of civilization, outside of which people would drift without the civilizing influences of law and 'fixed habitations'. Richmond conceived of this settled state as a prerequisite for Māori in becoming British subjects and enjoying their same rights and privileges. These are further elaborations of stadial history, the history of civilization.²⁵⁸

In a fascinating passage Richmond linked together property law, civilization and cultural 'habits':

The Natives were not yet prepared for British tenure, which implied a degree of civilization these people had not yet attained. It was a matter of experience that Native title had a tendency, as it were, to grow over even lands which had been granted by the Crown to the Māoris. The mere issue of a Crown grant to a Native did not do away with the habits of communism.²⁵⁹

In this passage (and in the epigraph at the beginning of this chapter), Richmond spoke of tenure as a matter of cultural recognition and practice – in other words as a customary entity. In another place he referred to 'the old Māori districts, where

²⁵⁷ Ibid: 475.

²⁵⁸ See, at n. 116, Richmond's discussion of these subjects in relation to the other legislation of his Native policy.

²⁵⁹ *NZPD* (1856-58): 474.

aboriginal manners and laws were yet in full force'.²⁶⁰ He also argued that it was the business of Government to see that the half-caste population became Europeans 'in their habits and in the settlement of their lands'.²⁶¹ (William Daldy, in a debate on the Bill, pejoratively referred to the 'evils' resulting from the Natives' 'tribal habits'.²⁶²) Māori custom, Richmond acknowledged, was communal and would only support a communal form of land tenure. A foreign law could not immediately transform this customary practice. It would have to do so gradually. Hence any attempt to impose British fee simple tenure on Māori would not work and should not be attempted. Such a piece of legislation 'would be entirely inoperative and so become virtually a dead letter'.²⁶³ Once again Richmond spoke in a Burkean or Tocquevillian manner concerning the nature of law. He saw a need for law to be supported by custom. If a new legal regime was to be introduced it needed to recognise that custom must somehow change with it. It was not a question of simply creating the appropriate statute. Using an earlier Richmond phrase, the role of law was to 'induce' this change, not somehow effect it by positive legal fiat.²⁶⁴

Political Economy as Normative Discourse

The epigraph from J. S. Mill at the head of this chapter is included for a number of reasons. First, it shows how notions of savagery were quite easily applied to Europeans as a description of their actual physical mode of existence or subsistence. Second, it suggests the ways in which stadial theory and political economy undergirded the project of colonization. If colonists were not to be scattered upon the landscape, as stadial theory envisaged 'savages' to be, then government needed to direct colonization. It did this by purchasing territories from indigenous peoples (or otherwise acquiring unoccupied lands) and then

²⁶⁰ Ibid: 515 (in a related debate on the Bay of Islands Settlement Bill).

²⁶¹ Ibid: 528.

²⁶² Ibid: 476.

²⁶³ Ibid: 528.

²⁶⁴ See n. 143.

selling those purchased lands at a ‘sufficient price’ to enable the correct proportions of capital and labour in a new colony. This was Wakefield’s theory of systematic colonization, inspired in turn by his reading of the classical economists.²⁶⁵ Third, it demonstrates a fact concerning projects of systematic colonization and, to a large extent, colonization in general: that it was concerned with the settlement of European populations in new lands and treated the presence of non-European peoples as largely a secondary consideration. After all, these new settlements were to take place upon ‘unoccupied land’. If necessary, lands could be purchased. Peter Gibbons is critical of histories that assume the presence of Europeans in the lands of indigenous peoples is normative or unproblematic.²⁶⁶ However, the discourses of savagery and civilization, of unproductive wandering vagrants and productive, developed commercial societies, were the normative narratives of the colonists. There were debates, some quite vociferous, concerning these issues. The missionary or humanitarian body had in earlier times despaired at the notion that the Crown could automatically assume ownership of the waste or unoccupied lands by virtue of its sovereignty.²⁶⁷ They knew that Aotearoa or Niu Tirenī (New Zealand) was essentially divided between the tribes, with some areas having overlapping claims. But although many did not accept the Lockean theory of labour as grounding rights of property in land, many would not have questioned the concept that unoccupied land was unproductive land and

²⁶⁵ For Wakefield’s definition of ‘systematic colonization’ see Edward Gibbon Wakefield, *A View of the Art of Colonization, with Present Reference to the British Empire; in Letters between a Statesman and a Colonist* (London: John W. Parker, 1849): 16. See also chap 5 for further discussion of Wakefield.

²⁶⁶ Gibbons, ‘Cultural Colonization and National Identity’: 14-15.

²⁶⁷ In particular, in response to Earl Grey’s despatch of December 1846 to this effect. See for example, William Williams to C.M.S., 12 July 1847, in Frances Porter, ed., *The Turanga Journals 1840-1850. Letters and Journals of William and Jane Williams Missionaries to Poverty Bay* (Wellington: Victoria University Press, 1974): 435-37; Selwyn to Henry Williams, 30 June 1847, in Hugh Carleton, ed., *The Life of Henry Williams, Archdeacon of Waimate*, vol. 2 (Auckland: Wilsons & Horton, 1877): 153-55; and William Martin, *England and the New Zealanders. Part I. Remarks Upon a Despatch from the Right Hon. Earl Grey, to Governor Grey. Dated Dec. 23. 1846* (Auckland: Bishops’ Auckland, College Press, 1847): 35-43 in particular, which argues against the (Lockean) theory of labour as grounding rights of property. In Earl Grey’s case it appears he relied on the authority of Dr Thomas Arnold (rather than directly on Locke or Vattel) for this point, although it can also be said that Grey was a spokesman for the 1844 Report of the Select Committee of the House of Commons, which in turn was heavily biased towards New Zealand Company arguments (and interests).

inherently inferior to agricultural uses of land. Moreover, the belief that European society was more advanced was scarcely questioned by all European parties to colonization. Debate occurred within this meta-narrative of civilization, not outside it.

The epigraph from Richmond further demonstrates this point. British law was seen to be superior and indeed normative. But if this was an imperialistic and paternalistic discourse it also contained some subtlety, as British law was not to be imposed; in fact it could not be imposed if it was to ‘take root in the country and grow’.²⁶⁸ It had to convince Māori, over time, to modify their customary practice of communal tenure, otherwise it would fail.

²⁶⁸ See n. 249.

4. **FitzGerald's 1862 Address:** *Political Civilization & Native Title*

‘The case of New Zealand in this respect is very similar to the case of Ireland. There we had a race of Irish landlords.’

James Edward FitzGerald (6 Aug 1862).²⁶⁹

‘Before the [English invasion of Ireland] there was probably as much material, certainly as much spiritual, culture in Ireland as in any country in the West; but there was not that by whose sustaining force alone these things endure, by which alone the place of nations in history is determined—there was no political civilisation.’

Lord Acton (1862).²⁷⁰

Tenure Amalgamation and Irish History

In his 1862 speech, FitzGerald remarked that the ‘original title’ of the Natives at the onset of contact or colonization was ‘the single title of all savage tribes’, viewed by the law as ‘little or no title at all’. This title, declared FitzGerald, was limited to ‘certain rights of use and occupation’, nothing like a fee-simple or legal estate in the soil. In the usual course, he said, the Crown would ‘enter on’ the lands of savage tribes either by right of discovery or conquest; but in the case of New Zealand – seemingly an exception – the Crown had recognised a title in the Natives by the Treaty of Waitangi. Apparently also, the Crown renounced its right of discovery to New Zealand prior to the Treaty. Hence, it recognised it could only obtain title through the Natives.²⁷¹

²⁶⁹ *NZPD* (1861-63): 492.

²⁷⁰ Lord Acton, ‘Mr. Goldwin Smith’s *Irish History*’

²⁷¹ *NZPD* (1861-63): 491.

This characterization of Native or ‘savage’ title was a combination of stadial history – in which ‘savages’ had appropriated little if any property – and a post-1840 New Zealand Company interpretation of Vattel (or Locke), in which the extent of use delimited legal rights to land. FitzGerald acknowledged that the Treaty had made an important difference in the New Zealand situation. It meant the Crown had had to deal with Māori for the purchase of their lands rather than simply assuming title over unoccupied or ‘waste’ land by right of discovery or conquest. This was, in fact, a reasonably correct description of the approach taken by the Colonial Office in New Zealand, which decided not to simply declare sovereignty but to treat with Māori for a voluntary concession of that sovereignty. McHugh shows how, in taking this approach, the Crown specifically rejected the jurisprudence of the United States Supreme Court, encapsulated in the phrase ‘the doctrine of discovery’.²⁷²

From this preamble, FitzGerald launched into a somewhat curious argument. He stated that Native title had been ‘gradually changing’ since the Treaty of Waitangi because Māori understanding of land ownership had been changing. Over time FitzGerald said, with characteristic idealism, their conception of title and their title to land itself would ‘accommodate itself to our ideas of ownership’. It was simply a question of time, the end result being that Native title could be dealt with in the British Courts, in accordance with British law. This would render unnecessary the current system of Crown purchase and Crown grant. Crown pre-emption would be abolished. FitzGerald’s proposed mechanism was the Old Land Claims Court. He wished, in effect, to return to the pre-Treaty days of private individual purchases.²⁷³ Any European purchaser of land would come into this Court and prove his title, apparently substantiated by Māori evidence. Any Māori could, if he chose, also come to the Court to individualize his title. FitzGerald went further, suggesting that the Crown must also have its purchases validated by

²⁷² McHugh, *Aboriginal Societies and the Common Law. A History of Sovereignty, Status, and Self-Determination*: 167.

²⁷³ The Old Land Claims Court was the court that determined the fairness of European land purchases from Maori occurring prior to the Treaty.

the Court in the same way. The Court would effectively supervise or review the Crown's purchases. In making this argument FitzGerald employed a reference to Waitara, implying that such supervision would prevent this scenario occurring again.²⁷⁴ The concept of direct purchase, and even more so the concept of the Crown's prerogative in land purchases being fettered by a court, was an inversion of the orthodox notions of systematic colonization and Crown prerogative. These notions were articulated well by Sewell and are examined in the next chapter. Like Sewell, FitzGerald recognized that the system of Crown purchase had failed and that another system must be substituted in its place.²⁷⁵

In 1858 Richmond had clearly doubted the capacity of Māori tenure to adapt itself to European modes, certainly in the immediate future.²⁷⁶ FitzGerald was considerably more optimistic. In spite of these differences, they both characterized land tenure as a feature of cultural or customary practice. This was to define the nature of law in a Burkean or common law fashion. For FitzGerald this customary change in Māori tenure was both an internal (intellectual) and an external (material) change:²⁷⁷ internal in that it meant changing the way 'the rights and obligations'²⁷⁸ of title were understood; external in that it reflected that they were no longer 'entirely savage tribes', implying that they no longer lived by the same mode of subsistence (perhaps that their existence was a more settled agricultural or commercial one). This discussion corresponded with how he characterized the changes taking place in Māori society generally.²⁷⁹ FitzGerald was persuaded that Māori custom was capable of transforming itself – or 'accommodating' itself – into something that the law could recognize. An illustration of this was his identification of Māori communal title as similar to a

²⁷⁴ *NZPD* (1861-63): 492.

²⁷⁵ *Ibid*: 491-92.

²⁷⁶ See n. 259.

²⁷⁷ See n. 208.

²⁷⁸ *NZPD* (1861-63): 491.

²⁷⁹ See n. 206.

form of company in existence in Ireland. Hence, he argued, Māori title was ‘as easily recognisable by law’ as these Irish estates.²⁸⁰

Although FitzGerald’s universalist discourse tended to down-play Māori distinctiveness, he did display an imaginative capacity to see in Māori society parallels or reflections of British legal forms. There was a certain Romantic quality about his approach to policy innovation. Coleridge’s definition of the poetic imagination is pertinent. It was a faculty of mind, involving ‘deep feeling and profound thought’ or ‘insight’, which interpreted, shaped, and re-created its experiences.²⁸¹ This Romantic quality in FitzGerald’s vision, combined with his Burkean ‘conservatism’, allowed him to make these identifications. A positivist era where law was defined as that proceeding from a sovereign’s (that is, ‘parliament’s’) command may not have appraised Māori custom in this manner. Ironically, although FitzGerald essentially wanted to bring Māori tenure immediately within the jurisdiction of the British-colonial courts of law, he was also prepared to recognise that Māori communal tenure might have some ongoing validity. Why else discuss Irish communal estates? His point was that British law already recognised such forms, so that a simple transformation of Māori tenure into British fee simple tenure – the whole objective of the later Native Land Court legislation – did not necessarily need to be the objective of a Native land policy.

This is consistent with his other suggestion that there did not need to be any separate process of ascertaining Māori title – again a feature of the later Native Land Court legislation – but that the European purchaser would have to prove that his title was sound. FitzGerald did not believe in compelling Māori to come to

²⁸⁰ Held by the ‘Irish Society...in Ulster’. For a contemporary Victorian history of that Society, compiled by a Select Committee appointed for that purpose, see *A Concise View of the Origin, Constitution and Proceedings of the Honourable Society of the Governor and Assistants of London, of the New Plantation in Ulster, within the Realm of Ireland, Commonly Called the Irish Society* (London: G. Bleaden, 1842).

²⁸¹ Claire Lamont, ‘The Romantic Period (1780-1830)’ in *An Outline of English Literature*, ed. Pat Rogers (Oxford: Oxford University Press, 1992): 265, citing Coleridge’s *Biographia Literaria*, which, somewhat incidentally, was present in the General Assembly Library.

Court to individualize their titles, at least prior to any purchase, although he suggested that Māori sellers could be punished for fraud if they validated the European purchaser's title without bringing all the interested Māori sellers before the court. Some of the implications of this system can be evaluated. In an era of direct Māori-settler purchase, a basic requirement of honesty on the part of the communal sellers would have been reasonable. In the era of Crown purchases it was reasonable to put a large proportion of responsibility on the Crown to ascertain the seller's right to sell, as this was at least an implied feature of a system of Crown pre-emption and Native protectionism. Furthermore, Crown purchase agents were appointed based on expertise in Māori land tenure, so a more rigorous purchase process could be expected. It would be unreasonable, however, to have expected the average settler to understand the complexities of Māori tenure. In the absence of fraud or actual knowledge of irregularities in the purchase on their part, their purchase would be secure provided it was 'substantiated by Māori evidence' (as with the Old Land Claims Court process). This evaluation of FitzGerald's alternative system demonstrates that FitzGerald had thought through some of its implications. He also made the crucial point that this process would be to recognize that Māori had a valid private title in land which they could alienate privately. Such recognition would be inconsistent with the situation pertaining to Māori land after the Treaty of Waitangi in which the Crown had the pre-emptive right. It might also be inconsistent with his earlier point that Māori typically had no title to their unoccupied lands, assuming he was including waste-lands within the lands that Māori might privately alienate. If this was the case, then recognition of a private title in all lands (whether unoccupied or not) would be to contradict the basic stadial picture of 'savage' land title.

As part of this same argument, FitzGerald likened Māori to 'a race of Irish landlords' with whom the British Parliament had to deal. Fox interjected 'not a race', to which FitzGerald replied, 'well, I think I could show that they were almost a distinct race'. The contemporary relevance of this 'race' language will shortly be discussed, but FitzGerald's immediate point was that the process of

ascertaining the title of the Irish landlords through the relevant court increased the value of the land.²⁸² In similar fashion, the confirmation of Native title and the disposal by Natives of a portion of their estate to the colonists would increase the value of the estate they retained. This was a rationale for the proposal to use the Old Land Claims Court (pre-Treaty) process of direct Native-settler transactions and dispensing with Crown purchase. By this method would the ‘nagging’ at the Natives for their lands cease and Māori would perceive the advantages to be derived from selling a portion of their lands, hence ‘throw[ing] into the market...at market prices [more land] than you will have people to buy’.²⁸³ FitzGerald here employed the language of the free market, which had assumed prominence in Victorian Britain especially since the earlier debates concerning the Corn Laws and the relaxing of import restrictions on foreign goods. Political economy is also relevant to this discussion as well. An earlier Mercantilist theory which lasted into the nineteenth century had equated wealth with the amount of gold or money accumulated within the nation. Hence, on this model, exports were viewed positively because they would bring in money, whereas imports were viewed negatively because they would dissipate money. By the time John Stuart Mill published his *Political Economy* in 1848, this theory had been overturned and wealth became identified with many more things including actual physical resources and goods. Moreover, the free flow of capital and labour was seen as facilitating the growth of wealth.²⁸⁴ FitzGerald’s explanation shares in this thinking, as the sale of some Māori land – presumably to industrious neighbour settlers – would increase the value of the land not sold (that is, by trading their capital they would increase the capital value of the lands retained). In addition, in this open market place, Māori would be able to determine price, and perhaps what those buyers intended to do with the land, more fully. FitzGerald’s proposals

²⁸² Although Lord John Russell’s original conception in 1848, that the Irish themselves would profit by the operation of the Encumbered Estates Court, did not take place. See ‘Irish Encumbered Estates Papers’ (Crown, 2007).

²⁸³ *NZPD* (1861-63): 492.

²⁸⁴ See Mill, *Principles of Political Economy with Some of Their Applications to Social Philosophy*

represented an overturning of the protectionist (and paternalist) policies associated with Crown pre-emption, wherein the Crown would purchase territories and then determine the selling price to settlers (or capitalists).²⁸⁵

English ‘Political’ Civilization and Irish ‘Social’ Civilization

This discussion shows how FitzGerald had recourse to recent Irish political history to assist explanation of a Native policy proposal. His comparison between a ‘race’ of ‘Irish landlords’ and their Māori equivalents, suggests that when FitzGerald looked at Māori society he perceived its ‘aristocratic’ structure as its most significant aspect. It is possible to suggest that FitzGerald saw the Māori ‘nobility’ as ‘landlords’, although to apply a rigid feudal metaphor would be going too far. The use of ‘race’ has definite connotations of national character or nationality, concepts FitzGerald had already used in his parallels between Māori and Saxon and Celtic characters.²⁸⁶ Here, he emphasized the connection between retaining land holdings (the ‘Land Leagues’) and preserving their ‘race’ or nationality. This linked back to his recommendations for abandoning the Crown purchase system and using the Old Land Claims Court to confirm Native title; by revolutionising the land purchase system in this way the value of the estates retained by the Natives would increase. In the same way the estates of the ‘race of Irish landlords’ had become more valuable. Prior to that, stated FitzGerald, the Irish landlords ‘were possessed of the soil of Ireland’ but ‘were too poor to be able to use it profitably’. One of the principle reasons for this, he implied, was that ‘the proprietor of the soil had a difficulty in making out a title to his land’.²⁸⁷ FitzGerald could have meant a number of things by this, one being that since the Irish landlords could not accurately define the title to their lands they could not sell portions of it and so reduce the debts relating to the remaining portion. Another interpretation is that the process of actually defining title enabled the land

²⁸⁵ See n. 238 and following.

²⁸⁶ See chp 2, especially n. 215 and following.

²⁸⁷ *NZPD* (1861-63): 492.

to be more productively utilized, perhaps because it enabled the proprietor to acquire development loans more easily. Whatever FitzGerald's meaning, the result of this process was clearly stated: it increased the value of the land, or made it more profitable, so that the poor-rates paid by the Irish landlords dropped to below those paid in England.²⁸⁸ On another level FitzGerald's discussion reflects general aspects of the British-Irish relationship and the conception of race or nationality involved in it. These have already been discussed in chapter two relating to the earlier portions of FitzGerald's 1862 speech.

Some further cultural meanings embedded in these Irish references can be elaborated. Lord Acton had written in the same year, in his review of Goldwin Smith's *Irish History*, that history was made by the 'active' races, the Saxons being one, along with the Romans, the Greeks, and the Persians. Races such as the Celts, the Chinese, and the 'Hindoos' were the 'passive' races. This did not mean that the Saxons were any more cultivated than the Celts in terms of literature, religion and culture generally. But it meant that the distinguishing feature of the Saxons, Romans, and others was their superiority at government or legal administration. This capability enabled them to mobilize the otherwise inert cultural resources of the Celtic and other races by advancing their institutions of government or state. Acton stated confidently from his understanding of history:

Subjection to a people of a higher capacity for government is of itself no misfortune; and it is to most countries the condition of their political advancement. The Greeks were more highly cultivated than the Romans, the Gauls than the Franks; yet in both cases the higher political intelligence prevailed.²⁸⁹

There are definite similarities here with Mill's distinction between civilization in the broad sense of cultural cultivation, and the narrow sense of the development

²⁸⁸ Ibid: 492.

²⁸⁹ Lord Acton, 'Mr. Goldwin Smith's *Irish History*' .

of political freedoms and economic productive capacities.²⁹⁰ In Lord Acton's words, the Saxon race had the capacity for 'political civilization', and it was the capacity for 'political' rather than 'social' civilization that was the defining feature of the history-making races. The Celtic race might have 'social' civilization but, as with the French, they were unable to derive a constitution that ensured true freedoms and liberty.²⁹¹ FitzGerald shared in this discourse when he spoke in terms of what 'we' (that is, the British/English) did for the Irish landlords. He was saying in effect that Britain made them wealthy by applying superior legal administration to their land titles. This method, he implied, would show the Māori 'race' that there was no particular reason to maintain the Land Leagues. Their race would be preserved because their lands would be preserved and made more valuable.²⁹² FitzGerald's answer was to give Māori 'our nationality' or 'our political and social organization'; in Acton's words, 'our political civilization'.²⁹³

There were further complexities involved in the idea of giving Māori 'our nationality'. FitzGerald had approved of the Māori 'pining for nationality', but had also reminded his listeners that the attainment of nationality took considerable 'pain and labour' before a nation could be 'born into the world'. He warned his fellow parliamentarians that as this organic Māori nation was growing they must consider 'how to give him [the Māori] political institutions which you fancy are suited to his present condition' when that condition was 'rapidly passing into another'. They would never again 'make the Māori what he was before this King Movement'. It was implied that Māori had been gaining a political education from the colonists and their society. There was a warning to Māori in this passage: they must understand what was involved in fashioning a 'perfect nation'. There was likewise a cautionary note to FitzGerald's colleagues: make sure the institutions fashioned for Māori were suited to their actual state. The phrase 'political

²⁹⁰ See n. 208.

²⁹¹ Lord Acton, 'Mr. Goldwin Smith's *Irish History*' .

²⁹² *NZPD* (1861-63): 491-92.

²⁹³ *Ibid*: 489.

education' recalls the discussion in chapter one concerning Richmond's conception of Native juries as having functions both educational and political.²⁹⁴

Lord Acton used very similar words:

A nation can obtain political education only by dependence on another. Art, literature, and science may be communicated by the conquered to the conqueror; but government can be taught only by governing, therefore only by the governors; politics can only be learnt in this school.²⁹⁵

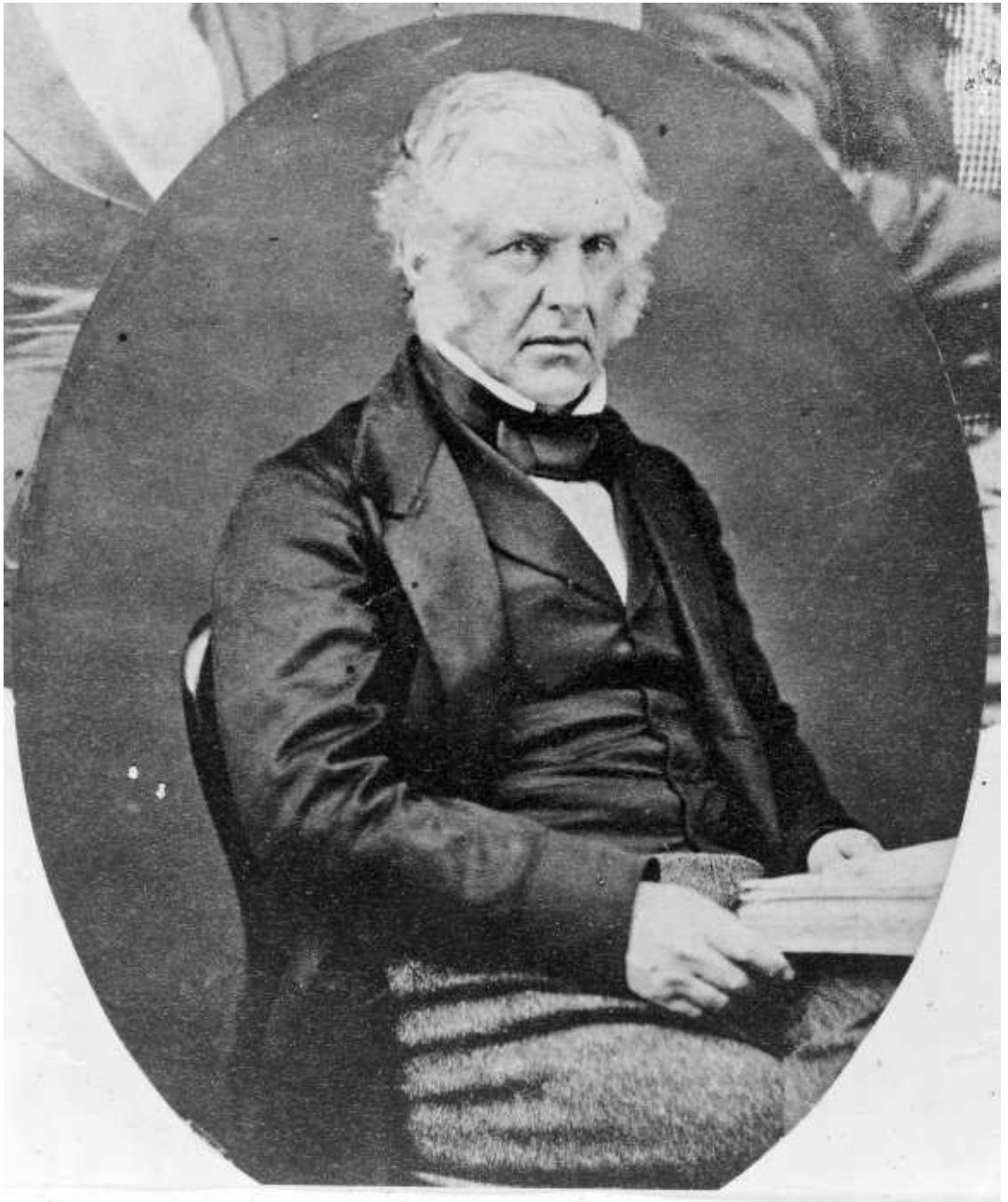
It was the 'political education' involved in being incorporated within the new colonial nation, which served as FitzGerald's answer to the King Movement. This new nation already possessed the structures of law and government implied by the word nation, or perhaps possessed the resources of such from its British inheritance. Perhaps FitzGerald was saying, applying Acton's historical analysis, that it would be far better for Māori to accept this British nationality than attempt to construct their own from their own cultural resources or by borrowing from the colonists. The British Anglo-Saxons understood nation and nationality. Their history was that of the growth of nationhood. Kerry Howe has commented that because Māori society had no centralized leadership or government, this allowed the British to argue that they needed 'imperial guidance, protection and regulation'.²⁹⁶ This statement could be generally applied to imperial or colonial perceptions. But it is possible to go further and make the connection between the way British legislators saw themselves as sharing in – even being at the pinnacle of – 'political civilization', with the cultural and historical inheritance to make them capable of building new nations in a way that other peoples were not capable.

²⁹⁴ See n. 142 and following.

²⁹⁵ Lord Acton, 'Mr. Goldwin Smith's *Irish History*' .

²⁹⁶ Howe, 'Two Worlds?': 53.

The commentary in this chapter on FitzGerald's vision for Native land policy shows how the different languages or thought traditions could be employed in a variety of ways to suit the political purpose. Chapter three showed how political economy, at least the J. S. Mill version, could be used to justify a Crown-led systematic colonization and how that was also explained in the stadial terms of centralized commercial settlements. This chapter shows how FitzGerald used the language of the private free market, among other resources, in arguing for the desirability of direct settler purchase. FitzGerald also made the point that a direct settler purchase system involved recognizing Māori title to land contained in private transactions. This inverted the stadial or Vattelian criteria, which recognised title in 'savage' or 'barbarian' tribes only for land they actually occupied or cultivated. So while political economy and stadial history supported government-led colonization, other considerations of political economy helped to explain a free-market system of land alienation, even if this involved the conclusion that Māori actually had title to 'waste' lands. While this might appear inconsistent and show that political languages were merely political means subordinated to political ends, that was not the case. The intellectual resources of political economy could be used to justify quite different political purposes without doing violence to the tradition. Political economy (and even the rigid 'four stages' version of stadial history), was not determinative of policy. It was capable of generating more than one policy position.



5. Sewell's 1862 Speech: *The Peaceful Mission of Colonization & British Empire*

'In fulfilling the work of colonization we are fulfilling one of our appointed tasks. It is our duty to bring the waste places of the earth into cultivation, to improve and people them. It was the law laid upon our first parents – to be fruitful and multiply, and replenish the earth and subdue it – to the restore the wilderness to its original gardenlike condition.'

Henry Sewell (9 Sept 1862).²⁹⁷

'England in the moment of her greatest weakness impressed the conviction of her inherent strength upon the Hindoos. Referring to the vengeance taken for the massacre at Kyber Pass, and to the terrible but triumphant struggle in the Punjab, he [Richardson] said by the lesson England had there taught her enemies – a lesson not easy to forget – she established her Empire.'

Major John Richardson (23 July 1862).²⁹⁸

Finding a Way through the 'Labyrinth'

Henry Sewell,²⁹⁹ along with many of his contemporaries, considered the purchase of Māori lands among the most difficult issues of colonial policy. In 1855 he recorded privately that it was a 'labyrinth' of competing interests and concerns.

²⁹⁷ *NZPD* (1861-63): 690.

²⁹⁸ *Ibid*: 429.

²⁹⁹ Henry Sewell (1807 – 1879) was born on the Isle of Wight, England. After attending Hyde Abbey, a fashionable preparatory school, he followed his father into the legal profession, serving articles to become a solicitor about 1836. The Sewell family were strong Anglicans and regarded highly literary pursuits. Sewell became an official in the Canterbury Association and arrived in New Zealand himself in 1853; he was critically involved in extricating the Association from financial debt. He became one of the first three Members of the 'unresponsible' (or unofficial) Ministry in 1854. He became New Zealand's first premier in the first 'responsible' Ministry for a brief period of two weeks in 1856. He was a moderate in Native affairs, disliking the use of force against Maori. He left a detailed journal, which candidly describes the settler and political life of the colony. With his wife he was a committed Anglican parishioner. See W. David McIntyre, 'Sewell, Henry 1807 - 1879' in *DNZB* (1990); and McIntyre, ed., *The Journal of Henry Sewell 1853-7*. .

Direct settler purchase was supported by the ‘Land-sharking Interest’; however Crown pre-emption following the Treaty (entailing the absolute prohibition on private purchases) brought problems of its own, in particular that the purchase fund was insufficient. In Sewell’s view, George Grey did not institute any real system of Crown purchase, which left many issues unresolved.³⁰⁰

Sewell’s 1862 speech addressed the Domett Ministry’s Native Lands Bill.³⁰¹ In it he emphasized the Bill’s departure from Crown pre-emption, involving a variation of the terms of the Treaty of Waitangi. Sewell stated: ‘as a measure of policy it is a perfectly novel experiment in the history of our dealings for land with barbarous or semi-barbarous races, and an abandonment of rules applicable to the disposal of waste lands hitherto recognized as fundamental principles of colonization’.³⁰² Although all principles and theories of ‘systematic colonization’ would be set aside by the legislation, Sewell felt compelled to support the Bill because of the absolute necessity to settle Māori rights to land and enable colonization to continue.

The imperial and colonial contexts of the Native Lands Bill were significant. Shortly before the Bill was presented, the House had adopted an Address to Her Majesty which in part constituted a protest against the Duke of Newcastle’s despatch of 26 May 1862. The despatch had essentially relinquished Crown control of Native affairs to the Colonial Government on the basis that the British Government no longer possessed the power to practically benefit Māori: ‘the endeavour to keep the management of the Natives under the control of the Home Government has failed’. He also said that he could not guarantee for how long a large military force could be stationed in the colony and indicated that the colony would (of necessity) and should be taking greater responsibility for the defence of its own colonists’ property, rather than the British taxpayer. This sent shock

³⁰⁰ McIntyre, ed., *The Journal of Henry Sewell 1853-7.*: 169-71.

³⁰¹ The first Native Lands Bill 1862 was initiated by the Fox Ministry, see *NZPD* (1861-63): 421-426; Sewell drafted this Bill, as he stated in the speech that is the focus of this chapter.

³⁰² *NZPD* (1861-63): 687.

waves through the colony. The Address adopted by the House interpreted this despatch as a wish to extricate the Crown from responsibility for Native affairs and not pay the costs (particularly military) of resolving New Zealand's internal strife. The House also implied that the Crown's control and management of Native affairs had led to these dilemmas, rather than anything the settlers had done.³⁰³ Sewell referred to this context in the opening portion of his speech. Somewhat contrary to the message of the House's general response to Newcastle's despatch, Sewell stated that it was 'the duty and the interest of the colony fully and frankly to accept the responsibility cast upon it by the Duke of Newcastle's despatch'.³⁰⁴ On the other hand, he was firmly of the opinion that the Bill should be reserved for the assent of the Home Government.³⁰⁵

Thus, in general terms, the relationship between Crown and colony and the Crown's attempt up until that time to protect an indigenous population from the worst excesses of colonization, formed part of the background to the debates in the General Assembly concerning the Native Lands Bill. The Bill was presented to the House only six days after the Address to Her Majesty was adopted. It represented the beginnings of a definite break in the relationship between the Crown and New Zealand, the Colonial Government attempting to obtain a firmer grip on Native affairs, even though it was at the same time attempting to hold the Crown responsible for the military costs of the land wars. Although the settlers' interests in obtaining land and progressing colonization could be clearly observed in this Bill, the debates on it reflected varying opinions and rationales for and against the setting aside of Crown pre-emption. It was not simply a question of systematic colonizers (and perhaps 'Philo-Māoris')³⁰⁶ versus free-marketers and 'land-sharks'. The subject was contestable. The issues were most clearly set out

³⁰³ *Nelson Examiner*, 9 Sept 1862.

³⁰⁴ *NZPD* (1861-63): 687.

³⁰⁵ *Ibid*: 691.

³⁰⁶ See the *Nelson Examiner*, 3 Sept 1862, for a use of the term 'Philo-Maori' applied to those ten Members who voted against the second reading of the Native Lands Bill in the House (composed of seven Wellington and 3 Auckland members).

by Sewell, hence the following focus on his speech in the Legislative Council.³⁰⁷ Although there were clear majorities in favour of the Bill, the divisions show that the mood was not all one way. The House divided on the second reading 27 to 10;³⁰⁸ the Legislative Council eight to four.³⁰⁹

Sewell believed the draft Bill to be imperfect, but was willing to vote for the second reading because he believed the basic principle was sound and the need for resolution pressing. He adopted this stance even though the Bill was contrary to the ‘fundamental principle’ of systematic colonization (whereby the Crown acquired land by ‘cession’ and alienated it to settlers), the Treaty of Waitangi’s principle of pre-emption, and the Constitution Act (s73). He stated that any legislation regarding Native land was under the jurisdiction of Her Majesty’s prerogative, as it was she to whom sovereignty had been ceded under the Treaty. Any dealings with Māori over ‘waste’ lands were likewise an executive act of the Queen.³¹⁰ Hence also, the creation of courts regarding such land Sewell saw as within the jurisdiction of Her Majesty’s prerogative power.³¹¹ In Sewell’s conception any issues relating to Māori land were intimately connected with the Treaty. Both were within the sphere of the Crown and involved the exercise of executive power. Native land was not a matter of domestic law so much as international law, a matter between the Crown and the nations it had treated with. Similar international law notions were expressed in the *Wi Parata* judgment of 1877, where the domestic courts were viewed as not able to recognize Native tenure, although that judgment was embedded in a more rigid positivist framework unable to recognise any form of customary law or treaty-making ability in tribal groups.³¹²

³⁰⁷ For Sewell’s full speech on the Bill’s second reading in the Legislative Council, see *NZPD* (1861-63): 686-691.

³⁰⁸ *Ibid*: 654.

³⁰⁹ *Ibid*: 695.

³¹⁰ *Ibid*: 687.

³¹¹ *Ibid*: 688.

³¹² See Grant Morris, ‘James Prendergast and the Treaty of Waitangi: Judicial Attitudes to the Treaty During the Latter Half of the Nineteenth Century’, *Victoria University of Wellington Law*

It is evident from Sewell's speech that he was convinced of the propriety of Crown, or systematic, colonization. He referred to his failed efforts to convince the Government to embark on new attempts at Crown purchase in 1859 and 1860.³¹³ He believed that 'well-devised plans of systematic colonization' might well have succeeded in 'opening the country for colonization without violence'. However, the Taranaki war had changed the circumstances that might have made such plans possible. The war had 'altered the relations between the two races, and thrown up a barrier between them'. The Land Leagues and King Movement had put up impassable lines to colonization. It was in these new circumstances that Sewell felt compelled to lay aside, for the present at least, all theories of systematic colonization. This impasse had to be overcome if colonization was to continue and if even greater calamities were to be avoided.³¹⁴ Sewell continued to hope that the reconciliation of this impasse would be peaceful.³¹⁵ Other Members who supported the Bill were not so committed to the principles of systematic colonization. Alfred Domett stated that 'Pre-emption was one thing, sole emption quite another', indicating that Crown pre-emption meant simply a right of first refusal.³¹⁶ In Domett's speech, this was a bald statement without any reasoning surrounding it. Hugh Carleton, however, provided some historical justification for the same view. He stated that a right of first refusal was how pre-emption was explained to Māori at signing of the Treaty of Waitangi: 'The word was of common use in the United States, hardly known in England; and it was according to the ordinary use that it must be interpreted'.³¹⁷ Sewell would have considered this explanation unorthodox. It did not form part of reasons for his assent to the

Review 4 (2004): para 34; McHugh, *Aboriginal Societies and the Common Law. A History of Sovereignty, Status, and Self-Determination*: 149-52, 66-73.

³¹³ One of Sewell's proposals (which made considerable provision for Maori within new Crown settlements) was appended to a memorandum dated 2 July 1859 of Gore Browne to the Home Government, see *AJHR* (1860): E – No.1: 20-21.

³¹⁴ *NZPD* (1861-63): 691.

³¹⁵ *Ibid*: 690.

³¹⁶ *Ibid*: 650-51.

³¹⁷ *Ibid*: 620.

Bill's second reading, as it did for Domett and Carleton. This alone demonstrates the variety of rationale given in support of the Bill.

Land, Law and Civilization

Sewell canvassed to some considerable degree the challenges presented to colonial government and society by the Māori tenure system. He stated: 'No community, civilised or barbarous, can settle down into a state of order and law without a settlement of their rights to land. Land is the foundation on which every organized political system is based.' In Sewell's conception, settling Native land rights was intimately bound up with 'the work of educating, civilizing, and governing' the Natives.³¹⁸ As such, Sewell's argument, like C. W. Richmond's,³¹⁹ was centred on the role of law as a means of civilization or, as he put it, 'reducing their social condition into order' and 'effectually planting among them civil institutions'. In this same passage, however, Sewell was at pains to argue that the Native Territorial Rights Bill of 1858 (Richmond's measure) would not have accomplished the aim of determining Native property rights. Rather it proposed the creation of 'a sort of hybrid title' in the form of certificates to Native lands – 'a title neither British nor Māori'.³²⁰ Sewell believed that for Native title to have a legal status recognized by the colony's courts then it would have to be a title founded on Crown grant. He believed that Native title was simply too complex to be comprehended by courts used to dealing with English law. Rights of property were inseparable from its duties and liabilities and to confer on Māori a legal title not British but Māori would necessarily involve the courts attempting recognition of obligations pertaining to Māori society. In Sewell's view, this process might embroil the courts in land disputes that would entail political difficulties for the Government.³²¹ He was firmly of the view that settling Māori property rights involved conferring a British title on Māori. To do anything else, as Richmond's

³¹⁸ Ibid: 689.

³¹⁹ See chaps 1 and 3.

³²⁰ *NZPD* (1861-63): 689.

³²¹ Ibid: 688.

Territorial Rights Bill had done, would be to further postpone the ‘evil day’ when ‘some system for determining the rights of Natives to their land’ would have to be originated.³²² This discussion demonstrates that Sewell perceived complexity in Māori land tenure and in the issues it presented for the colonists’ legal system. It also shows, by the way in which Sewell contrasted his view with Richmond’s legislation, how two well trained legal minds could prescribe different remedies for the same policy problem.

Sewell continued his address by arguing that the obligation to introduce law and government among Māori was based on the engagements entered into by the Treaty of Waitangi. By the Treaty, the Crown bound itself to assume sovereignty and carry out the duties of a Sovereign, and to protect the land rights of Māori. He articulated the *contra proferentem* rule of contract or Treaty interpretation (‘[v]erba fortius accipiuntur contra proferentum’), inverting the argument of those who said the Treaty could be ignored because it was ‘a device to amuse savages’. On the contrary, said Sewell, it was Māori who could legitimately ignore it because it was a British document and they may not have clearly understood its import. His conclusion was that: ‘We at least are estopped from repudiating its undertakings.’³²³

McHugh has written that British treaty-making throughout the eighteenth century and well into the nineteenth was consistent with Vattel’s theories. If a state had some system of internal self-government then it qualified as a sovereign body and had the right to self-government without interference. Rights of government of

³²² Ibid: 689.

³²³ Ibid: 689. The doctrine of estoppel is a contractual or commercial law concept closely related to *contra proferentem*; in essence it means the party making a representation or promise upon which the opposite party relies to its detriment cannot later resile from that representation or promise. *Contra proferentem* is today usually understood as a rule of contract interpretation, whereby if the party ‘proffering’ or putting forward the contract asserts that a clause means X and the other party asserts that Y is meant, then the conflict is resolved by preferring Y (in a situation where the natural and ordinary meaning of the words used is capable of more than one interpretation). Sewell, however, seems to be using *contra proferentem* to mean essentially the same thing as estoppel: that the party proffering the contract may not later refuse to perform it (rather than as a rule of interpretation).

one nation over another were based on consent. The Treaty reflected this conception. It contrasts with the later positivist view expressed in *Wi Parata*.³²⁴ McHugh also points out how the Treaty used the language of English property or contract law and suggests that this, despite the absence of legal training in the drafters, reflected a ‘deep-seated’ intellectual tradition ‘instilled into all educated Englishmen’. This was the tradition identified by Burke, who pointed out how Englishmen were inclined to describe their civil rights in the terminology of property rights – as contractual rights or, more usually, land rights.³²⁵ International law conceptions also emphasized property relations in dealings between nations or sovereigns.³²⁶ Sewell still reflected this basic concern or preoccupation some twenty years later. Rights of property were paramount in his definition of the rights ensured to Māori by the Treaty. He also identified ‘the duties flowing from the relation between Sovereign and people’, but did not describe in any detail the nature of this relationship and its associated duties. These appeared to meld into the central duty to protect the subject’s property rights, rather than being separately defined.³²⁷ It is probable Sewell had in mind the Lockean contractual tradition of government by consent of the governed. This was, in fact, a concomitant of the understanding of civil rights as property rights: the subjects promised to obey the Sovereign and in return the Sovereign promised to protect the liberty of their persons and their property.³²⁸

Providence and Political Economy

Continuing his argument, Sewell said that the Crown or Government had respected Native land rights in that they had never attempted to take their lands except through ‘voluntary cession’. However, they had failed to make Native land

³²⁴ See n. 312.

³²⁵ McHugh, *The Maori Magna Carta. New Zealand Law and the Treaty of Waitangi*: 36-38.

³²⁶ See book I (chap 21) and book II, of Emmerich de Vattel, *The Law of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns*, ed. Joseph Chitty (Philadelphia: T. & J. W. Johnson & Co., 1883).

³²⁷ *NZPD* (1861-63): 689

³²⁸ McHugh, *The Maori Magna Carta. New Zealand Law and the Treaty of Waitangi* : 33-39.

part of the Crown system, that is to say, ‘we never regarded these land rights as part of that political system which the Crown, by its assumption of sovereignty, bound itself to organize for and amongst them’.³²⁹ Having made these arguments, Sewell referred to ‘Her Majesty’s exclusive right of pre-emption’ as the ‘law of colonization’, by which the ends of land purchase and settlement were attained. Sewell continued: ‘I see, with some regret, all our old doctrines on that subject thrown overboard by gentlemen zealous for the rights of the Natives, and who, I think, push them to a preposterous extreme.’³³⁰

Sewell then brought to the House an extended argument concerning the unoccupied lands of the colony:

In fulfilling the work of colonization we are fulfilling one of our appointed tasks. It is our duty to bring the waste places of the earth into cultivation, to improve and people them. It was the law laid upon our first parents – to be fruitful and multiply, and replenish the earth and subdue it – to restore the wilderness to its original gardenlike condition. As [a] matter of abstract theory, I utterly deny that the lands of these favoured Islands were meant by Providence to be retained in a state of waste.... I deny that, in the sense of any inherent right, this people can maintain their exclusive title to forests and plains which they never trod, and mountains, teeming probably with unlimited store of wealth, which it may be they never have seen.³³¹

Sewell’s arguments can be compared with those of J. C. Richmond and Alfred Domett, who had both cited the authority of Vattel and Thomas Arnold for the

³²⁹ *NZPD* (1861-63): 689.

³³⁰ *Ibid*: 689-90. From the comments analysed in the next paragraph, Sewell may have been referring to the Anglican divines, in particular Selwyn, Martin and Hadfield, who argued against a purchase regime that recognized individual rights above tribal or chiefly rights. Another interpretation of Sewell’s comments, however, is that he was criticising those settler politicians who wanted to abolish Crown pre-emption under the pretext that Maori rights to sell property would then be acknowledged (by the direct purchase regime); by contrast Sewell appeared reluctant to give up pre-emption and argued that Maori rights were ultimately limited, as the following paragraphs illustrate (though see also on this point, n. 267 and 339).

³³¹ *Ibid*: 690.

theory that only labour expended on land constituted a right of property in that land.³³² Sewell's comments can be construed as also sharing in this Vattelian (or Lockean) argument. Vattel had stated:

Those who still pursue this idle mode of life [living as hunters or pastoralists], usurp more extensive territories than, with a reasonable share of labour, they would have occasion for, and have, therefore, no reason to complain, if other nations, more industrious and too closely confined, come to take possession of a part of those lands.

Vattel was arguing that cultivation of the soil was a natural obligation because, apart from its beneficial productive effects, the world was not capable of sustaining its population without it (hunting and pastoral modes using too great an extent of land area). A consequence of this supposition was that if a nation could not supply the necessities of life from cultivating its available land, then it was considered just for it to 'enlarge its boundaries' in order to do so. Vattel condemned the 'ancient Germans' and 'some modern Tartars' who irresponsibly did not cultivate their fertile countries but lived by 'plunder'; they deserved, he said, to be 'extirpated as savage and pernicious beasts'.³³³

Although Sewell's argument clearly shared this labour or cultivation theory of property rights, he does not argue explicitly from necessity. The major contrast with Vattel's language, however, is that Sewell based his argument on divine command rather than natural obligation. It was articulated using theological references, in addition to Vattel's secular reasoning. Sewell identified British colonization with the divine mission of Adam and Eve, understanding this as the work of restoring the earth from a condition of wilderness and waste to one alike to the Garden of Eden. Sewell's view, that Māori could not maintain any inherent right to these places they neither used nor cultivated, bears the impression of a

³³² Ibid: 630 (J. C. Richmond) and 648-49 (Domett).

³³³ Vattel, *The Law of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns*: paras 77 and 81 (book I). See also paras 86-87 (book II).

moral judgment, as they would be opposing the divine ‘law’ of cultivation. It is possible to doubt the authenticity of Sewell’s use of Biblical imagery and say that it was mere artifice, that he was really sourcing these arguments from Vattel (he did after all refer to his argument as ‘a matter of abstract theory’).³³⁴ What is clear is that Sewell was clearly drawing on a number of language traditions, including most probably Vattel and stadial history.³³⁵ At the same time, he was ostensibly drawing on Biblical authority. This was not a monochrome picture.³³⁶

Another contrast between Sewell and J. C. Richmond was that Sewell did not turn the argument for limited Māori title into an argument that the British Government could simply have taken possession of New Zealand without regard to the prior occupation of Māori.³³⁷ Sewell was quite clear that although in the larger scheme of things he believed Māori could not maintain an exclusive right to the wastelands, that did not mean the lands could simply be taken from them, for the Treaty guaranteed Māori rights.³³⁸ There was an ambiguity in the theory of systematic colonization as to whether it necessarily involved accepting that tribal societies possessed property rights to the ‘waste’, or whether the Crown only had to purchase from them the lands they actually occupied (and assume possession of the remainder). In New Zealand a vigorous debate on this issue followed the

³³⁴ Acts 17:26 (Authorized Version) stated: ‘And [He] hath made of one blood all nations of men for to dwell on all the face of the earth, and hath determined the times before appointed, and the bounds of their habitation’. Any contemporary discussions of this verse would make for a fascinating comparison with Sewell’s argument drawn (ostensibly) from Genesis.

³³⁵ See also n. 345.

³³⁶ If Sewell was responding to Selwyn and others, then his allusion to Biblical authority may have been designed to counteract their arguments. He may also have wanted to appeal to a wider settler audience. The influence of British Protestantism, while not the focus of this thesis, can be seen intertwined with other discourses, notably in FitzGerald’s identification of the Maori adoption of Christianity as an important cause of change in Maori society and his specific use of humanitarian and Biblical references in his call for a peaceful policy in 1862. It can also be identified in Sewell’s notions of circumscribed Maori land rights based on biblical arguments concerning the higher value of cultivation. The influence of British Protestantism generally on conceptions of society and civility and in turn on Native policy, together with more specific analysis of religious allegiances amongst New Zealand parliamentarians, would be a subject capable of sustaining further research.

³³⁷ See *NZPD* (1861-63): 630 for Richmond’s views.

³³⁸ *Ibid*: 690.

arrival of Earl Grey's 1846 instructions to Governor Grey, in which Earl Grey had relied on the authority of Thomas Arnold concerning the labour theory of land.³³⁹

Although more theological in tone than J. C. Richmond or Domett, Sewell's speech can also be interpreted through the 'secular' lenses of political economy. Mill had this to say in his *Political Economy*:

To appreciate the benefits of Colonization, it should be considered in its relation, not to a single country, but to the collective economical interests of the human race. The question is in general treated too exclusively as one of distribution; of relieving one labour-market and supplying another. It is this, but it is also a question of production, *and of the most efficient employment of the productive resources of the world* [emphasis added].³⁴⁰

Edward Gibbon Wakefield had in fact quoted this passage from Mill in his *Art of Colonization* in 1849.³⁴¹ Mill had cited Wakefield the previous year.³⁴² This cross-fertilization of ideas demonstrates the close interrelations of people and ideas in the intellectual milieu of early to mid Victorian Britain. Sewell, of course, was directly involved with Wakefield in relation to the Canterbury Association's project for the systematic colonization of Canterbury.³⁴³

The science of political economy was concerned with investigating the nature of wealth and its origins. In the passage quoted above, Mill saw colonization as a way of maximising wealth by efficiently employing the world's 'productive resources'. Sewell spoke forcefully of the 'rights and duties of colonization'; rights and duties involving the improvement, peopling and replenishing of the

³³⁹ See this debate referred to at n. 267.

³⁴⁰ Mill, *Principles of Political Economy with Some of Their Applications to Social Philosophy*: 623.

³⁴¹ Wakefield, *A View of the Art of Colonization, with Present Reference to the British Empire; in Letters between a Statesman and a Colonist*: 93.

³⁴² See Miles Fairburn, 'Wakefield, Edward Gibbon 1796 - 1862' in *DNZB* (1990).

³⁴³ See McIntyre, 'Sewell, Henry 1807 - 1879' .

earth. There was, in both their conceptions, a universality of application: the mission of cultivation concerned the whole world.

Mill, in this same discussion in *Political Economy*, related colonization to civilization, saying that ‘the question of government intervention in the work of Colonization involved the future and permanent interests of civilization itself, and far outstretches the comparatively narrow limits of purely economical considerations’.³⁴⁴ Sewell also identified the work of colonization with that of civilization: the lands of New Zealand should not ‘be rendered for ever inaccessible to civilization and forbidden to the use of man by an imaginary title vested in fifty or sixty thousand semi-barbarous inhabitants scattered thinly over the country in miserable villages in a few scarcely perceptible spots’.³⁴⁵ Civilization was identified with use, cultivation and settlement; by contrast ‘barbarous’ tribes were seen to have a tentative hold on the land and were perceived to use little of it. This imagery also recalls Mill’s discussion at the beginning of *Political Economy* on the progress of societies from savagery to pastoral, agricultural and commercial states.³⁴⁶ Hence, political economy, and stadial history more generally, illuminate some of the intellectual context for Sewell’s comments.

It is difficult to dismiss this material as mere intellectual justification for colonization. The reasoning of political economy and scriptural precedent were normative categories. As for political economy, efficient production was held up as the goal of any civilized commercial society. Mill’s argument for government involvement in colonization came towards the end of a long treatise, in a section where he discussed the limits of the laissez-faire principle.³⁴⁷ Cultivation was seen as a divine command. This is not to say that these arguments, or language

³⁴⁴ Mill, *Principles of Political Economy with Some of Their Applications to Social Philosophy*: 622.

³⁴⁵ *NZPD* (1861-63): 690.

³⁴⁶ See n. 18.

³⁴⁷ See n. 240.

traditions, were not employed in rhetorical ways, although at least with Sewell, rhetorical speech does not appear to have been his primary mode.³⁴⁸

The irony of the Native Lands Bill was that it would confer on Māori a private property right to their lands in their entirety, enabling them to dispose of them on the open market. Sewell, along with many of his contemporaries regarded this as bringing risks of its own. In Sewell's words, the Bill involved 'plac[ing] between fifteen and twenty millions of acres of land in the hands of, and at the disposal of, a people wholly unused to the exercise of such proprietary rights'. However, he was not apprehensive about this because he believed that 'the ordinary laws of social economy' decreed that these lands must fall into the hands of those who could make something of them. As 'an ignorant and barbarous people without capital and without skill' it would be difficult for Māori to make profitable use of their lands. The phrase 'social economy' may have meant something close to political economy, involving as it did considerations of capital and labour resources. These comments implying Māori incapacity to succeed in a new capitalist era were balanced by the comment that, should some Māori succeed in acquiring 'great wealth', colonists should not regard this with jealousy as: 'That [result] will be in future years the best monument we can raise to the justice of our dealings with this people'.³⁴⁹ An article in the *Nelson Examiner* expressed similar views to Sewell's, stating that Māori would be incapable of making use of such large estates, being unused to toil, and that they would rely on the sales of their lands. It advocated the need for control in the way the new regime was implemented, as Sewell had proposed.³⁵⁰ The article also suggested that Māori tribes might wish to perform the same functions as the land boards of the provinces.³⁵¹ This was perhaps influenced by FitzGerald's advocacy (during the debate on the second reading of the Native Lands Bill) of the proposition that district runanga should be responsible for making regulations for the disposal or

³⁴⁸ See n. 323.

³⁴⁹ *NZPD* (1861-63): 691.

³⁵⁰ *Ibid*: 691.

³⁵¹ *Nelson Examiner*, 10 September 1862, (see also 6 September 1862 issue).

leasing of land. He also repeated the proposal of his earlier address in August,³⁵² that the district runanga should be made into a provincial government to that end: ‘The Native lands might then bear the same relation to the runangas as the waste lands of the Crown did to the Provincial Government’.³⁵³ This discussion demonstrates that within the confines of stadial history and political economy, there was a degree of flexibility in the way that a new regime of free market land alienation could be interpreted.

Colony and Empire

The Waitara affair and the first Taranaki war that followed were also an important context for the development of the Native Lands Act. It was felt that there needed to be more orderly and definitive ways of ascertaining Māori title to avoid disputes over land purchases.³⁵⁴ But to what extent did the Taranaki war interact with and influence the discourse context of Native policy-making? With reference to some earlier debates of 1861 the effects of this altered political environment can be observed.

In the House, on 11 June 1861, Francis Jollie moved the Address in Reply to Governor Gore Brown’s speech and a debate followed. In his speech, Jollie employed rather lofty rhyming couplets concerning England’s greatness and the need to establish law and order amongst the Natives. Jollie encouraged the Governor to make sure of colonisation ‘once for all’ by military might. He cited British historical precedent, in a way already quite familiar, except this time in relation to conquest rather than civilization by consent:

³⁵² See chap 4.

³⁵³ *NZPD* (1861-63): 628.

³⁵⁴ See Ward, *An Unsettled History. Treaty Claims in New Zealand Today*: 124, 47-48; and Bryan D. Gilling, ‘Engine of Destruction? An Introduction to the History of the Maori Land Court’, *Victoria University of Wellington Law Review* 24 (1994): 115-39: 123.

...I have no doubt whatever that when we engage in the future struggle, such as in all probability will occur, we shall require something of the fire and energy of Napier in his conquest of Scinde, and, as in the conquest of ancient Britain, the varied genius, the patient endurance, and indomitable valour of Agricola.³⁵⁵

Jollie's speech was opposed by a number of members including William Fox and Dillon Bell, although Bell indicated that ultimately it might be necessary for the Government to enforce the 'supremacy of the Crown', without Māori consent.³⁵⁶

On 19 June 1861, Frederick Weld moved three resolutions with respect to the sovereignty of the Queen and the Taranaki war. He referred in his speech to C. W. Richmond's 1858 Native policy address,³⁵⁷ which he said was an important landmark. Weld remarked that history showed that when men in a 'semi-civilised' state came into contact with a 'superior race', they had to be shown superiority in 'arms' as well as 'arts', otherwise the two races would not merge.³⁵⁸ On 4 July, Josiah Firth expressed a similar notion to Weld, implying that conquest must precede the civilization of Māori. As Firth asserted: 'Never till the British power in these islands became a stern reality would the Māoris receive with any measure of respect the civilisation we might be prepared to offer them'.³⁵⁹

During the same want of confidence debate, some more unfavourable views of Māori were expressed. Reader Wood declared, with reference to the Taranaki war, that the civilized man, because of his 'energy' and 'indomitable

³⁵⁵ *NZPD* (1861-63): 18-20. Agricola (Gnaeus Julius Agricola, AD 39-93) was a Roman general and governor of Britain (77-84 AD). He subdued North Wales, occupied the lowlands of Scotland and overcame the combined Caledonian tribes at Mons Graupius (84 AD). Napier (Lord Robert Conelis Napier, 1810-90) was a British soldier and general who fought in the Sikh Wars of 1845 and 1848 and against the India Mutiny of 1857-58. See Christopher Haigh, ed., *The Cambridge Historical Encyclopedia of Great Britain and Ireland* (London: Cambridge University Press, 1985): 26, 338, 63.

³⁵⁶ *NZPD* (1861-63): 24.

³⁵⁷ Considered in chap 1.

³⁵⁸ *NZPD* (1861-63): 64-68.

³⁵⁹ *Ibid*: 139 (in the context of a want of confidence motion respecting the Stafford Ministry).

perseverance’, must in the long run ‘subdue his savage foe’.³⁶⁰ George O’Rourke was probably articulating the views of a number of members when he said, in the context of discussing the King Movement:

there were dwelling on the same soil two populations locally intermixed, but morally and politically sundered, the one sedulously engaged in the peaceful pursuits of industry, the other marked by that supine indolence and squalid negligence characteristic of an uncivilised race; the one cramped and pinched for land to supply the pressing wants of an increasing population, the other hoarding up, but in no way using, vast tracts of territory – territory which they were unable to enjoy themselves, but now vigilantly guard against those who could.³⁶¹

These sentiments can still be understood as inflexions of stadial views, their tone explained by the context of war and the settler obsession with obtaining land. O’Rourke clearly stated that the races were politically and morally separated, which suggested belief in a race divide, however the characteristics of indolence and not utilizing land were sourced from a stadial picture. A division between the races could still be a temporal one, rather than reflecting immutable racial characteristics. The tone of moral judgment present here was markedly different from most other parliamentary descriptions of Māori at the time. However, it was still a moral and political judgment, not a judgment that embodied a view of biological differentiation.

There is a wider British imperial context in which the expression of moral judgments (Wood and O’Rourke) and the advocacy of conquest (Jollie and Weld) can be understood. The immediate New Zealand context of the first Taranaki war was of primary significance, but other factors also affected the interpretation. Jollie’s speech referred indirectly to the Indian Mutiny, through its reference to Lord Napier. Major John Richardson, during a debate in July 1862, referred

³⁶⁰ Ibid: 133.

³⁶¹ Ibid: 145.

directly to the Mutiny. His life itself was a fair reflection of the variety of contexts present in British Empire at this time, and his language and arguments reflected this experience.³⁶² Richardson stated his view that the elevation of Māori to civilization required both education and punishment, where the latter was deserved. He gave a few instances of his military experience in India, whereupon the reports recorded his statements concerning England establishing its Empire through its suppression of the Mutiny.³⁶³

David Newsome writes that there can be no doubt British Government attitudes hardened after the Sepoy Rebellion (or Indian Mutiny), and relations between the Empire and her subjects 'were never to be quite the same again'.³⁶⁴ In a historiographical survey of British political history, Philip Harling agrees that a 'mid-Victorian break' cannot be doubted, with attitudes to coloured races hardening and the forms of colonial rule over non-whites becoming more authoritarian.³⁶⁵ However, Newsome and Harling take a somewhat different view to scholars such as Catherine Hall who, listing events such as the Indian Rebellion, the 'Māori Wars' of the 1860s, the Fennian 'outrages' of the same decade, and the Jamaican Rebellion and Governor Eyre controversy of 1865 and following, asserts that a relatively benign cultural racism emphasizing familial paternalism 'had been displaced by a harsher racial vocabulary of fixed differences'.³⁶⁶ This suggests an unbridgeable racial (or biological) divide. Similarly to Hall, Jennifer Pitts speaks about earlier stadial ideas becoming racialized in the nineteenth century, such that societies regarded as being at

³⁶² John Richardson was born in Bengal, India, and fought for England in the Afghanistan campaign and the Sikh Wars of the early 1840s. He settled in Otago with his family in 1856. See Bernard John Foster, 'Richardson, Sir John Larkin Cheese' in *An Encyclopaedia of New Zealand*, ed. A. H. McLintock (1966).

³⁶³ See full quote in epigraph of chapter.

³⁶⁴ David Newsome, *The Victorian World Picture. Perceptions and Introspections in an Age of Change* (London: John Murray, 1997): 109.

³⁶⁵ Philip Harling, 'Equipoise Regained? Recent Trends in British Political History, 1790-1867', *The Journal of Modern History* 75 (2003): 890-918: 912.

³⁶⁶ Ibid: 911-12; and see Catherine Hall, *Civilising Subjects. Metropole and Colony in the English Imagination, 1830-1867* (Cambridge: Polity Press, 2002).

‘earlier’ stages of development came to be described as ‘cognitively limited’.³⁶⁷ The language of Wood and O’Rourke (for example) may have taken a dim view of the ‘uncivilized’ man. However this thesis argues, *pace* Hall and Pitts, that while the language of ‘savage’ or ‘barbarian’ may have been employed in a harsher way in the context of the Taranaki and Waikato wars, this language did not reveal a conviction that the races were forever divided by ‘fixed differences’. Where this language was used it remained embedded in a stadial framework of Māori capacity for progress and civilization. Moreover, the referencing of history (rather than science or biology) as a mode of argument did not change, only that which was being referenced: Jollie’s belligerent Agricola and Napier had replaced Richmond’s Saxon courts.

Hence, the emergence from the early 1860s of this more aggressive language of civilization can be explained by the colonial and empire contexts just explored. These contexts together formed the landscape in which Henry Sewell addressed the Legislative Council on the Native Lands Bill. With his forceful articulations of Māori rights guaranteed by the Treaty (although qualified by his statements concerning their ultimate limitations) and by his emphasis on the peaceful acquisition of land from Māori, he was in part responding to the re-emergent language of ‘civilization by conquest’.³⁶⁸ He concluded his address by expressing the concern that control of the colony might fall into the hands of those who might not be disposed to recognize Native rights. These rights can only be denied Māori, said Sewell, ‘at the cost of a deadly struggle between the races’. He did not believe, therefore, that such a ‘fatal impact’ scenario was inevitable, provided Māori rights were secured by wise legislation. But the risks of such an outcome were clearly what Sewell wanted to avoid, and this provided added incentive to

³⁶⁷ Jennifer Pitts, *A Turn to Empire. The Rise of Imperial Liberalism in Britain and France* (Princeton: Princeton University Press, 2005): 8, 20, 21.

³⁶⁸ In many ways he was seeking to retain his earlier emphasis on Maori self-government, or government by consent. For example, in August 1860 he had called on the Stafford-Richmond Ministry to join with him in devising for the Natives institutions, ‘British in their spirit – founded on the principles of self-government, though adapted to their [i.e., Maori] peculiar circumstances’, see *NZPD* (1858-60): 278.

support a measure that departed from systematic colonization principles and which he believed was inadequate in its current form. Sewell fell back on the assurance that the British Government would be allowed to give its imprimatur to the Bill.³⁶⁹

³⁶⁹ *NZPD* (1861-63): 691.

Conclusion

‘The emphasis on history, the progressive purposes immanent in it, and the role of imperial superintendence for realizing those purposes can all be seen as elaborations on the Lockean idea of the need to be educated into reason, and into liberty only thereafter.’

Uday Singh Mehta (1999).³⁷⁰

This thesis has argued that a civilizational perspective was the dominant language with which Members of New Zealand’s General Assembly engaged with Native policy. An almost universally held belief among Britons in the superiority of their society was identified with commercial advancement, political liberties secured by a free constitution, and the ‘enlightenment’ brought by Christianity. This perspective derived from a number of different sources in mid-nineteenth century New Zealand. The Scottish Enlightenment histories of civil society remained an important cultural and intellectual resource. These stadial histories understood alterations in the mode of subsistence, from ‘savage’ hunter-gatherer states through to commercial and industrial modes, as a gradually advancing ‘civility’. A ‘conservative’ or Burkean vision of the British people as the inheritors of a free constitution that secured to them their property rights and personal liberties, further reinforced this conviction.

Stadial and constitutional notions were very much an insular British inheritance (although the Scottish authors were influenced by Continental writers such as Montesquieu). Another important tradition, given some prominence in this thesis, was that of the Saxon. German Romanticism helped to rekindle this interest in the Middle Ages, which was also a reaction to eighteenth century rationalism and the

³⁷⁰ Uday Singh Mehta, *Liberalism and Empire. A Study in Nineteenth-Century British Liberal Thought* (Chicago: University of Chicago Press, 1999): 199.

mechanism of political economy.³⁷¹ Political economy was at least partly derived from stadial history, so it is important to note the ways in which the Saxon vision of an organic English nation modified the stadial picture. British civilization became identified not only with commercial progress and constitutional liberties, but also with the character of Saxon ancestors. Saxon forbears brought with them the disposition to liberty and its earlier legal forms, helping to fashion the British constitution. Civilization was thus partly a national inheritance, that is, not solely the result of external chance factors such as climate, changes in the mode of subsistence, or the development of plough technologies (all to some extent features of stadial history).³⁷²

In New Zealand, Saxonist language in the Native policy debates was still clearly located within a stadial paradigm. Duncan Bell distinguishes between civilizations ‘theorized in either constructivist or essentialist terms; as the products of time, chance, luck, and skill, or alternatively as the result of ingrained biological difference’. Bell essentially agrees with Peter Mandler that constructivist views emphasizing historical ‘dynamism’ or the capacity for societies to change and advance, remained the dominant framework for some time beyond the middle decades of the nineteenth century. In the final decades, Bell indicates that biological or ‘scientific’ racism gained significant ground, without becoming ascendant over the civilizational perspective.³⁷³ In New Zealand, the shift away from the constructs of political economy and conjectural history began to occur in the 1870s, as Darwinian biology gained influence. This new approach was not however simply about demarcating races on biological grounds. Rather, it consisted of far broader and more complex inquiries, often concerned with explaining why Māori were a decreasing or dying race. The narratives combined Darwinian language of ‘the struggle for existence’ with a historical perspective

³⁷¹ Newsome, *The Victorian World Picture. Perceptions and Introspections in an Age of Change*: 178-79. See also nn. 40 to 43.

³⁷² See section entitled ‘Saxonism Applied’ in chap 1.

³⁷³ Duncan S. A. Bell, ‘Empire and International Relations in Victorian Political Thought’, *The Historical Journal* 49 (2006): 281-98: 287-88.

persuaded that all races either die out or give rise to other races. References to Anglo-Saxons and civilization continued, but were set within a more biological or scientific discourse, agreeing with Duncan Bell's terminology.³⁷⁴

Concerning the earlier period of the early to mid 1860s, Philip Harling writes that Mandler has 'convincingly argued' that even the supporters of Governor Eyre in Jamaica, and other apologists for a more authoritarian empire, were basing their imperialism less on notions of biological racism or 'organic nationalism' than on a paternalism that stressed the importance of creating the right conditions for progress. They believed in the unique development of Britain's political institutions, rather than in a unique Anglo-Saxon character, as the source of Britain's civilizational advancement.³⁷⁵ Bell, Harling and Mandler were in part responding to Catherine Hall, Keith McClelland and others, who argue that the 'mid-Victorian break' was more than just a change in tone or emphasis, but that it reflected a new 'harsher racial vocabulary of fixed differences'.³⁷⁶ This thesis aligns with the former group of scholars, but not without some qualification, as Saxonism was an important discourse of Native policy. References to Saxons or Anglo-Saxons in the debates were reasonably infrequent, but when they were used, as by Richmond and FitzGerald, they flavoured the civilizational perspective with a conviction that Saxon virtues had some affect upon the growth of British liberties or prosperity. As early as 1841, Richmond wrote to Maria Richmond comparing Anglo-Saxon and French character, his description exhibiting a consciousness of national difference and the geographical supremacy

³⁷⁴ This summary is derived from an 1881 paper by Alfred Newman to the Wellington Philosophy Society, in which Newman argued that Maori were dying out and had been dying out since before European arrival in New Zealand. He explained this as the combined effects of physical environment (including indigenous and imported diseases), mode of living (low lying damp whare rather than hill top pa), and biological characteristics (low reproductive powers). See Alfred K. Newman, 'A Study of the Causes Leading to the Extinction of the Maori', *Transactions and Proceedings of the New Zealand Institute* 14 (1881): 459-77.

³⁷⁵ Harling, 'Equipose Regained? Recent Trends in British Political History, 1790-1867': 916, citing Mandler, "'Race" And "Nation" In Mid-Victorian Thought' .

³⁷⁶ Ibid: 912, citing Hall.

of Britain's Empire over that of France.³⁷⁷ In 1849 Edward Gibbon Wakefield employed a Saxonist paradigm in his *Art of Colonization*, saying that colonies were made prosperous by good government, but especially so by the 'energy' of the 'Anglo-Saxon race', by contrast with the diminished capacity for industry exhibited by the 'Milesian-Irish' or 'Celtic-French'.³⁷⁸ This Saxon language reflected the Victorian discourse on national character that Varouxakis writes about,³⁷⁹ such discourse having a tendency to suppose the superiority of the Saxon character. As Lord Acton's writing made clear however, this superiority was usually perceived as a greater capacity for 'political civilization' or political liberties, rather than a superiority in other 'social' features of civilization. The constitutional focus is implied by the notion of a 'democratic-Teutonist' discourse, discussed by Peter Mandler. And as Mandler also says, even the ultra-Teutonism of E. A. Freeman still retained some residual universalism.³⁸⁰ Goldwin Smith clearly envisioned a universal humanity beneath more superficial differences of English and Irish character. He also clearly articulated the notion of the racial fusion of British Saxon and Irish Celt, which Varouxakis also discusses.³⁸¹ It is probably no coincidence that Richmond described his 1858 policy as a policy of 'fusion'.³⁸² When New Zealand parliamentarians used the language of Saxons (or Celts) it was usually to compare Māori favourably with themselves. This identification had important policy implications (examined in chapters one and two); it provided a basis for applying the Saxon jury to Māori (in Richmond's case) and amalgamation (in FitzGerald's case). Catherine Hall has

³⁷⁷ C. W. Richmond to Maria Richmond, 22 June 1841, in Guy H. Scholefield, ed., *The Richmond-Atkinson Papers*, vol. I (Wellington: Government Printer, 1960): 30-31. A section of the letter reads: '...whilst the vivacious Frenchman, the quintessence of intellectuality, is sipping his eau sucrée on the Boulevards of Paris, the dull masses of flesh called Anglo-Saxons is pretty sensibly felt from the frozen St Lawrence to the burning Ganges. This stubborn fact must lead us to conclude that energy [i.e., the English trait] and vivacity [i.e., the French trait] mean different things, and are not perhaps equally valuable. But I wax prosy and national'. He was writing from France at the time, which probably heightened the sense of national difference.

³⁷⁸ Wakefield, *A View of the Art of Colonization, with Present Reference to the British Empire; in Letters between a Statesman and a Colonist*: 79, 84.

³⁷⁹ See n. 220.

³⁸⁰ See n. 43.

³⁸¹ Smith, *Irish History and Irish Character*: 14.

³⁸² See n. 111.

argued, concerning the 1867 Reform Act, that ‘race, gender, property, labour and purported level of civilization now determined who was included in and excluded from the political nation, how groups belonged to the social body’.³⁸³ Significantly, in New Zealand, this Saxonist ‘race’ language was part of the rationale for Māori being incorporated within the new colonial nation (rather than being excluded from it).³⁸⁴

Hence, while Saxonism supplied content for Native policy discussions (and while it was perhaps more generally a category of national identification) it is important not to overemphasize its political role. FitzGerald employed Saxon and Celtic references in the context of discussing the elements of Māori character shared with all men,³⁸⁵ a discourse which reflected the universalism of stadial history. Richmond obtained his jury policy from Hallam’s *Middle Ages* which, while it may suggest Saxonist leanings, was too early to share in the cultural Saxonism of mid-century. John Burrow writes of Hallam as a Whig historian.³⁸⁶ This is reflected in the opening paragraph of Hallam’s chapter on the constitutional history of England, where he emphasized the constitution (or political institutions) as the primary cause of England’s prosperity, its ‘characteristic independence’ and its ‘industriousness’.³⁸⁷ Richmond’s cultural or democratic Saxonism was clearly still expressed within the dominant stadial paradigm.³⁸⁸ Therefore, while the interactions between Saxonism and more mainstream Whig or stadial visions of civilization were demonstrably complex, the civilizational perspective

³⁸³ Catherine Hall, Keith McClelland and Jane Rendall, *Defining the Victorian Nation. Class, Race, Gender and the British Reform Act of 1867* (Cambridge: Cambridge University Press, 2000): 233.

³⁸⁴ Mandler also agrees with Varouxakis that Victorian discussions of English-French contrasts where about conceptions of the world’s diversity as much as any project to define Englishness against the Other, see Peter Mandler, ‘What Is “National Identity”? Definitions and Applications in Modern British Historiography’, *Modern Intellectual History* 3 (2006): 271-97: 284. Similarly, in terms of the Saxon applications to Maori, it could be argued that no Maori Other was involved but rather a reflection back (or perhaps a projection) of the British national image.

³⁸⁵ See nn. 178 and 179.

³⁸⁶ See J. W. Burrow, *A Liberal Descent. Victorian Historians and the English Past* (Cambridge: Cambridge University Press, 1981): 117-18.

³⁸⁷ Hallam, *View of the State of Europe During the Middle Ages*: 505-06.

³⁸⁸ See in particular nn. 42 and 43, and sections on the jury and Saxonism in chap 1.

remained the meta-narrative for the middle period of the nineteenth century and beyond.³⁸⁹

The colonial contexts of the New Zealand wars and the Empire contexts stemming from the Indian Mutiny clearly affected the tone of language employed by some Members of the General Assembly. However, as chapter five argued, the harsher vocabulary employed in describing Māori society was still framed within the civilizational paradigm. Duncan Bell concurs that this shift in tone was ‘an increasingly toxic combination of hostility and defensiveness, the product of anxiety spawned by perceived imperial weakness’.³⁹⁰ In New Zealand’s case, the perceived threat was of a Māori nationalist movement unwilling to relinquish territory to settlers. In the context of these tensions, parliamentarians often employed the discourse of ‘fatal impact’, a term which is capable of many interpretations. FitzGerald’s speech is one example of this; he argued that if a peaceful resolution with the Kingitanga was not found by an effective policy of amalgamation or absorption, then the colonial government would be compelled to exact submission by force. Conquest was presented as a policy choice, not an inevitability. If war was resorted to, then extermination of Māori was presented as a matter of self-preservation. Even then, there was a definite rhetorical character to FitzGerald’s speech.³⁹¹ Of those in favour of a coercive policy, many did not view this in a negative light, if it meant that the ground would then be prepared for Māori to accept British government and civilization.³⁹² Statements that appear contradictory were often juxtaposed in a Member’s speech, seemingly without recognition of any contradiction. Prior to his declarations concerning Britain establishing its Empire by force in India, Major Richardson had confidently advocated Māori representation in the House: ‘he scarcely dared hope that the day had come when they would see some of the Māori nobility members of that

³⁸⁹ As Mandler argues, see n. 43.

³⁹⁰ Bell, ‘Empire and International Relations in Victorian Political Thought’: 288.

³⁹¹ See n. 190. Sewell’s comments are similar (although less rhetorical), as both present the choice between peace and amalgamation, or war and the death of Maori.

³⁹² See the language of Weld, Firth and Richardson, at nn. 358, 359 and 363.

House, and debating in it with their English brethren, alternately in English and Māori'.³⁹³ This discussion illustrates that 'fatal impact' language in this period was suffused with various concerns and perspectives, as it had been since the 1830s.³⁹⁴ Essentially, however, it did not displace the stadial perspective. Māori remained capable of civilization in the eyes of colonial politicians, but if they were 'destroyed' then that was a result of failing to achieve a political resolution.³⁹⁵

The notion of educating Māori gradually into British legal forms has been examined along with the stadial concepts underlying this view. More broadly, Victorian liberals advocated education as a precondition for citizenship. Uday Singh Mehta argues that nineteenth century liberals involved in Empire approached the unfamiliarity of other societies through the lens of historical development, education (often expressed in paternal or kinship language) and time, these playing an important role in the progression towards Englishness. He cites Macaulay's 1835 Minute on Indian Education as an articulation of this liberal project: 'to form a...class of persons, Indian in blood and colour, but English in taste, in opinions, in morals, and in intellect'. Mehta denies that liberalism can be merely dismissed as a convenient justification for Empire.³⁹⁶ The theme of gradual development or adoption by Māori of British legal forms was quite visible in Richmond's 1858 address, as was the corresponding theme of the educational role played by these Saxon-inspired institutions. Māori were seen as children requiring a political education in British institutions, as part of their journey towards 'union' with the colonists. Mehta makes the various connections necessary to understand this Imperial or colonial project:

³⁹³ *NZPD* (1861-63): 429.

³⁹⁴ See Belich, *The New Zealand Wars and the Victorian Interpretation of Racial Conflict*: 323-24.

³⁹⁵ 'Destroyed' is FitzGerald's word, see *NZPD* (1861-63): 494.

³⁹⁶ Mehta, *Liberalism and Empire. A Study in Nineteenth-Century British Liberal Thought*: 198-201. He says (at 201): '...from the outset of this book I have placed the question of the liberal endorsement of the empire as secondary to that of the liberal response to the experiences of the unfamiliar'.

By the nineteenth century, the centrality of education, still conceived and expressed in terms of metaphors of kinship, gets projected on a global canvas through the notion of the scales, or grades, of civilizational progress. The emphasis on history, the progressive purposes immanent in it, and the role of imperial superintendence for realizing those purposes can all be seen as elaborations on the Lockean idea of the need to be educated into reason, and into liberty only thereafter.³⁹⁷

Sewell's 1862 reference to the relationship between Sovereign and people and its associated duties also employed the language of obligation, under the Treaty of Waitangi, to 'establish amongst them law and order and government'. This task of establishing 'civil institutions' for Māori was conceived as the task of 'educating, civilizing, and governing them', in which the primary need was to settle their land rights. Sewell's language thus also shared in the liberal conception of law and government as conjoined to education.³⁹⁸ In November 1857 Edward Stafford referred to the necessity of elevating 'the mere Māori into a reasoning citizen', if the Native race were to be preserved and the peace of the country maintained.³⁹⁹ Richmond in his 1858 speech argued that Māori were a reasoning people, but to enjoy the privileges of being British citizens (or subjects) they needed to participate in the political education to be gained through the jury system.

Intrinsic to these stadial and liberal concepts of education were the notions of gradual civilization through consent and a degree of self-government. Also inherent in the educational paradigm was a Burkean or Tocquevillian stress on a people's political system being undergirded by their customary practices or values, the jury system being a prime example of this in England and America. The jury system was itself a form of political participation or self-government in Tocqueville's view. The prevalence of these ideas in parliamentary discussions

³⁹⁷ Ibid: 199.

³⁹⁸ See n. 318.

³⁹⁹ Cited in the 'Report of the Waikato Committee', *AJHR* (1860): F – No.3: 1. The Waikato Committee of October 1860 inquired into the attempts made under Fenton to introduce civil institutions to the Waikato district.

had the policy implication that institutional change could not be imposed on Māori through legislative or executive action; any legal intervention needed to obtain the support of the people it was designed for otherwise it would fail. Legislation was not understood as a coercive instrument, William Daldy stating that ‘military force would never conquer the Māori; it might ruin him – might render him sulky; but it was the moral force of legislation which would elevate him, and upon which the colonists must depend’.⁴⁰⁰ This Burkean paradigm is another context for comprehending Members’ supposition that adaptation of Māori society to British legal forms should be gradual and not coercive. However, although this was a prevalent way of conceiving the nature of law, it succumbed, like a number of other paradigms, to the colonial and Empire imperatives of the New Zealand wars.

In conclusion, this thesis has analysed a series of contexts in light of which the Native policy of 1858-62 and the parliamentarians who created it can be better understood. While the imperial and colonial contexts are critical, particular emphasis has been given to the intellectual and cultural contexts, as these have been less considered in New Zealand historiography. Some New Zealand historians have been explicit about not doing intellectual and cultural history. David Williams clearly stated in his introduction to a study of the Native Land Court 1864-1909 that his work was not to understand the Court ‘in the light of contemporary thinking in the period’. His statement that such a task would be ‘for a historian to undertake’, might appear to demarcate the concerns and approaches of Waitangi Tribunal or claims-focussed history from the concerns and approaches of academic history.⁴⁰¹ However, there is no sound reason why

⁴⁰⁰ In a debate on the Native Offenders Bill 1860, see *NZPD* (1858-60): 579.

⁴⁰¹ David V. Williams, ‘*Te Kooti Tango Whenua*’. *The Native Land Court 1864-1909* (Wellington: Huia Publishers, 1999): 7-8. A number of historians have recently engaged in a debate concerning the nature of the history produced by the Waitangi Tribunal. See, for example, W. H. Oliver, ‘The Future Behind Us. The Waitangi Tribunal’s Retrospective Utopia’ in *Histories, Power and Loss. The Uses of the Past. A New Zealand Commentary*, ed. Andrew Sharp and Paul McHugh (Wellington: Bridget Williams Books, 2001): 1-29; and Michael Belgrave, ‘Looking Forward. Historians and the Waitangi Tribunal’, *New Zealand Journal of History* 40 (2006): 230-50. In this

academic history, nor intellectual and cultural history, should be divorced from the concerns of justice and cultural identity in Aotearoa New Zealand. If Māori and Pākeha⁴⁰² are to be reconciled to their past and to each other, then attempting to understand the different worlds in which ancestors or tūpuna were operating must be integral to that process. The constructs of stadial history, Saxonism and Burkean constitutionalism are reminders that the world of mid-nineteenth century New Zealand was not the same as the world of twenty-first century Aotearoa. These languages of political and cultural discourse illuminate the meanings of Native policy of the 1850s and 60s. Moreover, they enable comprehension of the way the Victorians perceived themselves, in particular, through the looking-glass of history. An understanding of these past worlds must be recovered to obtain an accurate picture of those who devised New Zealand's early institutions.⁴⁰³ This will enrich the narratives of Aotearoa New Zealand and the histories of British imperialism and colonization.

article Belgrave calls for a greater appreciation of the historical work undertaken for and by the Tribunal. While critical of some of the narratives produced in Tribunal reports, Belgrave highlights the significant historiographical debates occurring in the Tribunal's work concerning (among other things) the interactions between Maori custom and imported law and between Maori and settler society in the trade arena, arguing that these debates can inform debates concerning colonization and imperialism. Belgrave argues that many of the more recent Tribunal reports read as more conventional history, having been freed from the political pressures of the 1980s and 90s.

⁴⁰² Using these terms as categories of cultural identification rather than binary biological entities.

⁴⁰³ Of course, quite different worlds must be recovered in order to comprehend those, on the Māori side, who opposed or accommodated the British colonial institutions. At the same time, it should not be assumed that there were no parallels or convergences between the worlds of Māori and Pākeha.

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