Turning Clark Kent into Superman: The New Zealand Bill of Rights Act 1990

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Clark Kent was a mild-mannered, cautious newspaper reporter. Superman was the caped man of steel, righting wrongs and preventing evils with his superhuman strength. Clark Kent bumbled along, deferential to others and rather ineffective both as a reporter and in his attempts to woo Lois Lane. Superman was completely effective in all he attempted — there was never a doubt that he could provide a remedy for every wrong, for every right infringed. Mere politicians and police might be ineffective, indeed biased and short-sighted, but not the caped man of steel. After all, Superman was faster than a speeding bullet, more powerful than a locomotive, and able to leap tall buildings in a single bound. In short, Superman was goodness and right and justice incarnate.

What no one knew, save millions of television viewers, was that Clark Kent and Superman were one and the same person. Whenever evil or injustice loomed, Clark Kent would disappear down a deserted alley or into an empty phone box, spin around a few times, and emerge in cape and tights as Superman. Hence when injustice, unfairness and moral wickedness threatened then the ineffective, cautious and deferential turned into the potent, omniscient, fearless and justice-dispensing.

The story of Clark Kent and Superman is a morality tale few can resist. It is comforting to think some ultimate saviour exists to remedy breaches of rights. Rather than rely on fallible politicians it is a great solace to know (well, to imagine) one's rights might be securely protected in some more powerful and effective way, and so ultimately upheld by trustworthy, wise and infallible beings. Why settle for Clark Kent when Superman is available? And if one is stuck with Clark Kent (perhaps because one's reactionary and illiberal fellow citizens were overly worried about the dangers of kritarchical kryptonite), why not turn him into Superman over time, bit by bit, bootstrap by bootstrap?

Now suppose, as many do, that an entrenched, justiciable, 'constitutionalized' Bill of Rights is the desirable Superman model or version of such instruments. On that view a statutory or "watered-down"[1] Bill of Rights *Act*[2] is the undesirable

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1 See Michael Taggart, "Tugging on Superman's Cape: Lessons from Experience with the New Zealand Bill of Rights Act 1990", [1998] *Public Law* 266 (hereinafter "Taggart") at p. 267. The Superman metaphor is originally his (via Jim Croce), though he applies it to the legislature (or perhaps to both legislature and judiciary) while I apply it to entrenched Bills of Rights and to the over-powerful judiciary that interprets them.

2 A Bill of Rights *Act* is a statute; a Bill of Rights is not. What's in a name? Sometimes an accurate description of the status (and so powers) of the thing being described.

Clark Kent model. The former version hands ultimate power to the unelected judiciary to decide what the enumerated rights it contains (which are necessarily expressed in vague, amorphous and emotively attractive terms) mean in specific cases and moreover to strike down any Acts of the legislature which breach or infringe the specific meanings so given. The latter version does not give judges this power. At any rate, the Clark Kent version is not meant to give judges this power. Whatever else a statutory, Clark Kent-type Bill of Rights Act is meant to do, it is clearly meant to keep the judiciary subordinate to the legislature when it comes to social policy-making.

Supporters of the Superman model will regret this state of affairs. They may also think the prospects of an open, democratic endorsement of the Superman version anytime soon seem dim. One option in such circumstances is simply to pretend the Clark Kent version and the Superman version are — or virtually are — one and the same thing. The trick is to get the judges to interpret and treat the unentrenched, statutory Bill of Rights Act in the same sort of way as they would were it a constitutionalized, entrenched Bill of Rights. Then, with a little luck, over time, Clark Kent will begin to look and act more and more like Superman.[3] And as Superman is goodness and right and justice incarnate, critics of such a backdoor, bootstraps operation can simply be dismissed as morally deficient, illiberal (or, perhaps, simply ignorant) cranks.

This paper will review the first decade of operation of the New Zealand Bill of Rights Act 1990. To start, the first and main portion of this paper will consider the extent to which the above analogy applies to the New Zealand experience. Did New Zealand opt for a Clark Kent-type Bill of Rights Act? If so, have there been any moves to 'upgrade' it, to add a cape here and some tights there? Are there commentators who want more?

Next, and related to these questions, is the issue of certainty and the degree to which Bill of Rights Act jurisprudence can be said to be settled. Whatever the answer to that, there is the further but connected issue of the degree of discretion the judges have given themselves (in that case law) when it comes to applying the Bill of Rights Act. So certainty will be the second subject of this paper.

The third topic follows on from the first two but will be discussed in far less detail. Here I will consider whether the Superman-type Bill of Rights is a desirable model for a parliamentary democracy state such as New Zealand. I will argue that it is not. I will also contend that one's assessment of the desirability or otherwise of such a constitutionalized model is likely to influence whether one supports or opposes the bootstraps efforts and calls to turn Clark Kent versions into Superman versions.

Finally, this paper will finish with a short glance forward. If, contrary to my preferences, New Zealand is to have a constitutionalized, entrenched Bill of Rights sometime in the future, what is the best way of adopting one? How should Superman come into being?

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[3] "In the shell game of constitutional reform, however, it is often difficult to keep your eye on the pea. And once the reform is securely in place, history often is quickly forgotten, pushed down by the imperative to make the best (as judges see it) of what we have in a forward looking manner. Such is the New Zealand experience . . ." (Taggart, p. 268.)

1. Pretending Clark Kent is Superman

It is beyond dispute that in 1990 New Zealand opted for a Clark Kent-type Bill of Rights Act.

It is true, of course, that half a decade earlier the prime political mover for a Bill of Rights, Geoffrey Palmer (now Sir Geoffrey), had wanted a Superman version modelled on the Canadian Charter of Rights and Freedoms (1982). "The Draft Bill originally proposed in the 1985 Government White Paper *A Bill of Rights for New Zealand* took the form of an entrenched supreme law that would empower the courts to strike down inconsistent legislation, and included a wide remedies clause (Article 25) authorising the courts to redress violations of rights by granting 'such remedy as the court considers appropriate and just in the circumstances'".[4] But this Superman model "met with overwhelming public opposition"[5] and was rejected. To be precise, the Select Committee concluded that New Zealand was not ready, if it ever would be, for a fully fledged Bill of Rights along the lines of the White Paper draft.[6] Instead, the Select Committee recommended enactment of an ordinary statute Bill of Rights Act.

But even to get this 'fall back' model enacted was far from easy. First off, even as regards this Clark Kent version "[t]here was no ground-swell of public support for it; indeed, it is possible that public opinion was against it".[7] Geoffrey Palmer's Labour party colleagues were not much more enthusiastic, viewing "even the watered-down [Bill of Rights Act] with suspicion, . . . in the event [buckling] down and vot[ing] for the government measure".[8] But not before it was further enfeebled.

The Bill's passage only took place after two major changes had been made. Firstly, a new operative provision not present in the Draft Bill had to be added. This became section 4 and reads:

> **4. Other enactments not affected**—No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—
> (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or

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4 J. A. Smillie, "The Allure of 'Rights Talk'; *Baigent's Case* in the Court of Appeal", (1994) 8 *Otago Law Review* 188 at p. 193 (internal footnote to 'Government Printer, Wellington, 1985' omitted) [hereinafter "Smillie"].

5 Smillie, p. 194. Smillie at the same page goes on to note that "[t]he Parliamentary Select Committee to which the White Paper was referred for investigation received 431 submissions. Of these, only 35 supported the Draft Bill or even the concept of a bill of rights, while 243 were wholly opposed to the proposal." Taggart, describing those same statistics, states that this Superman model "was rejected in the court of elite public opinion." [Taggart, p. 266).

6 See Smillie, p. 194.

7 Paul Rishworth, "The New Zealand Bill of Rights Act 1990: The First Fifteen Months" in *Essays on the New Zealand Bill of Rights Act 1990* (Legal Research Foundation Inc., Auckland, Publication No. 32, 1992), pp. 7-8. For more on the history of the Bill of Rights Act see Paul Rishworth's "The Birth and Rebirth of the Bill of Rights" in *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (eds. G. Huscroft and P. Rishworth, Brooker's, Wellington, 1995).

8 Taggart, p. 267 (internal footnote omitted).

> (b) Decline to apply any provision of the enactment— by reason only that the provision is inconsistent with any provision of this Bill of Rights.

Notice that this section 4 not only makes explicit the doctrine of implied repeal (whereby later statutes that are inconsistent with the Bill of Rights Act would prevail) but, singularly, directs that even earlier inconsistent Acts should prevail. It needs to be remembered (particularly in discussions of the Act's purpose) that of the three main operative provisions (*viz.*, sections 4, 5 and 6), section 4 was the only one that was not present in the rejected Superman version. More importantly, its insertion prior to second reading was a necessary price for passage of even this Clark Kent version.

The second major change before passage was the removal[9] of the wide remedies clause referred to above. Indeed to get the Bill passed in the face of continuing Opposition and public concern Geoffrey Palmer, by now Prime Minister, was forced[10] to say the following in moving the second reading of the Bill which by now lacked a remedies clause:

> [T]he Bill creates no new legal remedies for courts to grant. The judges will continue to have the same legal remedies as they have now, irrespective of whether the Bill of Rights is an issue.[11]

Enough has been said, I think, to repeat the claim that Parliament intended to enact "a parliamentary Bill of Rights"[12] which took every precaution to limit any new powers the judges might otherwise have with such an instrument and which left Parliament as the "guardian of fundamental rights and freedoms in

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9 Smillie calls it the "deliberate omission". See Smillie, p. 195.

10 I use the passive verb "was forced" because of Sir Geoffrey's subsequent comments about the legislative history of the Bill, and in particular about his own statements in the House during the Bill's progress. In an editorial to Issue No. 5 of the 1995 *Bill of Rights Bulletin*, at p. 78, Sir Geoffrey stated, "I am amused at the different interpretations placed on what I said. Bills are made to pass." I am not clear what to infer from this 1995 remark, though it certainly provides ammunition to those with a strong dislike of selective judicial recourse to legislative history in interpreting statutes. If the point is that politicians shepherding Bills through the House say whatever is necessary to get them passed, then the debates and legislative history never provide a safe indication of the enactors' purpose in enacting them and the courts should never have recourse to that history. Bills are made to pass, but in my view they are best passed by actors observing particular standards, or not at all.
As it happens, the New Zealand courts do *not*, at present, assume that the legislative history is completely unreliable. There seems to be an assumption that most legislators generally say what they mean. That is why the present New Zealand position is that the courts will sometimes — though admittedly selectively — look at the legislative history in interpreting a statute.

11 (1990) 510 New Zealand Parliamentary Debates 3449, 3450. See too some of Geoffrey Palmer's other statements to the House, detailed in Smillie, pp. 195-196. In the event the New Zealand judiciary paid no attention to these remarks uttered 'to get the Bill passed'. Or in Taggart's characterization, "the Court of Appeal *rose above* that legislative history". (Taggart, p. 269, italics mine).

12 (1989) 502 New Zealand Parliamentary Debates 13038 *per* Rt Hon Geoffrey Palmer PM moving introduction of the Bill.

New Zealand".[13] It is beyond dispute, that is, that in 1990 the New Zealand Parliament opted for a Clark Kent-type Bill of Rights Act.

a) Adding a New Cape

Why settle for Clark Kent if he can be turned into Superman over time, bit by bit, bootstrap by bootstrap? Why, indeed, many supporters of a Superman version of a Bill of Rights might ask themselves.

The judge most keen to 'upgrade' the enacted Clark Kent model New Zealand Bill of Rights Act 1990 was the then President of the New Zealand Court of Appeal Sir Robin Cooke (now Lord Cooke of Thorndon, a sitting member of the House of Lords and occasional member of panels of its Judicial Committee and of the Privy Council's). In the first ever Bill of Rights Act case to reach the Court of Appeal[14] Cooke P. suggested that s. 6 of the Bill of Rights Act[15] may require a court to depart from a long established judicial interpretation of the meaning and intent of a particular statutory provision. Speaking for the Court, Cooke P. said they saw "force in the argument that, to give full effect to the rights . . . , [a particular statutory provision with a long-standing interpretation] . . . should now receive a wider interpretation than has prevailed hitherto".[16]

A year later in *R* v *Butcher*,[17] Cooke P. made the following comments in *obiter*:

> What can and should now be said unequivocally is that a parliamentary declaration of human rights and individual freedoms, intended partly to affirm New Zealand's commitment to internationally proclaimed standards, is not to be construed narrowly or technically.[18]

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13 *Ibid.*

14 *Flickinger* v. *Crown Colony of Hong Kong* [1991] 1 NZLR 439. It is worth mentioning here that Cooke, prior to the enactment of the Bill of Rights Act, had advocated for a Superman version extra-judicially. Indeed he had claimed there was very little difference between administrative law and Bill of Rights adjudication. (See the "Synopses of Papers Presented at Legal Research Foundation Inc. seminar at the University of Auckland 20-21 February 1986: JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN THE 1980s — PROSPECTS AND PROBLEMS", in particular p. 3 of Cooke's synopsis of his own paper 'The Struggle for Simplicity in Administrative Law' where he states that "[w]hile this is not a seminar on the Bill of Rights, I suspect that the present paper will not be the only one thus to bring out, directly or indirectly, the extent to which the courts have long had to make value judgments in determining issues between citizens and authorities. From the work already performed by the courts *it would be only a small step to the work under the proposed Bill of Rights* of determining whether some particular restraint on a right or freedom falls within 'such reasonable limits prescribed by law as can be demonstrably justified in a full and democratic society'". (italics mine; this comment does not appear in the published version of the paper in Taggart (ed.), *Judicial Review of Administrative Action in the 1980s: Prospects and Problems* (OUP & LRF, 1986)). In a sense, therefore, Cooke had been on the side that lost 'in the court of elite public opinion'.

15 Section 6 reads: "Whenever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning".

16 [1991] 1 NZLR 439 at 441.

17 [1992] 2 NZLR 257.

18 *Ibid.*, p. 264.

> Certainly the Act is not entrenched. Still it is an affirmation of the basic rights of people in New Zealand. The correct judicial response can only be normally to give it primacy, subject to the clear provisions of other legislation.[19]

And in the same year in *Noort*[20] more *obiter* still from Cooke P:

> ... the [Bill of Rights] Act requires development of the law where necessary. Such a measure is not to be approached as if it did no more than preserve the status quo .... The effect of the Bill of Rights Act will have to be worked out with common sense. No more in New Zealand than anywhere else in the world can detailed rules be laid down in advance. They would be contrary to the spirit of a bill of rights .... it is asking no more than that we in New Zealand try to live up to international standards or targets and to keep pace with civilisation.[21]

So from the beginning there was a suggestion (which was to grow and strengthen for a while) that the enervated Act actually enacted should, contrary to the clear legislative history, be treated as some sort of extra-special, half-"constitutionalized" Bill of Rights to which the judges would give primacy unless clear legislation indicated otherwise. A new cape was already beginning to take shape.

From the pen of Cooke P. such judicial creativity was anything but surprising. After all, this is the judge who from the early 1980s had suggested in various *obiter dicta* that "[s]ome common law rights presumably lie so deep that even Parliament could not override them".[22] Were such a notion true, were it the case that the judges had (or had given themselves or could give themselves) some sort of veto on what the legislature could do then, *pace* all the received wisdom, New Zealand would *not* have a Parliamentary Supremacy form of government. Rather it would be best described as a Judicial Supremacy. But such *obiter dicta* are simply nonsense. They bear no relation, and have never borne any, to an accurate factual account of New Zealand's governing Rule of Recognition.[23] Instead such comments must be understood as an attempt by Cooke P. to change the existing Rule of Recognition, to bring about a very quiet revolution in the power relations between Parliament and the judiciary.[24]

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19 *Ibid.*, p. 267.

20 *Ministry of Transport* v *Noort* [1992] 3 NZLR 260.

21 *Ibid.*, pp. 270-271.

22 *Taylor* v *New Zealand Poultry Board* [1984] 1 NZLR 394 at 398. See too *Fraser* v *State Services Commission* [1984] 1 NZLR 116 at 121 and *New Zealand Drivers' Association* v. *New Zealand Road Carriers* [1982] 1 NZLR 374 at 390. For more details of such *obiter dicta* and extra-judicial utterances by Robin Cooke to the same effect see Paul Rishworth, "Lord Cooke and the Bill of Rights" in *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon* (ed. P. Rishworth, Butterworths, Wellington, 1997). For a contrary view to Lord Cooke's, in the same book, see Justice Michael Kirby of Australia's chapter "Lord Cooke and Fundamental Rights".

23 On the rule of recognition see H. L. A. Hart, *The Concept of Law* (2nd ed. by P. Bulloch and J. Raz, Clarendon Press, 1994), pages 94-110. For an excellent fleshing out of Hart's rule of recognition notion see Kent Greenawalt, "Hart's Rule of Recognition and the United States", (1988) 1 *Ratio Juris* 40.

24 Justice Antonin Scalia of the US Supreme Court makes a similar, if more strongly expressed, point about the sometimes heard claim that Lord Chief Justice Coke was stating orthodoxy nearly four hundred years ago in *Dr. Bonham's Case*. "Professor

Accordingly, it is easy to understand why Cooke P. would welcome any sort of Bill of Rights Act, however limited, and be keen to upgrade it at the first opportunity. But he was not alone. With the qualified exception of Gault J., all the justices of the Court of Appeal in the first few years after the enactment of the Bill of Rights Act seemed enthusiastic and keen to add that missing cape.

> [T]he Court of Appeal insisted that the [Bill of Rights Act] had to be interpreted and applied generously and purposively, rather than narrowly and technically . . .. The rights and freedoms affirmed were said to be part of the fabric of New Zealand law, and the fact that they are not constitutionally entrenched . . . does not diminish their importance or affect their meaning . . .. [T]here was enthusiasm for the [Bill of Rights Act] among some senior members of the judiciary. In the early years one intuited a sense of excitement in at last joining the pantheon of civilised societies with Bills of Rights . . .[25]

This early judicial enthusiasm manifested itself overwhelmingly in the criminal procedure realm.[26] Within three years or so the Court of Appeal had created a *prima facie* exclusion rule for evidence obtained improperly in breach of the Bill of Rights Act.[27]

Then came the big development in the civil law sphere. In *Baigent's Case*,[28] in a 4-1 decision by the Court of Appeal,[29] a public law remedy sounding in the Bill of Rights Act was both created *ad hoc* and distinguished from the common

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Wood accepts as orthodoxy Lord Chief Justice Coke's statement in *Dr. Bonham's Case* (1610) that 'in many cases, the common law will controul Acts of Parliament and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such Act to be void'. It was not orthodoxy at all, but an extravagant assertion of judicial power, scantily supported by the authorities cited, vehemently criticized by contemporaries, and seemingly abandoned by Coke himself in his *Institutes*." (Antonin Scalia, *A Matter of Interpretation, Federal Courts and the Law*, Princeton University Press, 1997, pp. 129-130 — four internal footnotes omitted). See too John Smillie's "Introduction" to *Judicial Review of Administrative Action: Problems and Prospects* (ed. M Taggart, OUP/LRF, 1986). For a book length examination of the doctrine of parliamentary sovereignty, in which the notion that judges have ever been free not to recognise as valid statutes enacted by Parliament is rubbished, see Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press, 1999). *Dr Bonham's Case* is discussed pp. 111-117.

25 Taggart, pp. 274-275 (three internal footnotes omitted).

26 In this realm the judges need not strike down statutes to re-write the law (or 'constitutionalize' new rights if you are a Superman advocate). Most of this area of law is a creature of executive action, judges' rules and common law.

27 See, for example, *R* v *Kirifi* [1992] 2 NZLR 8; *R* v *Butcher* [1992] 2 NZLR 257; *Ministry of Transport* v *Noort* [1992] 3 NZLR 260; *R* v *Goodwin (No. 2)* [1993] 2 NZLR 390. The pre-Bill of Rights Act position had been that improperly obtained evidence was admitted unless there was real unfairness to the accused. Leaving aside confessions where reliability was the main test and the hurdle for admissibility relatively high, this meant such improperly obtained evidence had been excluded rather infrequently.

28 *Simpson* v *Attorney-General [Baigent's Case]* [1994] 3 NZLR 667.

29 Gault J. dissented in part. The four in the majority were Cooke P., Casey J., Hardie Boys J. and McKay J.

law tort of breach of statutory duty.[30] In creating this new *sui generis* cause of action two obstacles, which had to be overcome or got round, lay in the path of the majority justices.[31] The first was the lack of any provision in the Bill of Rights Act itself for remedies for infringement. (The reader will recall the remedies clause was removed, seemingly to ensure the Bill's passage, and also Sir Geoffrey Palmer's comments in moving the Bill's second reading.) The second was a statutory immunity provision which seemed to apply and if so, by s. 4 of the Bill of Rights Act, would mean that provision prevailed.

The majority justices in the event did overcome or get round both these obstacles, though in this author's opinion "the reasoning of the majority in [*Baigent's Case* was] sophistical".[32] Certainly it was a clear example of judicial activism, as Taggart implicitly concedes:

> *Baigent's Case* gives some indication of the potential potency of the technique known as 'reading down' (and its travelling companion 'reading in'). My colleague, Paul Rishworth, has championed the use of these techniques in the context of the [Bill of Rights Act] from the beginning. In essence, his argument is that in respect of statutes which affirm fundamental rights *the courts are justified in departing from even clear words* by reading the statute down (or reading words in) so as not to infringe rights as long as by so doing the legislative purpose is not frustrated. This well-supported thesis opens up considerable scope for attaining rights-respecting outcomes by the judiciary.[33]

After *Baigent* the way seemed clear for an on-going judicial upgrade and make-over of Clark Kent. Following on from the new cape fashioned in Baigent the judges would continue with their bootstraps re-tooling, bit by bit adding new tights, a belt, the trademark 'S', even some flashy red boots. And all the while they would be cheered on by their various supporters in the legal academy and the practising Bar. (See section **1** *b*) below.) *Baigent* seemed to portend the piecemeal 'upgrade' of Clark Kent.

In the event, surprisingly, this has proved not to be. *Baigent's Case* turned out to be the highwater mark or apogee in the metamorphosis of Clark Kent. From then till now the tide has somewhat ebbed (though not without recent hints of a new flow coming). The cape is still there, that is, but it is donned less than earlier signals portended. And little else of significance has been added. Indeed there has been a slight backtracking.

One partial explanation for this halt in judicial activism when it comes to the Bill of Rights Act is that soon after *Baigent's Case* was decided Sir Robin became

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30 Taggart describes the case as "creat[ing] a public law claim for compensation for breach of the Bill of Rights." (Taggart, p. 269 — see too a similar description at p. 283).

31 I have discussed *Baigent's Case* in more detail in "Speaking with the Tongues of Angels: The Bill of Rights, *Simpson*, and the Court Appeal", [1994] *Bill of Rights Bulletin* (Issue No. 1, November), 2. *Baigent's Case* is also discussed by Smillie, Rishworth and Joseph *inter alia*.

32 *Ibid.*, p. 3. For a contrary view, though, see Rodney Harrison's replies to me in Issues No. 2 and 3 (March and June 1995) of the *Bill of Rights Bulletin*.

33 Taggart, p. 284 (internal footnote omitted, italics mine).

Lord Cooke of Thorndon and retired from the Court of Appeal.[34] So too did Casey J. and Hardie Boys J. The newly composed Court of Appeal under Richardson P. took its first noticeable step back towards Clark Kent in *Grayson*.[35] In that case, in a judgment of the Court (Richardson P. and Gault, Henry, Keith and Neazor JJ.), the judges decided that a police search that involved a trespass on to property without lawful justification was not unreasonable. (And as the police had been held not to have acted unreasonably under the s. 21 'unreasonable search and seizure' provision of the Bill of Rights Act, the accused had no chance of any remedy.) In other words, the effect of *Grayson* was clearly and unambiguously to sever the unreasonableness determination (in s. 21) from a simple consideration of illegality.[36] Illegality could not be thought of as co-extensive with or even subsumed by unreasonableness, according to the *Grayson* Court.

However, for the purposes of this paper, what is of particular note in *Grayson* are the two pages of *obiter dicta* at the end of the judgment in which the Justices signalled a desire to move away from the existing *prima facie* exclusion rule for evidence obtained in breach of the Bill of Rights Act. Indeed the judgment finished with the explicit statement that "on an appropriate occasion the Court would be prepared to re-examine the prima facie exclusion rule".[37] Instead of a purely rights-centred approach the Justices indicated they were attracted to a "broader perspective [which] also looks to the general underlying public interest."[38] So possible remedies might include exclusion or a reduced penalty or an order for costs or police disciplinary proceedings or criminal prosecution or civil proceedings for damages, a declaration or something else. Indeed the possible remedies were deliberately left open and made dependent upon all the circumstances.[39]

The crucial point is this: *Grayson* is a clear (albeit *obiter*) step back in the bootstraps operation to mould Superman out of Clark Kent. What the judges had given, not least their earlier ascribing to a 'rights-centred' interpretive framework, the judges said (in *obiter*) they could also take away. As a result, the case was harshly criticized by commentators who prefer their Bills of Rights unshakeable, stirring and caped.[40] That said, and despite these protestations, it

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34 Lord Cooke has been less successful in the House of Lords than he was in the New Zealand Court of Appeal at carrying other judges along in his views. See, for example, *Platform Home Loans Ltd* v *Oyston Shipways Ltd* [1999] 1 All ER 833; *Effort Shipping Co. Ltd.* v *Linden Management SA* [1998] AC 605; and *Hunter* v *Canary Wharf Ltd* [1997] AC 655.

35 *R* v *Grayson and Taylor* [1997] 1 NZLR 399.

36 I have argued in "Hoisting *Grayson* with *Baigent's* Petard", [1997] *Bill of Rights Bulletin* 13 (Issue No. 1, January) that this standard of unreasonableness — being different from illegality and determined on a case by case basis according to the particular circumstances — is precisely the same standard of unreasonableness the Court of Appeal invoked in *Baigent*. What this approach means in terms of certainty I leave for section 2 of this paper below.

37 *R* v *Grayson and Taylor* [1997] 1 NZLR 399 at p. 412.

38 *Ibid.*, p. 411.

39 See section 2 below.

40 See, *e.g.*, Andrew Butler, "The End of Precedent and Principle in Bill of Rights Cases? A Note on *R* v *Grayson*", [1997] *New Zealand Law Review* 274; Scott Optican, "Rolling

was a small step back, not a giant one. To date, despite submissions having been made on the point, the Court of Appeal has yet to re-examine the *prima facie* exclusion rule. Indeed, there is some evidence the court may not abandon this rule after all.[41]

Another recent case which showed there is a limit to the social policy-making the judiciary is prepared to indulge in, under the guise of upholding and giving life to the broad, amorphous rights set down in the Bill of Rights Act, was *Quilter*.[42] All five judges in this case[43] held that the Marriage Act 1955 was intended to confine marriages to those between a man and a woman, and that whatever s. 19(1) of the Bill of Rights Act might imply about discrimination for lesbian couples wanting to marry but being unable to do so, where there is clear inconsistency the Marriage Act 1955 must prevail. This sort of social policy-making is for Parliament, was the clear message.[44]

So despite some differences of opinion amongst the five judges in *Quilter*,[45] a clear line was drawn — one that would not be drawn in Canada or the United States with their Superman-type Bills of Rights. The metamorphosis in New Zealand of Clark Kent into Superman by means of some judicial bootstraps operation has its limits, *at least so far*. I emphasize that last phrase because a recent (to date unreported) case suggests the bootstraps operation may not be

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Back s. 21 of the Bill of Rights", [1997] *New Zealand Law Journal* 42; and all of the *Public Law Bulletin* (No. 10, December, 1996 — New Zealand Institute of Public Law). Taggart notes that *Grayson* has "been harshly criticised by some commentators, who see the courts extracting the self-same teeth they had *earlier uncovered* in the [Bill of Rights Act]". (Taggart, p. 276, italics mine.) It is worth emphasizing, in response to the anti-*Grayson* commentators, that the *prima facie* exclusion rule had not been in existence long; certainly there was no basis for treating it as writ in stone.

41 See Richard Mahoney, "Evidence", [1998] *New Zealand Law Review* 53 at pp. 83-84. See too *R* v *T* (CA302/98, 2 November 1998) and *R* v *Reid* (CA108/98, 30 July 1998).

42 *Quilter* v *Attorney-General* [1998] 1 NZLR 523.

43 The panel was Richardson P. and Gault, Thomas, Keith and Tipping JJ.

44 "The Marriage Act is clear and to give it such different meaning would not be to undertake interpretation but to assume the role of lawmaker which is for Parliament. That is particularly so in an area where the law reflects social values and policy." (*Ibid.*, p. 526, *per* Gault J.). "It is not possible to interpret the Marriage Act to include same-sex marriages as the appellants request. Any change in the law must come from Parliament." (*Ibid.*, p. 528, *per* Thomas J.) "The Bill of Rights must be given its full effect in the necessary process of interpretation, but it may not be used as a concealed legislative tool . . .. There is no basis therefore upon which the Marriage Act can (in terms of s. 6) be interpreted as permitting same-sex marriage . . .. If that is discrimination Parliament has expressly sanctioned it." (*Ibid.*, pp. 572, 581, 582, *per* Tipping J.)

45 Richardson P., Gault J. and Keith J. took the view that the prohibition on same-sex marriages in the Marriage Act 1955 does *not* infringe the s. 19(1) discrimination provision. For Richardson P. and Gault J. this was an *obiter* holding. For Keith J. it was unclear whether it was the *ratio* of his decision or an *obiter* holding (*cf.* the first three paragraphs of his decision, p. 555), though probably it was the former. Thomas J. and Tipping J., by contrast, both held the prohibition *did* discriminate against lesbian couples, though Tipping J. appears to leave open the question whether it is justifiable discrimination. For Thomas J. it is not. Strictly speaking, both Thomas and Tipping JJ.'s views on discrimination were *obiter*.

finished yet. In *Moonen*,[46] in a judgment of the Court delivered by Tipping J., the judges say some remarkable things. Most indefensibly, in my view, they say that henceforth when some statute is found to be inconsistent with the Bill of Rights Act, although they will be bound by s. 4, they may also make a declaration of inconsistency.[47] This is yet another new (and particularly gratuitous) remedy (well, 'remedy' if you are a superman adherent) the judiciary has simply created *ad hoc* without, unlike as in Britain, any statutory warrant whatsoever. Nevertheless, the judges are still, for now at any rate, prepared to give effect to s. 4.

b) Dons and Donning New Tights

Though the present judges on the New Zealand Court of Appeal are only prepared to go so far in the 'upgrade' of Clark Kent, it does not follow that most legal academics and commentators welcome that reticence. In fact, there seem to be a goodly number who would like the bootstraps re-tooling to push further on. They want not just a new cape, but some new tights as well.

Start with criminal procedure. Scott Optican and Richard Mahoney, to different extents, want the judges to use the Bill of Rights Act to move New Zealand law in the direction it has taken in the United States and Canada, both of which have Superman-type Bills of Rights.[48] Then there is administrative law. Three leading New Zealand legal academics have urged that new tights be donned here too:

> The Canadian experience with the Charter indicated that once the first waves of constitutional litigation had broken over the criminal law bar, the next area to be swamped would be administrative law. While it seems obvious that the [Bill of Rights Act] should have a significant impact on administrative law, it has been little used in this context so far in New Zealand. [Paul Rishworth, Janet McLean] and I argued a few years ago that the [Bill of Rights Act] superimposed a higher

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[46] *Moonen* v *Film and Literature Board of Review* (CA 42/99, 17 December 1999 - Elias CJ, Richardson P, Keith J, Blanchard J and Tipping J).

[47] "That purpose necessarily involves the Court having the power, and on occasions the duty, to indicate that although a statutory provision must be enforced according to its proper meaning, it is inconsistent with the Bill of Rights . . . Such judicial indication will be of value should the matter come to be examined by the Human Rights Committee . . . . New Zealand society as a whole can rightly expect that on appropriate occasions the Courts will indicate whether a particular legislative provision is or is not justified thereunder." (*Ibid.*, p. 12) The Court relies implicitly on an expansive view of s. 5, and indeed of s. 6, to justify this minimalist approach to s. 4. (See pages 10-12, especially paragraph [20]).

[48] See Richard Mahoney, "Evidence", [1994] *New Zealand Law Review* 82 at pp. 109-114; "Evidence", [1995] *New Zealand Law Review* 58 at pp. 74-77; "Evidence", [1996] *New Zealand Law Review* 60 at pp. 91-95; and "Evidence", [1998] *New Zealand Law Review* 53 at pp. 79-84. And see Scott Optican, *op. cit.*, fn. 40; and "Search and Seizure in the Court of Appeal — An Essay on the Uses and Misuses of Section 21 of the Bill of Rights", (1999) 18 *New Zealand Universities Law Review* 411. Optican's main complaint is with what he sees as a lack of intellectual honesty in some judicial decisions. This seems to me to push him into the Superman camp. But of course the former need not mandate the latter.

> constitutional dimension on top of the traditional administrative law grounds for review of discretionary decision-making.[49]

Philip Joseph, meanwhile, "advocates transparency and open acceptance of the methodology of constitutional review"[50] because "[c]onstitutional review is 'values driven' and substantive, aimed at vindicating basic constitutional and human rights standards . . . . [and requiring judges to] make a judgment as to where the balance of public welfare lies . . . . The Bill of Rights Act mandates constitutional adjudication."[51]

On more general lines, both Andrew Butler[52] and Paul Rishworth[53] see few differences between what judges *could accomplish* (in the way of respecting, affirming and giving life to fundamental rights) when operating a New Zealand-type Bill of Rights Act and what they *do accomplish* when operating Superman models overseas. Sir Geoffrey Palmer clearly agrees. He too thinks that the judiciary could (and should) go a long way down the road of turning Clark Kent into Superman.[54]

The point is simply this: There is a good deal of encouragement for the judiciary from the academy when each new bit of Superman clothing is added. These cheers quickly turn to jeers if anything, however small, is removed or if the piecemeal 'upgrade' is halted. My guess is that this support is not without effect in the judicial effort to make Clark Kent look and act more and more like Superman.

2. The Uncertainty Principle

However much the judiciary may or may not have resisted the desire to transform Clark Kent into Superman, there remains the separate but related Bill

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49 Taggart, p. 277 (three internal footnotes omitted). Note that at least in the realm of administrative law one can point to a Bill of Rights *Act* as mandating a certain methodology without, necessarily, being a cheerleader for a Superman Bill of Rights.

50 Philip Joseph, "Constitutional Review Now", [1998] *New Zealand Law Review* 85 at p. 85.

51 *Ibid*, pp. 85, 125. This article seems to move from the premise that because judges are doing something (*e.g.* treating Clark Kent as evolving into Superman), that in itself is a persuasive ground for welcoming it. See too Philip Joseph, "The New Zealand Bill of Rights", (1996) 7 *Public Law Review* 162 where he argues that "human rights transcend national and transnational boundaries. They are the language of the international community." (p. 170). But compare Joseph's chapter on the Bill of Rights Act in the first edition of his *Constitutional and Administrative Law in New Zealand* (Law Book Company, 1993) for a taste of the extent to which his views have changed since then.

52 See Andrew Butler, "The Bill of Rights Debate: Why the New Zealand Bill of Rights Act 1990 is a Bad Model for Britain", (1997) 17 *Oxford Journal of Legal Studies* 323 and fn. 40 above. Butler advocates the removal of section 4, the 'other statutes prevail' provision. Rishworth does not advocate such a removal of s. 4.

53 See chapters 1, 3 and 6 in *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (eds. P. Rishworth and G. Huscroft, Brooker's, Wellington, 1995); fns. 7 and 22 above; "Two Comments on *Ministry of Transport* v *Noort*: Part A — How Does the Bill of Rights Work?", [1992] *New Zealand Recent Law Review* 189; and the main text to fn. 33 above.

54 See Geoffrey Palmer, *New Zealand's Constitution in Crisis: Reforming our Political System*

of Rights Act issue of certainty in the law. This is best examined in two affiliated inquiries. Firstly, to what extent can Bill of Rights Act jurisprudence be said to be settled? Secondly, and whatever the answer to that, how much discretion have the judges given themselves (in that jurisprudence) when it comes to applying the Bill of Rights Act? Let us take each inquiry in turn.

It is certainly settled after *Baigent* that New Zealand law recognises and allows public law actions sounding in the Bill of Rights Act. Having *discovered* that this sort of action and remedy were implicit all along in the Bill of Rights Act itself (with its long title reference to the International Covenant on Civil and Political Rights), whatever the actual legislative history or status of the enactment, it is near impossible to imagine that the judges will reverse themselves. It is far less settled how common such actions will become. So far they have been rare — or rather, litigation has been relatively rare, and even where it occurs *Baigent* awards are usually concurrent with awards under existing forms of action. But there could be any number of settled *Baigent* actions which never get to court, actions which are no doubt run concurrently with other 'established' causes of action. It is difficult to assess, in other words, the actual effect the *Baigent* action and remedy is having.

Moving over to criminal procedure, and in particular to the *prima facie* exclusion rule for evidence obtained in breach of the Bill of Rights Act, the law is anything but settled. It is over three years since the *Grayson* decision and still the Court of Appeal has yet to take up its own invitation to re-examine the *prima facie* exclusion rule.[55] Uncertainty is rampant here, with entrail-reading of each case that fails to address the issue[56] adding to the doubtfulness and indeterminacy.

Then there is the thorny problem of the operative provisions (*i.e.* ss. 4-5-6) of the Bill of Rights Act and how they affect the interpretation of other enactments and of the Bill of Rights Act itself. On this issue much remains in fog. The leading case on the inter-relation of the three main operative provisions is *Ministry of Transport* v. *Noort*.[57] What happens when there is a possible conflict or inconsistency between one of the Bill of Rights Act's Part II rights and some

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(McIndoe, Dunedin, 1992), especially pp. 69-70; Geoffrey Palmer and Matthew Palmer, *Bridled Power: New Zealand Government under MMP* (Oxford University Press, Auckland, 3rd ed., 1997), especially pp. 276-277; and fn. 10 above. For a practitioner who is at least as keen see Rodney Harrison, "The Remedial Jurisdiction for Breach of the Bill of Rights", chapter 10 in *Rights and Freedoms, op. cit.*, fn. 53 above. On the mutually reinforcing relationship between judges and legal academics see F.L. Morton, "The Charter Revolution and the Court Party", (1992) 30 *Osgoode Hall Law Journal* 627.

55 See the main text above from fn. 35 to fn. 41, and in particular to fn. 37. It is not impossible, though this is pure speculation, that the Court of Appeal has not revisited the question of admissibility of improperly obtained evidence because its members are aware that the Law Commission's proposed evidence code would be dealing with this topic. (See section 29, at page 84, of the Law Commission's Report 55, Volume 2 *Evidence Code and Commentary* (Wellington, August, 1999).)

56 See, for example, fn. 41 above. Of course I do not mean to imply that criminal procedure law before the Bill of Rights Act was a model of certainty (*Cf.* tests such as 'unfairly' obtained evidence and 'fair' trials). The issue is whether the Bill of Rights Act has made matters worse.

57 [1992] 3 NZLR 260. I have discussed this issue at more length in "The Operative Provisions: An Unholy Trinity", [1995] *Bill of Rights Bulletin* 79 (Issue No. 5, October).

other statutory enactment? In other words, what weight are we to give to and in what order are we to consider each of the three operative provisions? There is no obvious answer to this, especially when one recalls that section 4 had to be added[58] in order to get the Bill through Parliament. The five judges in *Noort* evidently struggled in their attempts to rationalise the inter-relationship. Richardson J. (with McKay J. concurring) thought the correct sequence is s. 5, then s. 6, then s. 4. When confronted with a competing statutory provision that may be inconsistent with the Bill of Rights Act, "it is more consistent with the purposes of the Bill of Rights Act to resort to s. 4 only if the challenged action cannot be justified in terms of ss. 5 and 6. . . . [and between the latter two it] is at least arguable that [s. 6] serves a function different from s. 5 and logically falls for consideration following the application of s. 5 as the statutory sequence would itself also indicate".[59] Cooke P. and Gault J. disagreed. They thought that s. 5 has no application in such situations, that only ss. 4 and 6 apply. Then there is Hardie Boys J. whose view was that ss. 4, 5 and 6 "must be read as a whole".[60] This holistic approach will allow "the true significance of s. 5, otherwise a difficult provision, [to become] apparent".[61]

As Hardie Boys J.'s view appears to be closer to Richardson J.'s, the *Noort* case seems to be authority for reading the operative provisions in the 's. 5 then s. 6 then s. 4' sequence. But this is an almost incomprehensible rationalisation in my view.[62] More importantly, the judges seem often to do little more than pay lip service to *Noort*, preferring simply to ignore the thorny issue of how the three operative provisions can be understood together and instead picking whichever one is useful or preferable in the circumstances. Not only *can* this unsettledness and inconclusiveness give the judiciary great scope to upgrade Clark Kent into Superman,[63] it leaves the litigant unsure of the likely outcome of his case. The extent, therefore, to which the judges are prepared to avoid having recourse to s. 4 has obvious ramifications. One has only to compare *Baigent* (where the judges were prepared to rely on s. 6 — the reliance is implicit, but crucial all the same — to circumvent a competing statutory provision) with *Quilter* (where the judges were not prepared to use s. 6 to circumvent an arguably less express statutory provision and instead relied on s. 4) to see that this is so.

Leave now the extent of unsettledness of Bill of Rights Act jurisprudence and turn to the second inquiry raised above, the amount of discretion the judges have given themselves when it comes to applying the Bill of Rights Act. First off, the discussion above illustrates that the s. 6 interpretation power, or more accurately the manner in which the judges can use that power if they are so

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See too Rishworth, "Two Comments on *Ministry of Transport* v *Noort*: Part A — How Does the Bill of Rights Work?", [1992] *New Zealand Recent Law Review* 189. The operative provisions are revisited in *Moonen, op. cit.*, fn. 46, though in my opinion the Court there simply does what it can to minimalize s. 4.

58 See pp.615-616 above. Section 5 was also slightly altered when s. 4 was added in order to make it "subject to s. 4".

59 *Ministry of Transport* v *Noort* [1992] 3 NZLR 260 at p. 282.

60 *Ibid.*, p. 287.

61 *Ibid.*

62 See fn. 57 above. I prefer the Cooke P. and Gault J. view.

63 See the main text to fn. 33 above. See too Taggart, pp. 280-286.

inclined, heaps discretion on discretion. Secondly, were the *obiter dicta* in *Grayson* to be picked up, the possible remedies for evidence obtained in breach of the Bill of Rights Act would be myriad[64] and left to the discretion of the judge, all the factors and circumstances being thrown into the hopper, as it were. The earlier civil case of *Baigent* took the same line with respect to just what "an adequate public law remedy for infringement [of the Bill of Rights Act] obtainable through the Courts"[65] would be. We were told that "[w]hat is adequate will be for the Courts to determine in the circumstances of each case".[66] Judicial discretion, according to the judges, lies at the heart of applying the Bill of Rights Act and granting remedies. This is the uncertainty principle writ large.

Nor is the present President of the Court of Appeal immune to the charms of judicial discretion. Have regard to the implications of His Honour's comments in *Noort* on the extent of s. 5 inquiries and the (implicit) desirability of Brandeis brief-type submissions to the Court:

> It is worth emphasising too that in principle an abridging inquiry under s. 5 will properly involve consideration of *all economic, administrative and social implications*. In the end it is a matter of weighing:
> (1) the significance in the particular case of the values underlying the Bill of Rights Act;
> (2) the importance in the public interest of the intrusion on the particular right protected by the Bill of Rights Act;
> (3) the limits sought to be placed on the application of the Act provision in the particular case; and
> (4) the effectiveness of the intrusion in protecting the interests put forward to justify those limits.[67]

The point of this section of the paper is that the Bill of Rights Act has substantially increased uncertainty in the law. On the one hand, the judges have given themselves much discretion in how they will apply it and the remedies they will award when they decide it has been breached. On the other hand, the law surrounding the Bill of Rights Act is itself still unsettled in various areas. The result is plenty of uncertainty. For those who value a relatively high degree of certainty in the law, this is an unfortunate state of affairs.[68]

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64 See the main text to fn. 39 above.

65 *Baigent*, *op. cit.* fn. 28, p. 692, *per* Casey J.

66 *Ibid.* Casey J. continues, "In some it may be that already obtainable under existing legislation or at common law: in others, where such remedies are unavailable or inadequate, the Court may award compensation for infringement, or settle on some non-monetary option as appropriate . . .. Selection of the remedy which will best vindicate the right infringed will be a matter best left to a Judge rather than a jury." Cooke P., in a similar vein, says of the level of compensation for such Bill of Rights Act actions: "In the end the Judge can only exercise judgment in the light of the particular circumstances." (p. 678).

67 *Noort*, *op. cit.* fn. 57, pp. 283-284, (italics mine), *per* Richardson J. Remember, too, that Richardson J. would have all considerations of the operative provisions *start* with s. 5. Hence such abridging inquiries could never be avoided.

68 For two diverging opinions on the merits of a relatively high degree of certainty in the law compare my "The Invisible Hand in Justice Thomas's Philosophy of Law", [1999] *New Zealand Law Review* 213 with the response of Justice Thomas in "The 'Invisible

3. Do We Want Superman (And Supermen) To Save Us?

Many people seem to assume that simply by mentioning the words 'justice' and 'fairness' or by articulating some particular right, the 'right to freedom of expression' or 'right to be secure against unreasonable searches' say, that the world then divides into good and bad — those *for* justice, fairness and these rights on one side and those *against* on another. Of course if pressed concessions will generally be made — 'rights are not absolute, but involve some sort of balancing with other interests' can usually be heard eventually, though the concession is uttered *sotto voce*. But the underlying assumption that rights and justice are uncontentious, and only questioned by those beyond the moral Pale, remains in place. This is what gives such force to the Superman morality tale. The forces of good and evil are seen to be clearly demarcated. In such a world it is relatively unproblematic to have Superman arrive, take sides, and ensure the triumph of the former.

As it happens, however, the world is not like that. Virtually all of us may hold our hands up high when asked if we are in favour of justice or fairness. We nod in agreement that society should ensure rights to life, freedom of religion and expression, no undue delay before trying an accused, and no unreasonable police searches. However, all this widespread agreement occurs at the most general level where talk is in terms of free speech, privacy, equality, personal safety or some such other emotively and rhetorically attractive — but quite unspecific — quality or trait. Unfortunately, the minute anyone moves from the plane of vague generalities to that of specific policy choices it becomes abundantly clear that consensus, even near consensus, disappears. In other words, when we take the broad and imprecise standards embodied in the language of rights (and of 'justice' and 'fairness' for that matter) and apply them to specific situations,[69] any notion of consensus or even widespread agreement disappears.

This point is crucially important. Once a Superman Bill of Rights is in place, giving judges power to strike down legislation and so, undeniably, to have huge social policy-making powers,[70] the judges end up deciding *controversial questions of social policy* over which sincere, intelligent, well-meaning people disagree —

Hand' Prompts a Response", [1999] *New Zealand Law Review* 227 and with Justice Thomas's earlier paper "Fairness and Certainty in Adjudication: Formalism v Substantialism", (1999) 9 *Otago Law Review* 459.

[69] For example, how long should those accused of serious criminal offences be kept waiting for trial before judges order their release? (See *R* v *Askov* (1990) 74 DLR (4th) 355 and then one of the Justices of the Supreme Court of Canada's rather pathetic extra-judicial rationalization and apology for that decision in the July 26, 1991 *Lawyers Weekly* (vol. 11, no. 13) followed finally by the recanting of *Askov* in *R* v *Morin* (1992) 72 CCC (3d) 11 (SCC)). Similarly, what should the permissibility and extent of abortions be? (see *Roe* v *Wade* 410 US 113 (1973)); when should free speech concerns trump health and safety concerns (see *RJR MacDonald Inc* v *Canada* (1995) 127 DLR (4th) 1) or worries about pornography? (see *R* v *Butler* (1992) 89 DLR (4th) 449); when should police misconduct trigger an exclusion of the evidence thereby obtained? (see *R* v *Grayson and Taylor* [1997] 1 NZLR 399); and so on.

[70] Since the introduction of a Superman Charter of Rights in Canada in 1982 the judges there have made a multitude of rulings with social policy implications, rulings that the elected legislature cannot (in any practical sense) ever over-rule. The situation is similar in the United States. For detailed argument on this, and why it is democratically

questions about where to draw the line when it comes to abortion, privacy, police powers, free speech, religious practices, who can marry, how refugee claimants are to be treated, and much else. The judges *do not* end up stopping vulnerable minorities from being imprisoned because of their race[71] or protecting those with (or even without) distasteful political views from being hounded into unemployment and pariah status.[72] In any imaginable scenario in which the elected legislators would contemplate the sort of things almost everyone today (in the absence of an external threat, when times are good) would consider wicked, the judges too would contemplate the same measures. There is no special moral goodness or acute ethical perspicacity inhering in judges that the rest of us lack.

So what a Superman Bill of Rights does is to deliver from elected politicians to unelected judges power to decide highly contestable, debateable, social policy issues (where both sides to the dispute can be seen as reasonable, sincere and thoughtful), under the guise of upholding and protecting universally desired and uncontentious rights. It is not the clearly 'black and white', 'good versus evil' type issues, so often used to sell a Bill of Rights to the public, that the judges will be deciding. Rather, it is the day-to-day, but highly contentious, political and social issues over which these unelected judges will have the first (and in all practical senses the final) say. In my view, the realm of deciding such debateable social policies is not obviously one for jettisoning democratic decision-making.[73] Or in terms of the metaphor running through this paper, it is far from evident that Superman should be deciding debateable policy matters. The arrival of the caped man of steel to ensure the victory of truth, justice (and the American way?) when society is threatened by injustice and moral wickedness may be one thing. But to take power out of the hands of the elected representatives of ordinary citizens and give it to Superman judges (the necessary effect of a Superman Bill of Rights) to exercise in highly contentious matters where no side can be characterized as wicked or unjust,[74] is quite another.

Yet that is what the supporters of a Superman Bill of Rights effectively advocate, when all the rhetorical debris surrounding rights is cleared away.[75] In my view that is not a desirable model for a parliamentary democracy like New Zealand, whose political history is at least as commendable as those countries with

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deficient, see my "Bills of Rights and Judicial Power — A Liberal's Quandary", (1996) 16 *Oxford Journal of Legal Studies* 337; *A Sceptical Theory of Morality and Law* (Peter Lang, New York, 1998), chapter nine; 'The Invisible Hand in Justice Thomas's Philosophy of Law", *op. cit.*, fn. 68 above; and "Rights, Paternalism, Constitutions and Judges", forthcoming as a chapter in *Liberty, Equality, Community: Constitutional Rights in Conflict?* (eds. G. Huscroft and P. Rishworth, Hart Publishing).

71 *Cf.* the plight of Japanese Americans in World War II. (See *Korematsu* v *US* 323 US 214 (1944)).See too *McClesky* v *Kemp* 481 US 279 (1987), where the US Supreme Court refused to stop minorities from being executed in numbers disproportionate to race.

72 *Cf.* the McCarthy hearings in the US. And recall that McCarthy was ultimately stopped by the political process.

73 For my full arguments to that effect see the items listed in fn. 70 above.

74 Or what amounts to the same thing, large groups of citizens on both sides will hold their view sincerely and think the other side's view is wicked and unjust.

75 I attempt such a clearing up in "Rights, Paternalism, Constitutions and Judges", *op. cit.*, fn. 70.

entrenched, justiciable, 'constitutionalized' Bills of Rights. We should be glad only a Clark Kent Bill of Rights Act was enacted in 1990.

For those who disagree, who prefer their Bills of Rights caped and beyond the reach of 'mere' politicians, it must be terribly tempting to smuggle through the back door what could not be got through the front door. When one's preferred Superman Bill of Rights is pictured as unequivocally a good thing, even a back door, bootstraps operation must seem attractive. So attractive, in fact, that many such supporters will welcome this judicial 'upgrade' and 're-tooling'.

This, in effect, is to make the hard-nosed utilitarian calculation that the end justifies the means, that the distastefulness of a back door, bootstraps operation to move towards what could not be obtained in an open, democratic manner is more than outweighed by the benefits of having a Superman Bill of Rights (which will ensure we "live up to international standards or targets and . . . keep pace with civilisation"[76] in what is anyway, we are told, "the shell game of constitutional reform"[77]). Such a utilitarian-type argument is jarring when it comes from the mouths of those who make rights pre-eminent.[78]

4. Then 'Twere Well It Were Done Openly[79]

This paper finishes with a short glance forward. If, contrary to my strong preferences, New Zealand is to have a constitutionalized, entrenched Bill of Rights some time in the future, what is the best way of adopting one? How should Superman come into being?

Not by means of judicial upgradings, re-toolings, references to international treaties and case law, and plain stretched interpretations of inconsistent statutes (not to mention judicial threats to make declarations of inconsistency in order to help out the Human Rights Committee), is the basic answer. If we are to have Superman, let us first make him an issue in an election, or better still the subject of a binding referendum.[80] Remember, it will be impossible, in practice, ever to get rid of an entrenched Bill of Rights (and its philosopher-king, Superman judges) once one has been adopted. So success in a referendum (or, less persuasively, in an election in which the issue is a live one) seems the smallest hurdle supporters should have to jump.

Here one might instructively compare what led to the adoption and entrenchment of the Superman-type Canadian Charter of Rights and Freedoms in 1982, so frequently looked at for guidance by our own judges. Surprisingly,

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76 *Noort*, *op. cit.*, fn. 21 above, *per* Cooke P.

77 Taggart, p. 268. See fn. 3 above.

78 For more on the oddity of strong rights supporters ending up relying on purely utilitarian arguments see my "Rights, Paternalism, Constitutions and Judges", *op. cit.*, fn. 70, Section D.

79 A slightly modified rendering of MacBeth's speech at the start of Act I, Scene VII.

80 The Australian constitution, the only one I know of in the developed world which lacks any sort of Bill of Rights, makes all important constitutional change subject to success in a referendum. See section 128 of the Commonwealth of Australia Constitution Act 1900 (UK) which, *inter alia*, requires approval in a referendum of both (i) a majority of electors in a majority of states and (ii) a majority of all electors voting.

and despite many judicial references by Canadian judges to its democratic lineage and pedigree (usually as an excuse for their own social policy-making boldness, a sort of 'the-devil-made-me-do-it' type reference[81]), no election was ever held in Canada, either federally or in any provincial jurisdiction, on whether to adopt the Charter. Nor was any referendum ever held.

Prime Minister Trudeau won the February, 1980 election on the issue of whether to raise petrol taxes by 18 cents a gallon.[82] (Trudeau was against, though, after the election, he raised them by a lesser amount anyway.) This victory brought Trudeau back from the political wilderness, as just before the election he had announced his retirement. Indeed, that announcement probably led the minority Conservative government of Joe Clark to think it could get its tax rise through the House. The important point, however, is that Trudeau made no mention during the election that victory for his party would lead to an entrenched Bill of Rights (or, for that matter, to a re-patriation of the Constitution). It is true that Trudeau, personally, had long championed the idea.[83] But never before had he made it an election issue, nor did he here. Nevertheless, shortly after the 1980 election, with his big majority in place, Trudeau decided to push for re-patriation and a Superman Bill of Rights.

The ten provincial premiers were initially mostly opposed. But after negotiations, a court case,[84] and deal-making, Trudeau was able to get nine of the ten premiers on board in support.[85] This was enough. The deal was done. And without any election or referendum on the question[86] — at any level of the Canadian federation or in any geographical area — the Superman Charter came into being after the federal parliament passed a law asking the United Kingdom Parliament to repatriate the Canadian Constitution.

All any defenders of the democratic legitimacy of the Charter can do is to point to opinion polls at the time which showed a majority of Canadians in

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81 See , as one example, *Re BC Motor Vehicle Act Reference* [1985] 2 SCR 486 where it was said at p. 497 that "It ought not to be forgotten that the historic decision to entrench the Charter in our constitution was taken not by the courts but by the elected representatives of the people of Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility".

82 For a good, brief history of the Canadian Charter see Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Wall & Thompson, Toronto, 1989 — hereinafter "Mandel"), pp. 4-34.

83 It is also true that before his 1979 election loss, in response to the Quebec separatist situation, Trudeau had introduced a Bill into Parliament which contemplated a Bill of Rights applicable to the federal government. This Bill, never made an election issue, did not get passed. Mandel, p. 21.

84 See *Reference Re Amendment of the Constitution of Canada (Nos. 1, 2 and 3)* (1981) 125 D. L. R. (3d) 1.

85 Only Quebec remained opposed. The fact the repatriation went ahead without Quebec's support is one (of many) causes for the lingering Canadian constitutional disquiet.

86 Trudeau did briefly moot holding a referendum, but abandoned the idea. See Mandel, p. 33.

support of Trudeau's initiative.[87] This is advanced, in all seriousness, as proof of the Charter's democratic credentials. And those supposed credentials are then relied upon by the judges as justification for taking up, in a most vigorous way, the powers that that Charter gives them.

I take it that most readers will agree that relying on opinion polls to vouchsafe the democratic legitimacy of the Charter's adoption, and so its attendantly immense power-conferring on to the judiciary, is at best suspect and at worst pathetic. It is exactly analogous to pointing to a few opinion polls in favour of capital punishment and then — without the benefit of an election or referendum campaign on the issue which might bring it to widespread public attention and force at least some of the likely consequences to be debated and considered — going ahead to reinstate capital punishment by using one's majority garnered in an election in which capital punishment's return was never mentioned. Worse, the analogy requires that we imagine capital punishment is not simply enacted by statute but entrenched and constitutionalized and put beyond the reach of those who in future might seek its repeal.[88] And the democratic warrant for this Superman entrenchment is to be a few opinion polls.

Of course a major distinction between the Charter and capital punishment is that most Canadian judges and legal academics like the former and dislike the latter. But that, in itself, does nothing to buttress the democratic credentials of the Superman Charter of Rights.[89]

The point of the comparison with Canada is to emphasize how preferable an open, democratic endorsement of a Superman Bill of Rights would be. 'If it were done when 'tis done, then 'twere well it were done openly.'

Better still, in my view, is to stay with the Clark Kent version we have, disdain future judicial bootstraps operations, and keep this the Parliamentary Bill of Rights Act its introducer into the House said it would be.

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87 These polls are noted in Mandel, p. 23. The sort of one-sided questions the polls asked is criticized in Mandel at p. 35 *ff*.

88 To amend the part of the Canadian constitution dealing with the Charter requires the agreement of both Houses of the federal parliament and of all ten provincial legislatures, in other words total unanimity. See sections 38-49 of the Constitution Act 1982. After nearly twenty years in force, there has yet to be one single successful amendment to the 1982 Canadian constitution (provided, that is, that one does not count judicial amendments which take the form of re-interpreting and giving new meaning to some provision whose words have not changed).

89 One might have thought such a provenance of the Charter would have made the Canadian judiciary somewhat cautious in using it to over-ride Parliament. Alas, no. Not only is the Canadian judiciary remarkably activist, its members commonly conflate 1) the constitution itself with 2) the decisions of the courts that interpret it. This is fallacious. It conveniently assumes that every decision courts make under the Charter is one that is required by the Charter itself. But of course the Charter could just as easily be interpreted as providing all sorts of room for deference to legislative policy judgments — an interpretation one might think would be greatly strengthened by *the Charter's lack of democratic credentials* (as a matter of historical fact).