Legislation Through the Millennial Looking Glass

Nigel Jamieson*

> As a New Zealander, I find it significant that the debate over the *Treaty of Waitangi*, an investigation and redefinition of the foundations of national sovereignty, was initiated under the fourth Labour government of 1984 – 1990, which will be remembered in the national history – if the nation survives to have one – as a unique blend of the creative and the radically destructive.
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> J.G.A. Pocock, 'Law, Sovereignty and History in a Divided Culture: The Case of New Zealand and the *Treaty of Waitangi*'[1]

The French – historically the common enemy of both maori and pakeha in New Zealand and the instrumental means of promoting their partnership – have a phrase *fin de siècle* to denote the decline that besets the end of each century. Today's legislation, itself a reflection of twentieth century society, operates like a laser when reflected back along its own millennial trajectory. That Heraclitean flood of statute law into which by reason of its constant amendment none can step twice, swirls us along over the daily Niagara of case-decided response — with revisionist legal history as the lawyer's only means of mitigating future shock. Madness this all must appear to previous generations of the legal profession. So it 'must' also be for those called on to construe the changeover from 'shall' to 'must' for the future of the Statute Book. Who can say what this new-look modal logic of legislation[2] must mean for the new millenium?

For as long as one can survive in New Zealand without the appropriate documentation under the Births, Deaths and Marriages Registration Act 1995 — where survival in New Zealand is as good a test of sanity as one can find under the Mental Health (Compulsory Assessment and Treatment) Act 1992 — one is nevertheless debarred from driving cars as much as flying planes — since to "participate" in "the land transport system"[3] or in "the civil aviation system"[4]

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* Senior Lecturer in Law, University of Otago, and formerly Parliamentary Counsel

1 (1988) 43 McGill L.J. 481, 504.

2 The more civilised and courteous expedient of denoting the imperative by reversing 'shall' and 'will' between first and other persons is now laid to rest. Its grammatical demise began with a history of judicial confusion. Judges insisted on reducing the 'mandatory' to the 'permissive' by distinguishing between different sorts of 'shall'. In consequence of this confusion a vastly more totalitarian imperative is born. Judges get their come-uppance for, under s 71(6) of the Trans-Tasman Mutual Recognition Act 1997, "the High Court 'must' hear and determine any question submitted to it," no less than "the Prime Minister 'must' recommend" pursuant to s 1(4) of the Ngai Tahu Claims Settlement Act 1998. What correspondingly new legal sanction – other than having one's head stuck on a Cromwellian pikestaff – can be created for the breach of this new-look modality? Presumably too, by way of consequential amendment, all 'shalls' are now 'mays' – a process which a brother at law aptly describes as being the ultimate in this long drawn out process of 'shilly-*shall*ying".

3 Land Transport Act 1998 s. 4.

4 Civil Aviation Act 1990 s. 12.

is impossible without that documentation — even within one's existing 'life-time licence'. As a matter of maintaining one's sanity one can perhaps avoid the legislatively induced manic-depressive re-distribution of individual rights and denial of governmental responsibilities – at least until called to account for over-staying under the Immigration Amendment Act 1999. That there is, apart from the bureaucratic proliferation of registers for this and that, a conspiratorial methodology underlying all this legislative madness for millennial documentation, most civil rights supporters as well as Christian fundamentalists would strongly suspect; and this without introducing the documentation required to evidence a lowered drinking age under the Sale of Liquor Amendment Act 1999. Even at the cost of $118M, however, the fact remains that INCIS — the police computer designed to do away with surplus policemen — does not work.

We might expect millennial to exceed centennial madness, and by learning more – as we usually do learn more from enemies than friends – find the managerial issue of the moment, which sets its millennial sights on quantifying excellence, no more decisive in principle nor objective in practice than philosophers from Plato onwards have established. It is about as decisive and objective as one would hope from section 169 of the Land Transport Act 1998 in promoting "land transport safety at a reasonable cost" by defining "reasonable cost" as that which "is exceeded by the value of the resulting benefit. " On this equation, outright death to many could be considered far more cost-effective than injuries to a few.

As a mark of that scholarly moderation which we associate with mid-millennial thought, we shall in these strange times reduce the issue of whether legislation has achieved excellence or legislators have finally lost their wits to one in which novelty becomes outmoded by the renewal of everything. Our new-look legislation already possesses that degree of strangeness which suggests it emanates from someone else's country. Thus, when we look at section 5(1) of the Trans-Tasman Mutual Recognition Act 1997 which provides that –

> Every law of New Zealand must, unless it or this Act otherwise expressly provides, be read subject to this Act

we see, to say the least, a remarkably strange provision. Unless expressly excluded, it purports to affect the whole of the New Zealand legal system. This presumably covers statute, common law, equity, indigenous or aboriginal custom, and every other jurisprudentially recognised source of law. Substantively, this is strange; and what is more strange is the unresponsiveness of the public and the profession to the passage of this prioritising provision into law. Having spent much legislative effort in repatriating New Zealand law under the Imperial Laws Application Act 1988, here in the Trans-Tasman Mutual Recognition Act 1997 "to provide for the recognition in New Zealand of regulatory standards adopted in Australia". we are now busily expatriating it.

There is also a strangeness at a formal, adjectival, and drafting level. The provision, although purporting to be of over-riding constitutional and interpretative significance, is tucked away in what could be mistaken for a

somewhat trivial trading statute. Our sense of strangeness may already have been softened by the Evidence Amendment Act 1994 where corresponding measures first debated in Australia as the Evidence and Procedure (New Zealand) Bill 1993 together with the Evidence and Procedure (Transitional Provisions and Consequential Amendments) Bill 1993 were introduced as reflecting "Australia's close links with New Zealand particularly in the economic area". Of course, in terms of the Trans-Tasman Mutual Recognition Act's title, 'to provide for the recognition in New Zealand of regulatory standards adopted in Australia regarding goods and occupations', it is not that sort of trading statute at all. Its implications for New Zealand sovereignty at international law, never mind its constitutional forcefulness, interpretative significance, and effect on professional autonomy and labour law, make it of mammoth concern. Its whole legislative scheme, as with almost every one of its particular provisions literally originates in, and gives credence to someone else's country. Here, in this Trans-Tasman Act we have a paradigm for some strange goings-on in our Statute Book – to which Act we shall return once we have established what to expect and not to expect by way of continuing to legislate for our own country.

I. Heritage Values Versus Law Reform

Do we, as lawyers, have a custodial responsibility for maintaining the law; or, as with the increasing politicisation of society, are we to be imbued primarily with a zeal for law reform? In a case of great controversy affecting our legal system, when the famous New Zealand judge Sir Joshua Williams dared to take their Lordships on the Privy Council to task for their misunderstanding of New Zealand law, it was with some pride in our country that he said:[5]

> Fifty years in New Zealand mean much more than fifty years in England. The changes, political, social and material that have taken place in New Zealand during the latter half of the nineteenth century are greater than those that have taken place in England from the time of the Tudors to the present day.

This was a daring statement – both by its text and for its context as in its own time and for all time – but it was also one which put New Zealand's legal history firmly in accord with the increasingly perceived relativity of the fourth and temporal dimension. By way of proving its own point, that legal history moved faster here than elsewhere, it anticipated Einstein's own formulation of relativity by several years. It is not proposed to stretch that point, however relatively elastic it may prove, by transcending the fourth into the remaining and unquantifiable dimensions, to show that we have already managed to encompass through our Hebraic, Greek, Roman and English legal heritage, several millennia of legal history within our hundred and fifty or so New Zealand years. It is enough to show that, within our own century, we have doubled back, renounced, abandoned, and broken down almost all the great legislative endeavours by which we established the strong public service values of a firmly founded, stable, and incorruptible executive arm of government, the proletarian and strongly socialist concept of a welfare state, and the centuries old concept of the Crown

[5] N.Z.P.C. Cases, 1840-1932, Appendix, p. 752.

as the fountain of justice, the champion of law and order, and the protector of both rich and poor. So too, in terms of economic theory, by substituting private enterprise for public interest, we have thrown away almost all that which we previously valued to be our rightful share in the wealth of nations. Since we now judge solely by how much wealthier are the wealthy[6] the immediate (never mind the long-term) issue for legislation is whether our economy can sustain such a sharp swing round in fundamental values.

Jurists, no less than lawyers, claim touchstones for quantifying professional excellence as much as they try to defend their efforts from what others see as madness. On the one hand, they invoke the divine origin of law to explain just how celebrating any legal system's year of jubilee, as with the foundational *Treaty of Waitangi*, is bound to rebirth the system and return the land to its indigenous inhabitants.[7] On the other hand, jurists may turn to today's authorised sources of law — being the reports of judicial cases, the promulgation of statutory and subordinate legislation, and the records pertaining to executive and administrative action — as a testimony to the logical independence, consistency, and completeness (*i.e.* the legal continuity or otherwise) of their own efforts. By examining the New Zealand Statute Book, both substantively and adjectivally, for the last decade of this second millenium, we shall choose to apply the second and seemingly more secular of the two touchstones. It is also that alternative which, although more jurisprudentially acceptable for our own times, is the most transient and the least rewarding. Our attempt to measure the millennial madness of our own legislative endeavour self-referentially will be no more valid, therefore, than the managerial move to quantify excellence with which the same *fin de siècle* period is identified. It will, however, complement the governmental euphoria with which both the Common Law and the Rule of Law[8] are currently under attack; and may even provide some sort of historical record of the deep depression felt by many professional lawyers during this era on finding long-established legal values defiantly and irrationally ignored, persistently eroded, or suddenly overturned by big-business interests and governmental managerialism.

Our own *fin de siècle* legislation testifies to a reversal of legal at the expense of intensifying political values – this time paradoxically in favour of entrepreneurial privatisation.[9] Public interest is equated externally now only with business so big as to be of a transnational magnitude. Internally, the domestic equation disempowers pakeha as much as urban maori with its resurrected tribalism of taonga-laden brown tables. Some say this is the final trade-off in the cargo-cult

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6 See *The Social Deficit*, being Chap 11, Jane Kelsey, *The New Zealand Experiment A World Model for Structural Adjustment*? (Auckland UP 1995) pp 271-296

7 "And ye shall hallow the fiftieth year...it shall be as jubilee unto you...and ye shall return every man into his possession...the land shall not be sold for ever, for the land is mine' saith the Lord." Leviticus 25:10, 13, 23. Fifty years intervenes between the present and New Zealand's last legislative attempt of the nineteen-forties to finalise finality for maori land claims.

8 See Geoffrey De Q Walker, *The Rule of Law* (Melbourne UP, Melbourne, 1988) and fn.15 infra.

9 Jane Kelsey has documented this potlatch of public assets for the first half of the nineteen-nineties. *New Zealand Experiment A World Model for Structural Adjustment*? Supra fn.6, Parts I & II pp 15-239.

of substituting exotically secular for indigenously spiritual values. Others say that it is simply a policy of appeasement by rapidly disintegrating but still innately paternalistic governments. As a global phenomenon, there are those who go so far as to claim it is a process of dumbing down what we have come to respect as civilisation. The present terms of reference do not permit the author's opinion[10]; but from the end of one century to the next you can always recognise each *fin de siècle* by the lack of moderation with which extreme values are reversed.

It is this lack of moderation that so completely characterises the present millennial moment in the history of our legislation as to make any committed investigator give up on the enterprise. One need not cite the long string of state-owned enterprise and privatising statutes that document this legislative immoderation, any more than the long string of public officials being prosecuted for fraud – or of those, if there be any difference between them, who are being blessed with six-figured (and much more) golden handshakes. Thanks to the Fourth Estate, these strange data are as well-known, one would hope, as they are unfortunately all too commonplace. Before the full catalogue of legislative vanities does conclude, however, some residual curiosity requires of any committed investigator — both to substantiate the accuracy of his own perception as well as assuage whatever curiosity he may retain — that he attempt to answer the question of how our throwing legislative caution to the four winds has come about.

II. The Politicisation of Law

The threat of increasing politicisation to western society was first raised in the BBC Reith Lectures. During the nineteen-eighties, the former Dean of Law at Otago, Professor PBA Sim, openly expressed his perturbation at the increasing threat of politicisation to the New Zealand legal system. The most obvious example of such politicisation today is the increasing reference made to parliamentary materials by the courts, which has been summarised by no less than the Clerk of the House of Representatives himself[11] as leading to "more litigation, less accessibility to the full range of legal materials which would then be needed, injustice, the use of parliamentary hearsay, reliance on superficial arguments drawn from other disciplines, and the undermining of Parliament". Quite "a catalogue of woes", as the Clerk of the House called them, but admitting of "one consolation – more work for lawyers and law librarians".

What Megarry[12] and others have called "the orthodox English theory" that, in Lord Wilberforce's words[13] "it is not proper or desirable to make use...of anything reported as said in Parliament, or any official notes" has also been described by Burrows[14] as "the New Zealand rule" at least so "it used to be thought" for interpreting statutes. In black-letter law, this is basically the law of

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10 See "The Last Indian Summer of Soviet Law Reform" [1995] Statute LR 125 for the author's comparative account of this global phenomenon.

11 D.G McGee, "Extrinsic aids to statutory interpretation." [1989] NZLJ 341, 345

12 See R.E. Megarry, Q.C., *Miscellany-at-Law* (London, 1955) 356-357.

13 *Black-Clawson International Ltd* v *Papierwerke AG* [1975] AC 591, 629.

14 Paper delivered to a Seminar on Statutory Interpretation held by the Law Commission in 1988.

documents. The rule derived from the four-corners doctrine which, to preserve the legal status of a document, generally excluded extrinsic evidence as to the document's meaning. In the case of parliamentary documents – emphasising the fine but highly principled line between legally enforceable enactments and politically debatable bills – the doctrine, requiring a separation of powers between the legislature and the judiciary, would also reinforce what Lord Wilberforce described as the Rule of Law.[15]

The rule excluding extrinsic evidence from statutory interpretation (no less than from statutory construction) can be stated with considerable clarity. It functions with all the rigorousness of lapidary law. Whatever inconvenience this rigorousness may cause operates as a constitutional check on the legislature to make its meaning clear. Compare that with the colloidal state of the law by which it now takes twenty pages of closely written commentary[16] to account for the way in which, by stirring widdershins[17], our common law assumes its present porridge-like (in)consistency. This restructuring of lapidary legislation back into its colloidal components has all come about by judicial initiative. Even in the legislatively authorised context of section 5(j) of the Acts Interpretation Act 1924 (which before its demise provided for 'the intent of the legislation' not that of the 'legislature') this colloidal mud-larking around went so far as introducing evidence from an executive[18] as to the meaning of the State-Owned Enterprises Act 1986, inviting views from interest and lobby groups[19] as to the meaning of the Matrimonial Property Act 1976, and allowing religious[20] issues to determine the granting of water rights under the Water and Soil Conservation Act 1967 (for which that Act makes no provision). None of those highly political matters could be admitted without the exercise of judicial initiative.

At first sight, then, the politicisation of legislation must be laid at the feet of the judiciary. It is replete with the radical decision in the English case of *Pepper* v *Hart*[21] where their Lordships were prepared, on a reading of *Hansard*, to exchange their first, although tentative, legal view for a final albeit political one. Of course, this outcome reversed long established precedents outlawing the use of parliamentary papers for the interpretation of statutes. In New Zealand the same radical trend, ensconced in the litigiousness of the United States and anticipated by Australian legislation since the nineteen-eighties, has been judicially advanced without legislative backing, particularly for public information bulletins and ministerial statements as in *Marac's* case[22] and, even more radically, by the *Maori Council* case[23] where the court was prepared to admit testimony from a public servant as to what he thought the legislation meant in terms of government policy. Why stop there? Sub-poena the draftsman, or better still, the Governor-

15 *Black-Clawson* (supra) 629.

16 J.F. Burrows, *Statute Law in New Zealand* (2nd ed.)(Wellington, 1999) 155-185.

17 Even for colloidal law, as for stirring Scotia's staple, there are right-handed rules for its preparation.

18 *The New Zealand Maori Council and Latimer* v *Attorney-general and Others* [1987] NZLR 641, 651.

19 *Z v Z (No 2)* [1997] 2 NZLR 258.

20 *Huakina Development Trust* v *Waikato Valley Authority* [1987] 2 NZLR 188.

21 [1993] AC 593.

22 *Marac Life Assurance Ltd* v CIR [1986] 1 NZLR 694, at 699, 701, 707.

23 supra

General to find out what he thought he was assenting to on behalf of the Queen as Head of State!

One wonders whether the judiciary is aware that even *Hansard* is not a *verbatim* account of parliamentary proceedings, but is subject to a political push and pull which has exposed prime-ministers from Gladstone to Callaghan to allegations of touching up and twinking out the record. The classic controversy over *Hansard* at a prime-ministerial level is fully dealt with in Engel's preface to the fourth German edition of *Das Kapital*[24]. All who listen carefully to the oral proceedings of parliament and compare them carefully with the written record can testify to this being an ongoing issue in New Zealand. Even statutes may differ in their wording between the time of their being given assent by the Governor-General and their official publication![25] For that matter, how goes it for the *Law Reports*?

However insidious it may be for the judiciary to break down the long-established cut-off point between the political process and enacted legislation, and so give the cutting edge to politics rather than law in the interpretation of ambiguous and equivocal statutes, the politicisation of legislation is far more insidiously accomplished by the increasingly fashionable provision of purpose and object clauses being incorporated into the legislation itself. These are very different, both in their raw ideological content and their purposively political aims, from the petitionary provisions of medieval legislation, which were used to identify the wrong to be remedied; and also from the recital provisions still required to explain the consensus required for legislating what might otherwise prove to be impossibly controversial measures. Both these functions have been partly taken over in New Zealand, at least for public bills, by the parliamentary convention of introducing them with explanatory notes. If prepared by parliamentary counsel, these presumably carry authority under the Statutes Drafting and Compilation Act 1920 – although the whole point of this Act, as promoted by Sir John Salmond, to establish an office of parliament for the purpose of drafting statutes, has been defeated by the Statutes Drafting and Compilation Amendment Act 1995 which now empowers the Inland Revenue Department to undertake legislative drafting.[26] In practice, however, these notes are prepared solely as part of the legislative process, and so drop off from the bill on enactment. As for the very differently motivated purpose, object, and aiming clauses that are now commonplace in legislation, let us look at some specific examples of these provisions to see whether the formula whereby "strict grammatical

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[24] (1890) The issue is whether Marx had 'added a lie' or Gladstone had 'excluded the truth' (p 618 of 4th German edition). Engel's account may be read in English pp 879-884 Everyman Edition (London 1930).

[25] See Roderick Munday "A reform that almost wasn't: or when to correct a parliamentary gaffe" [1989] NZLJ 345 – the tip of the iceberg.

[26] The proponents of purpose clauses may say 'So much for not having one in this principal Act!' Although a dedicated draftsman such as DAS Ward could insist, against all political odds, on changing the title of the Land Settlement Promotion Act 1952 to that, more truthfully indicating its purpose, of the Land Settlement Promotion and Land Acquisition Act 1952, dedicated drafting is rare. Enactments more surreptitiously change and can even be made to contravene their character, much to the confusion of the courts and of the citizenry, by a series of incongruent amendments – or by sometimes only even one of them. *Vide* s 30 Food Act 1981.

meaning must yield to sufficiently obvious purpose"[27] is in the long run any more than a stick to stir up controversy and a licence for litigiousness. It may be countered that this highly motivational formula operates only in the presence of a problem, but lawyers like philosophers, exist for the purpose of pursuing if not promoting problems. How objective can one be in determining criteria for strictness, sufficiency, and obviousness in the face of any problem over enforcing legislation, other than to say that its political purpose, where made sufficiently obvious, takes precedence over the strictly grammatical and therefore literal meaning of the legal text? Why then have any legal text at all – other than a political manifesto? With this judicial encouragement to subvert the Rule of Law, it is no wonder that lazy legislatures shortcut the transcendental endeavour to translate policy into law by simply enacting policy. Without the transcendental effort, identified and developed as the essence of legislation by generations of rule-oriented common law draftsmen, one might as well fall back on Justinian's continental proclamation that "the Emperor's will is law." Apart from the question of who rules as emperor (which may well be decided by the exercise of will under the provision in question), the New Zealand statutory version of such colloidal law is the commonplace one of taking into account "the principles of the Treaty of Waitangi". None can deny the licence for litigousness given by this now commonplace legislative provision.

A more explicitly purposeful provision, "increasingly common in modern times" as Burrows[28] puts it, can be found in section 4 of the Agricultural Compounds and Veterinary Medicines Act 1997. Providing both a legal commentary on its own statutory text as well as incorporating its own political context into that text, and both achieved with such a high degree of particularity that text from context, law from politics, and commentary from statute become inseparable, this provision is of course a prime example of contemporaneity in post-modernist literature.[29]

> **Purpose of the Act** — The purpose of this Act is to —
> (a) Prevent or manage risks associated with the use of agricultural compounds, being —
> (i) Risks to trade in primary produce; and
> (ii) Risks to animal welfare; and
> (iii) Risks to agricultural security
> (b) Ensure that the use of agricultural compounds does not result in breaches of domestic food residue standards:
> (c) Ensure the provision of sufficient consumer information about agricultural compounds.

Instead of transforming policy into law, which is the whole point of the legislative process in closing off debate, the sometimes raw, crude and always intensely dynamic policy is woven into the law. Analogous to the open-textured

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27 *McKenzie* v *Attorney-General* [1992] 2 NZLR 14, 17.

28 op.cit. 153.

29 An even more extreme meta-textual attempt to revive the dying dinosaur of the Accident Compensation Scheme can be found not only in the title to, but also in the several pages which comprise sections 2, and 4 to 12, of the Accident Compensation Insurance Act 1998.

taonga of the Treaty, this *tuhituhia* of policy straight into legislation transfers immense political power directly from parliament to the judiciary, and creates a huge new realm of colloidal or mud-law. Proposals for reforming Acts Interpretation Acts from Law Commissions the world over have had a similar effect in grinding down the lapidary rules for statutory interpretation. The outcome is only to reconstitute them in colloidal confusion. The wisdom of our own Law Commission in deciding to retain something equivalent to section 5(j) of the Acts Interpretation Act 1924 is marred by their preference for something so unequal in value. As it stood, section 5(j) was a classic piece of common law drafting - misunderstood, misapplied and even judicially overlooked[30] – but nevertheless one of the most highly refined, literary sound, and legally effective forms of legislative expression the common law has ever produced. To think that "the meaning of an enactment must be ascertained from its text and in the light of its purpose" whether with or without the words "and in its context" could or should be substituted for section 5(j) is so ridiculous as to make one give up, not so much on the argument, as on whether there could be any point in reasoning with those who advocate, and as with the legislature implement the substitution.

III. Copycat Legislation*

If we look back to the first laws formulated for New Zealand we find them remarkably original. Is that a myth – both as to their form and substance? Just recently, their originality has been re-appraised,[31] although it is hard to accept that Sir James Stephen of the Colonial Office would have bothered to describe them as a "remarkable collection of laws" without realising that they had been cribbed from Australia. It is true that we have always had a heritage of New South Wales Extension, Adoption and Continuance Acts from 1840 to 1846, and of English Laws Act from 1858 to 1908. Much of that legislation could be conceded for its time as being necessarily referential. And who could oppose implementing in any common law jurisdiction, the classic legislation of Chalmers' Sale of Goods Act 1893 (UK), and the Bills of Exchange Act 1882 (UK)? After all, we already had the common law context by which to gauge its desirability. Consolidating and codifying common law into legislation is among the most innovative of legislative enterprises. Our heritage of common law is the richer for our having Chalmers' classic exposition of it expressed by way of our own legislation.

Copycat legislation is something else and far more insidious. A curious answer can be given to the question of where our legislation comes from when asked of the increasing legislative output of successive New Zealand governments. It is this – that very little of our own legislation originates in New Zealand. Most of it is imported from overseas. Some of it is imported already fully assembled, the rest broken down or in kitset form. Often it is so outmoded as to be causing trouble in its jurisdiction of origin at the same time as it is being implemented

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30 D.A.S. Ward, "A Criticism of the Interpretation of Statutes in the New Zealand Courts" [1963] NZLJ 293.

31 Peter Spiller, Jeremy Finn, Richard Boast, *A New Zealand Legal History* (Wellington, 1995) pp 85-89. For another approach to the same issue see John Ryan, "The New Zealandness of New Zealand Law" (1972) 1 Anglo-American LR 204.

here. Just as Italy in 1994 abandoned proportional for first-passed-the-post representation, New Zealand in 1996 abandoned first-passed-the-post for proportional representation; and just as New Zealand now debates whether to revert to first-passed-the-post for the next millenium, Italy debates whether to return to proportional representation.[32] Like the grin of a Cheshire cat without the cat, keeping up with the Jones' of other jurisdictions disembodies our legal system.

Copycat legislation takes the place of referential legislation when colonial legislatures are anxious to prove themselves independent. It is this anxiety of the unfree to prove themselves free that also accounts for the fact that a great deal of legislation is copied, sometimes without any sort of formal recognition or citation being accorded to its source. The Criminal Justice Amendment Act 1975 (now incorporated into the Criminal Justice Act 1985 but copied from the Criminal Justice Act 1972 of the United Kingdom) is a typical example of this laissez faire.

The paradox of our own legislative sovereignty is that we compose less and less legislation for ourselves. A great deal of it is copied either in substance or form but often both from overseas. Huge and very critical areas of other legal systems are transplanted bodily from Scandinavian, Germanic and European countries without any thought as to how they might function or misfunction in New Zealand society. Much of this exotic legislation is incompatible with our context of common law. Worse still it plays havoc with our own indigenous and truly innovative attempts at legislation. We will never really know whether our accident compensation scheme would have worked out all right in the end, because the context in which the scheme was created was already in process of being swept away by changes to industrial law, traffic law, commercial law, public health, and social welfare – all largely imported from overseas. If there is any one lesson to be learned from problems affecting the continued administration of New Zealand's accident compensation scheme it is not so much the nature of a new law but the stability of the context in which it is implemented that counts.

This is the context of concern in which we examine *copycat legislation*. Much of it, introduced and enacted as if it were unique to New Zealand, is actually borrowed for the most part unthinkingly from other often incomprehensibly different jurisdictions. If anyone wants to see academic plagiarism at its worst today, one has only to look at the state of our Statute Book. The irony of this intensifying situation is that the Crown now expressly claims copyright for much of this legislative material unashamedly filched from overseas. One could be forgiven for thinking we had not a single original thought about how to govern ourselves when we look at our output of legislation. The underlying question always seems to be not whether we shall behave as New Zealanders, but whether we shall be bound by the same laws as the British, the Canadians, the Australians, the Americans – and now, increasingly, the Germans, the Swedes, the French, and curiously enough, also the Russians.[33]

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[32] Mario Patrono, "Electoral Alchemy or Fundamental Solutions? New Zealand and Italy", Paper delivered to the New Zealand Association for Comparative Law 12 October 1999 in Wellington.

[33] We too now have a *Revisor* or Inspector-General under the Inspector-General of

Half of our Residential Tenancies Act 1986 is imported from South Australia, Huge chunks of our Fair Trading Act 1986 are borrowed from the Trade Practices Act 1974 (Australia). Our Commerce Act 1986 is likewise based on the same Australian legislation.

Our current Companies legislation is a paste-up job of provisions culled from a multitude of diverse and incongruous jurisdictions. Some are borrowed holus bolus without thought of the vastly different context of company law and commercial trading in which they are to operate. Others have been refined with so much finesse that it becomes embarrassing and perplexing to work out what the subtle distinctions might mean as a matter of comparative law.

At two vastly different extremes, the Maori Language Act 1987 and the Imperial Laws Application Act 1988, provide evidence of the cribbing process giving rise to copycat legislation. Te Komihana o te Reo Maori of the Maori Language Act 1987 is cribbed from the Bord Na Gaeilge Act 1978 of Eire. The Imperial Laws Application Act 1988 is cribbed from a long legal history of similar statutes enacted in Australia.

The legal history of our recently enacted Imperial Laws Application Act 1988 began not with the introduction of the Imperial Laws Application Bill in 1981, but rather with the passage of the Imperial Acts Application Act by the Australian State of Victoria in 1922. Between then and now there is a veritable wilderness of attempts at law reform. So much of it is set out in our own parliamentary counsel's explanatory memorandum to the 1981 Bill, that the statute-user would be better served by enacting the explanatory memorandum instead of the Bill.

Interestingly enough, when Sir Leon Cussen first produced the Imperial Acts Application Act 1922 for the State of Victoria it was on the assumption that Magna Carta had little relevance in Australia.[34] At the same time as the Imperial Laws Application Act 1988 has been enacted in New Zealand, the same sort of assumption has been voiced here. In his paper on the "Practicalities of a Bill of Rights" presented as the F S Dethbridge Memorial Address in 1984, Mr Justice Cooke (as he then was) said "If Magna Carta means anything in the South Pacific in the twentieth century, it is not much". Despite Cussen's assumption of 1922, the Australian judiciary has cause to find otherwise. In *McArthur* v *State of Queensland*[35] Magna Carta provided insight into, and substantiation for a certain legal construction given to the Australian Constitution. In the more recent case of *R* v *McConnell*[36] it was held that a permanent stay of proceedings with Crown consent was an abuse of process that contravened the fundamental right enjoined by Magna Carta against delaying justice.

Although Magna Carta was not upheld by the South Australian Court of Criminal Appeal in *Clayton* v *Ralphs and Manos*[37] it is obviously still very viable

Intelligence and Security Act 1996. S 5(3) requires the appointee to have "previously held office as a Judge of the High Court of New Zealand". Apt for those who travel "the road to Delphi", the term Inspector-General (cf Dostoevski's Grand Inquisitor in *The Brothers Karamazov*) is also that given to the thirty-third degree in the Ancient (Scottish) rite of Freemasonry.

34 For this assumption see Alex Castles, (1989) 63 Australian LJ 122, 124.

35 (1921) 28 CLR 530.

36 (1985) 2 NSWLR 269.

37 (1987) 45 SASR 347.

in Sydney. In terms of the extra-curial dictum of Cooke J against the significance of Magna Carta in the South Pacific, it is not clear whether New South Wales has seceded from the South Pacific, but the lesson to be learned from *Fitzgerald* v *Muldoon*[38] warns against dismissing as of no legal authority what (by way only of legal commentary) had been dismissively considered as being merely legal history. The Imperial Laws Measures of Commonwealth countries only compound the difficulty of diagnosing where history stops and law begins. They are wasted effort - purely academic exercises that in the absence of any real need, only intensify the continuing conflict between law reform and legal history at the cost of cluttering up the statute book with further examples of copycat legislation.

The Maori Language Act 1987 shares some of the same shortcomings of copycat legislation as does the Imperial Laws Application Act 1988, but these have been highlighted for Ture o te Reo Maori 1987 by equating it with legislative schemes for implementing Welsh and Erse. At its best the Act can be construed to convey respect for the Maori language for its own sake, as held by Anderson J in *Anaru Kohu & Others* v *The Police*.[39] At its worst, however, it is a purely political measure that backfires because of the controversial context from which the provisions have been borrowed. Te Ture is meant to express a caring solicitude for indigenous culture. But unless that solicitude is heartfelt by its own legislators, Te Ture degenerates into hollow posturing. It expresses a complete pretence. The result is only to compound and confuse an already controversial issue. As with so much other ethnic legislation, the effect is counter-productive. For Te Ture this happens because instead of recognising and respecting the unique cultural context of *tikanga maori* in which the provisions are meant to operate for New Zealand, the legislation is content to crib concepts ostensibly from the Celtic Weald of Wales and Ireland. Worse still, it does so from a self-centredly imperial position, as to how the English have dealt with the Welsh, by way of the Welsh Language Act 1967. Not surprisingly, Te Komihana Mo te Reo Maori no longer calls itself the Maori Language Commission. Perhaps in being referred to the Gaelic experience it has learned too much about the fate of crofting commissions. Instead, and quite understandably in terms of the culture that it represents, it needs now to be known[40] as Te Taura Whiri I Te Reo Maori. None could complain of the legislation effecting that change as being one of copycat legislation - but what a long way round to secure one's objective. It also poses a problem for a written culture – that tomorrow Te Taura Whiri may want to be named yet differently, for after all, the *taonga* of te reo maori is a living language.

The Matrimonial Proceedings Act 1963 could be understood as the legitimate offspring of the Divorce and Matrimonial Causes Act 1928. Not so the Family Proceedings Act 1980, which has no conceptual correlation to common law grounds for divorce under previously existing marital law, and could therefore be considered a bastard were the concept of illegitimacy not already wiped out from the common lawyer's world view by the Status of Children Act 1969.

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38 [1976[2 NZLR 615

39 (1989, AP7/88 unreported).

40 Maori Language Amendment Act 1991.

Replacing the Matrimonial Proceedings Act 1963 with the Family Proceedings Act 1980 puts at issue the specificity with which the common law can delineate the difference between a worthwhile working marriage and some other sort of relationship that is heading for the rocks. Society expects the law to show some leadership in such matters rather than engage in the pseudo-intellectualism by which the issues are hidden rather than revealed. "The sole ground for divorce" writes Dale,[41] who advocates the continental approach to legislation in place of common law, "under both the German and United Kingdom laws is, at least ostensibly, the irretrievable breakdown of marriage". That is no reason why we should have followed continental concepts – which shows in the way we use our own language as if it were translated from a foreign source. Our legislation itself rather brokenly provides for marriage having "broken down irreconcilably" rather than having "irreconcilably broken down". Whenever one culture is consumed by another, the first institution to go under is the law, the second is language, and the third is cooking, but already most of us are well enough disposed to continental breakfasts not to be bothered about conserving British cuisine.

The Matrimonial Property Act 1976 was something of the same sort. First, it was retroactive – it applied to marriages entered into on a vastly different legal basis. Secondly, it intruded into personal affairs – what right had the state to poke its nose into domestic relations and decide as between those who were already man and wife whose property belonged to whom. Thirdly it was incompetently conceived. The Matrimonial Property Act 1976 which paved the way for the revolution in matrimonial relations undertaken by the Family Law Act 1980 was not called for by society at large, nor even married couples in particular. Instead it was imposed on New Zealand society entirely from the outside. If it were but known, the continental concept of communal property being applied to New Zealanders was the dreamchild of no more than three individuals. A fellow parliamentary counsel at about the same time described it all as part of the bureaucratic syndrome: the public servant in search of fame and fortune comes into work on Monday morning, and sits twiddling his thumbs until he can think of what to do today. "Oh I know", he says, "let's change matrimonial law".

The Matrimonial Property Act 1976 is popularly seen to have been influenced by West German provisions. Whether this is post factum the Bill is a moot point. Angelo and Atkin[42] drew parallels between the French and West German distribution of matrimonial property with the New Zealand situation. On the first page of their paper, Angelo and Atkin write about "applying [the French] system by analogy to the New Zealand situation" before they go on to discuss the ramifications of the West German solution being adopted by the New Zealand legislature. To decide whether this influence from the West German jurisdiction on the future history of the matrimonial Property Bill 1975 became homologous rather than merely analogous at comparative law requires a more detailed account of the legislation than can be possibly given here. At any rate the civil law influence on the Matrimonial Property Act 1976 then currently described as

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41 Dale, Sir William, *Legislative Drafting: A New Approach.* (London, 1977) 136.

42 "The Matrimonial Property Bill 1975 – Some Further Thoughts" [1976] NZLJ 424

"misguided chivalry" and a "comparable chaos" of "convoluted drafting" still takes its toll.

One way or another, the result is invariably copycat legislation. Legal changes, pursued by skating over the surface of thin ice without any thought for the depth of water that runs beneath, look for corresponding shortcuts when it comes to climbing intellectual heights. Most of New Zealand's apparently dynamic output of legislation over the last half century is deadwood from the start. It has been cribbed unashamedly from very different jurisdictions and could no more work in this jurisdiction *until it has given rise to the same wrongs that it was intended to set right* than could any other kind of remedy. The tragedy of such a situation is that most of this uncalled for and copycat legislation does give rise in our own jurisdiction to the very evils it was meant to resolve in another. Just as antibiotics and overdoses of vitamins can harm a healthy organism, so inapt legislation can injure a stable society by pulling down its legal system. In the same essentially bureaucratic way members of the Law Commission have been heard to admit that their first report on Imperial Legislation in Force in New Zealand was needed to justify their initial existence by "coming up with something". It is unfortunate that to come up with something in such a situation usually entails dragging something else down.

IV. The Persistently Resurgent Royal Prerogative

Keeping up with the Jones in a social context becomes keeping up with the Thatchers and the Gorbachevs in a governmental context – not that there may be much to pick and choose between either the contexts or the people. The paradox is that overthrowing the most secure and legally entrenched values of their respective nations, both of the above-mentioned leaders are lawyers. What were once a lawyer's largely custodial responsibilities have been reversed so that now the role of the legal profession seems set to achieve a revolutionary function. Gorbachev's think-big perestroika, just as Thatcher's small-shop managerialism, quickly become global phenomena. So, too, the remarkable innovativeness of law and politics in early pioneering New Zealand succumbs to hanging on to the coat-tails and experiencing, in as first-hand a way as possible, the future shock of the prevailing overseas experience.

We promised to return to the Trans-Tasman situation as a paradigm among legal transplants for what we have called 'copycat legislation'. The paradox of almost all our current law reform is that instead of being highly innovative, it is grossly imitative. By diving beneath the superficial and diversionary promotion of national identity which governments enhance by espousing indigenous issues, legal transplants compound all the fallacies of referential legislation. But just now and then, as with the Trans-Tasman transplant, a titanic proportion of the legislative ice-berg shows itself above the surface by threatening to topple all we take for granted by way of legal system. At the very least we are struck by the strangeness of the legislative provisions which explicitly surface into our own from someone else's country.

As with all strange provisions we are tempted, depending on the strength and direction of our involvement, to defend the excellence or decry the madness of this explicitly transnational legislation. After all, 'the Trans-Tasman mutual

recognition principle' already goes far deeper than just in relation to goods and occupations. It is not without constitutional significance,[43] that New Zealand is expressly recognised by clause 6 of the Commonwealth of Australia Constitution Act 1900 as a potential State of that Commonwealth. Since the nineteenth *fin de siècle* of that Act's drafting, New Zealand has never expressed any great affront to our sovereignty at being so regarded[44]. There is therefore no cause for any future prime minister of New Zealand expressing surprise, as did Mrs Thatcher on waking up to Britain's surrender of sovereignty to the European Community, that by such largely tucked-away provisions of the Trans-Tasman Mutual Recognition Act 1997, New Zealand is rapidly realising her potential to become an Australian State.

Looking at legislation from the inside out, this loss of New Zealand sovereignty takes place by way of treaty and trade agreement from the outside in. New Zealand, after all, is founded on Treaty. The prerequisite royal prerogative – despite its continuing conflict with what, in consequence of a coalition government produced by mixed member proportional system pursuant to the Electoral Act 1993, is a most confused and erratically unrepresentative Commons – goes on as it did in Victoria's time, controlling our country's outcome. At least in legal theory this still operates from the outside in. On the home front, however, the common law concept of the Crown, being progressively relieved of its public responsibilities for health, education, transport, communication, and welfare as a result of a marauding horde of restructuring statutes headed by the State-Owned Enterprises Act 1986, is regarded as being nearly obsolete. The inevitability of our becoming a republic has not just been prime-ministerially but gubernatorially proclaimed.[45]

The trouble with this new-age proclamation is that running down the Crown cannot be sustained by a study of our Statute Book. The legislative legacy of successive governments tells a vastly different story. It reveals not only the increasing incorporation into legislation of international treaties and trade agreements at the expense of national sovereignty from the outside in, but also the dynamic exercise of the royal prerogative on the home front to restructure New Zealand society from the inside out.

The irony is that 'the then Prime Minister the Right Honourable James Brendan Bolger', to quote from the title to the Ngai Tahu Claims Settlement Act 1998, would as the Crown's self-professedly republican prime-minister re-negotiate 'for the Crown' one of the most frequently and finally settled as well as being

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43 Thus Burrows (op cit n 13) understandably begins his account of *Statute Law in New Zealand* at the point of New Zealand being "[i]nitially a dependency of New South Wales..." p 3.

44 We were then a colony, not even a dominion, like each of the other separate colonies becoming States in the Commonwealth of Australia.

45 'Bolger Predicts Change of Mind on New Zealand Republic' NZPA *Otago Daily Times*, 8 July 1994. This same inevitability has been proclaimed more recently for New Zealand at the vice-regal level. Apart from the breach of propriety or decorum signifying the height reached by the politicisation of law, there is also the matter of legal ethics arising from breaking oaths of office. The history of the common law shows that royal 'servants' have lost their heads for much less. Does the fact that nothing much happens now indicate the decline of the common law?

one of the most financially rewarding and legislatively confirmed of any indigenous claims. It would be done so 'on behalf of all New Zealanders'. It would be based as much on legal fiction (in this case the process of conflating colloquial sayings, 'the unfulfilled promise' and 'the malaise of the tribe', with the substantiated legality of those claims) as on the *fait accompli* of the executed settlement to which section 7 of the Act gives interpretative precedence. Readers who remain untroubled by a long legislative history of re-negotiated final settlements – by which 'historical grievances' grow into 'historic grievances'; where 'a full and final settlement' of fisheries claims 'would continue...to give rise to Treaty obligations on the Crown'; where the Treaty aspirations of maori in 1840 to facilitate the sale of land (much of which had already been sold sometimes twice and thrice over) would be reversed by declaring land a '*taonga tuku iho*...to promote the retention of that land'; the recourse to poesy with expressions such as 'a new age of co-operation' and 'the spirit of the exchange of kawanatanga for the protection of rangatiratanga' being given legal weight in legislation; the incorporation of myths and legends into statute law by way of facilitating decisions of legal tenure; the language of lengthy legislative recitals relying on phrases such as 'it appears', 'it is thought that', and 'there is no record of' to restructure long-established land-holdings; and last, but apparently never again finally, the barely supportable financial demands by which future and successive governments have already legislatively bound themselves 'to atone for these acknowledged injustices' by Imprest and Appropriation Acts well into the next millenium – then besides the current legislation readers should at least refer to the Ngaitahu, if not also to the Taranaki and Waikato-Maniapoto Maori and Land Claim Settlement Acts of 1944 (and earlier) to realise how debilitating the current exercise of the royal prerogative in domestic relations is, at both linguistic and logical as well as legal levels, to the Statute Book. In a reciprocal way, however, the legislature has no compunction at playing Indian-giver; it blithly revokes life-time firearm licenses by amending the Arms Amendment Act 1992, and long-term driving licences by ministerial rules under the Land Transport Act 1998. The least final thing in life is legislative finality.

The Crown, Cabinet, or as it may be the Coalition as its doppleganger, can and will argue that by admitting its mistakes, the risk of reducing first legislative, and ultimately governmental authority is a small price to pay for resolving cultural conflict and achieving cultural co-operation. That depends, as Gorbachev found out with the collapse of the Soviet Union, not only on recognising that the genuiness of atonement goes much deeper than 'retrospective guilt' and that 'historical revisionism' is no substitute for historical truth, but on how much can be done to restructure the past without de-stabilising the present. Not only were thousands of pakeha landowners discriminated against by applying the pre-emption provisions of the Treaty retrospectively against them in 1840, but by the end of the same century many were ruined by the 'battle of the tenures' in which governments supported small-holders against run-holders, leaseholders against freeholders, and substituted land tax for property tax. The successful private enterprise by which some had achieved the status of landed gentry exposed them to re-purchasing provisions and a graduated annual tax, increased by twenty percent for absentee owners, by which the land reforming governments intended to 'burst up' the big estates. 'Whereas' to recite the

notorious John Donald Macfarlane Estate Administration Empowering Act 1918, 'the longer retention of so large an estate of land in one holding is against the public interest', the owner of that land, John Donald Macfarlane, would accordingly be deemed dead.

Look at anything strange long enough and it becomes familiar, look at anything familiar long enough and it becomes strange. The foregoing exposition of millennial legislation is therefore limited, for the most part, to an account of its strangeness. This strangeness, in finding foreign standards masquerading in our Statute Book and Statutory Regulations Series as our own authorised source of law, alienates ourselves, both maori and pakeha, from what we suddenly perceive to be no longer our own, but really someone else's country. The feeling of alienation is so extreme as to categorise most of the topics concerned under the pathology of law. Lay opinion may raise itself from an unconscious to a conscious level by dismissing it as political double-dealing. Thus the increasing politicisation of the law offends against the proclaimed autonomy, objectivity, and political neutrality of the legal system; the obsession with defining rights errodes the contextual freedom of the common law; the same rights-only way of looking at law undermines the collective trust inspired by an unwritten constitution; by championing a rights-orientated and on-going view of the Treaty in favour of tribal maori, the Crown brings about reverse discrimination against urban maori, pakeha, and other minority groups who are without the so-called 'Treaty rights'; the increasing proliferation of international treaties, with their consequent international, transnational, and supranational forcefulness over domestic law brings about – ironically when one considers the Crown's shrinking responsibilities – an increasing exercise of the royal prerogative; the legislative demise of the Crown, done without consensus and promoted paradoxically often only by party or prime-ministerial whim, creates a constitutional vacuum and destabilises the legal system; the radical reduction of public, and increasing privatisation of health, education, welfare and superannuation systems prevents life-long planning; the substitution of public relations for jurisprudence tempts governments to rely more and more on propaganda and advertising; the increasing inability of members to achieve and maintain a working coalition under the Electoral Act 1993 (together with the failure of list members to honour their representation, and the supercedure of parliamentary leaders without electoral mandate), disempowers the electorate; and increasing scandals and cases of corruption in high governmental office involving failures to observe, far less reveal the truth, provoke nationwide malaise. Worse then than finding ourselves to be someone else's country is once again to find ourselves a *territorium nullius* – like East Timor, nobody's country.

Some observers of current affairs will dispute the forcefulness of these factors as they are said to taint our Statute Book; but none, comparing them with long taught and strongly upheld legal values, can claim their irrelevance. Whatever controversy exists over the subversive effect of legislation intensifies, however, when we try to track down its root cause; for we find, paradoxically, the decline in legislative standards arises from what many of us have held most dear – a bill of rights-orientated view of law; a predilection for purpose-driven and mission-minded legislation; an ideologically reformative view of language by way of resolving gender, ethnic, cultural, and even trade issues; a desire for plain-

languaged and self-evidently understood legislation; highly-aspirational but experientially unsubstantiated notions of law reform; the proliferation of consultative, recommendatory, and supervisory processes for legislation at both parliamentary and cabinet, as well as at independently constituted law commission and tribunal levels, together with submissions from lobby groups and the general public; and a professed perfectionism for legislative endeavour frequently at odds, in form and function, with its practical output.

Trying to correct the root causes of this failure in legislative fulfillment without transcending the temporal dimension[46] is indubitably beyond our *fin de siècle* capability. Then "let us hear the conclusion of the whole matter", not only because "of making many books there is no end, and much study is a weariness of the flesh", but also because "there is no new thing" and "no wisdom to be discerned in asking why former days were better than now".[47] Sufficient is it to recognise a psychoanalytic theory of language by which every human vanity shows up sooner or later in legislation as clearly and conclusively as if its legislators had been in close confessional. Meanwhile, to distinguish legal text from political and social context and so avoid mistaking the dynamically wagging tail for the more usually static dog of our legal system, depends on how well the legal profession drafts and draws on the text to fulfil the legislative function. Although the radical move explicitly to recognise context has been rightly repudiated in statutory interpretation what is substituted still seems strangely redolent of someone else's country.[48]

It is hard enough for the historian to sum up his own century far less his own millennium. Classical models for history might deny that possibility on the basis of the historian's own participation. On the basis of the best evidence rule, however, legal historians have always looked for eye witness if not workface accounts. Living at the same time as the events observed is prerequisite to obtaining the best testimony. Thus it has been written recently[49]

> ...that in all the history of the planet Earth, there has been no period so mindlessly cruel as this twentieth century, so devastatingly in its disregard for human life and for every symbol of morality that man has painfully acquired through the ages.

If it takes too much millennial exaggeration to equate our country's decline in home grown legislation with this disregard for our age-old and painfully acquired heritage of law let me be content to emphasise and italicise one word alone from the above quotation. It is the one word *mindlessly*.

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46 See supra Part I.

47 Ecclesiastes 12:12, 13.

48 *Someone Else's Country – The Story of the New Right Revolution in New Zealand*, Community Trust Media, Vanguard Films.

49 Isabella with Irving Leitner, *Saving the Fragments*, Introduction by Howard Fast, New American Library, New York: 1986 ix