What is the Benefit of a Diversified Judiciary?

The Place of Values and Morals in a Judge's Decision Making

The Hon Robert French AC Oration, 2025

Supreme Court, Perth

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17 November 2025

It is indeed a privilege to be asked to give this oration in honour of the former Chief Justice of Australia, the Honourable Robert French AC.[1]

I begin however, with an observation made by the former Chief Justice himself when asked to give a lecture in honour of a similarly vibrant and healthy individual. The article is now published in the Flinders Law Journal, and begins:[2]

> Generally when asked to deliver a lecture named for a distinguished jurist I find that it is someone who is deceased or expected soon to shuffle off his or her mortal coil – in which case the event is a kind of pre-emptive eulogy.

I am pleased to observe that, at least in the Jewish tradition, the study of the law is a recipe for long life and continued good health. Thus, rather than a pre-emptive eulogy, I give this lecture in the spirit of a prophylactic potion for longevity.

The topic is values and morals in a judge's decision making. Given the character of the generous hosts of this evening's event, I intend to address that topic in the particular context of another topical and sometimes controversial issue - judicial diversity. In short: what is the place of morals or values, and is a diversified judiciary relevant to that question?

I was also moved in that direction because, as I was preparing for this occasion, I attended a meeting of a national body, the Judicial Council on Diversity and Inclusion. The matter of judicial diversity is a standing agenda item for the Council. As part of our meeting, we received a panel presentation entitled Diversity in the Law with presenters from the Asian Australian Lawyers Association, Pride in Law, the Queensland African Lawyers Network and the Pasifika Lawyers Association of Queensland.

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[1] I would like to acknowledge the assistance my associates, Charlie Richards and Lisa Zilberpriver, have provided in the preparation of this address.

[2] French R, 'Law making in a Representative Democracy: The Durability of Enduring Values' (2017) 19 *Flinders Law Journal* 19.

In the course of discussion following the presentation, an issue was raised by a very thoughtful judge from New South Wales. She asked about the place of truth in the justice system of diversified cultures suggesting that our system emanates from Christianity which puts paramount emphasis on, and preferences, truth over relational aspects of conflict resolution. That piqued my interest because I have a particular curiosity about that issue, and I was not sure that I had properly understood her reference to Christianity. I went to chat with her in the coffee break. In the course of quite a serious conversation, I explained to her that I was thinking about these issues because I was due to give a speech on values hosted by the Hellenic lawyers, the Asian lawyers and the Jewish lawyers' associations. In response and with a look of studied intensity she said:

> Oh that's great – the snacks will be fantastic!

So, let me begin then with a controversy that many of you may recall. In 2009, then US President Barack Obama nominated Sonia Sotomayor to become a member of the United States Supreme Court.

Strong criticism of her nomination arose from a line she had used in a number of her speeches and again in her nomination papers: 'I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life.'

A robust and inflamed public debate ensued.

The White House press secretary conceded that Sotomayor's word choice had been 'poor'. Sotomayor subsequently clarified her remark through the Senate Judiciary Committee, saying that while life experience shapes who one is, 'ultimately and completely' a judge follows the law regardless of their personal background.

That controversy reflects the reality that in the public and political discourse about diversity in judicial decision making, the discussion is often fuelled by a concern and mistrust that reference to diversity means the judge will be making decisions by adherence to something other than the law.

A less well known but closer-to-home example arose only a few months ago in this jurisdiction, when the Chief Justice of Western Australia was asked at a breakfast function how it is possible or even lawful for an observant Catholic to be the Chief Justice.

The clarifying statement made by Sotomayor reflects a different problem, because it embodies what many regard as an idealised fiction: that judges do no more than find and apply the law in some entirely neutral manner stripped of any personal background or subjective values.

However uninformed the public debate might be, it does raise this question: what is the benefit of what we all generally regard as a good thing - diversification of the judiciary - and what is the place of the values that may be imbedded in that diversified background in the judge's decision?

In a 2023 article in the Australian Law Journal, Professor Brian Opeskin of the University of Technology Sydney suggests that discussion of judicial diversity can be usefully framed by four questions.[3] The first, and what Professor Opeskin describes as the critical, question is: why does judicial diversity matter?

Professor Opeskin suggests that the most convincing justifications relate to *quality* (judicial diversity will improve judicial decision-making by avoiding the narrowness of experience implicit in a collection of homogeneous judges); *utility* (societies cannot afford to lose the intellectual power of groups who have been

[3] Opeskin B, 'Can the Australian Judicial System Meet the Structural Challenges of Future Population Change?' (2023) 97 *Australian Law Journal* 651, 656 - 657.

previously excluded from judicial office); and *legitimacy* (judicial diversity promotes public confidence in the legitimacy and impartiality of the justice system).[4]

I wish to develop the first of these; quality, but with a slightly different focus. Quality in this context is often used to mean that the judge will be more understanding of and sensitive to the cultural or other background of the litigant or offender.

For example, our honouree, in a 2015 article (again when he was Chief Justice of Australia) emphasised the sensitivity required by a judge to cultural differences, particularly in areas of the law in which the exercise of discretion or evaluative judgment is required.[5] Sentencing is an obvious example, but there are many others. Equal justice requires the legal system to respond to differences. This requires sensitivity to diversity.

A similar theme may be found in the Australian Law Reform Commission's report of 2021, *Without Fear of Favour: Judicial Impartiality and the Law on Bias*. In chapter 12, which was directed to judicial diversity, it referred to Professor Opeskin's classes of justification, noting that the issue of quality was most important to its enquiry because it addressed the crucial aspect of addressing institutional biases. Diversity there is seen as contributing to quality because an appreciation of diversity contributes to impartiality.

There is no doubt that diversity equips the judiciary to be more sensitive, understanding and impartial. They are all very important. But I wish to suggest, as Sotomayor may have meant, that diversity in perspective enriches the

[4] Opeskin (n 3) 657.
[5] French R, '*Equal Justice and cultural diversity: the general meets the particular*' (2015) 89 *Australian Law Journal* 706.

development of the common law in ways that substantively enhance the interest of justice in the development of a more just and humane society.

Can I begin with the issue that has long occupied scholars of jurisprudence: do judges find and apply the meaning of legal rules through purely neutral methods, or do judges decide matters influenced by their own values and preferences? Or is it a mixture of the two, and if so, what is the balance and how is that achieved?

I turn first with a nod to our Hellenic hosts.

In Plato's *Apology of Socrates*, on trial for his life, Socrates declares that the judge's duty is not to make a present of justice but to give judgment; and the judge has sworn to judge according to the law, and not according to the judge's own good pleasure.

This outlook is often labelled legalism. In its simplest form, legalism holds that law exists independently of judges, free of morals or politics. The law is 'out there', distinct from morals and politics, legal rules are determinate, the legal system is complete.

Many, - perhaps all - of you may think that is an unrealistic portrayal of how the law operates. You are in good company. So did Socrates himself. In Plato's *Gorgias*, Socrates predicted that his trial would be the equivalent of a trial of a doctor prosecuted by a cook before a jury of children.

The suggestion of entirely dispassionate judges has been likened by Justice Robert Jackson of the US Supreme Court to the Easter Bunny,[6] and by Lord James Reid to a fairytale.[7] Statements by Supreme Court nominees are widely dismissed as a charade.

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[6] ***United States v Ballard*** (1944) 322 US 78, 94.
[7] 'The Judge as Lawmaker' (1972) *The Journal of Public Teachers of Law* 22.

One variation of simple legalism is positivism, which rejects the declaratory theory of law as mythical and accepts that judges make law. While positivists reject any necessary connection of morals and law, most positivists concede that judges may consider morals in their judicial decision, but they deny that a norm has to be moral to be law.

For those keen on further study of this there is an excellent resource very recently published titled: *The Oxford Handbook of Comparative Judicial Behaviour*.[8] I should caution that, in a phenomenon perhaps unique to lawyers, the 'handbook' is over 1,000 pages long.

The summary in the Oxford Handbook explains that of the contrasting theories to legalism, the attitudinal model likely dominates the field. Developed by US political scientists in the mid-twentieth century, this model holds that judges' decisions reflect their political preferences towards the facts raised in disputes — with political preferences usually defined by the judges' ideology or partisan identity.

All of this is a difficult and life-time study and many here will be familiar with these notions through the study of jurisprudence.

But let us start with something, hopefully more digestible.

One of the better known and widely quoted writings on the place of values and morals in judicial decision-making is the series of four lectures entitled *The Nature of the Judicial Process* by Benjamin Cardozo and published by the Yale University Press.[9] Cardozo was a Jew born in New York 1870 who wrote and

[8] Epstein et al, *The Oxford Handbook of Comparative Judicial Behaviour* (Oxford University Press, 1st ed, 2024)
[9] Cardozo BN, *The Nature of the Judicial Process* (Yale University Press, 1921).

delivered his essays in 1921 while a member of the New York State Supreme Court. He spent his final years as a Judge of the US Supreme Court.

I am going to quote passages of this beautifully written work. I will use the original words and trust that given its antiquity, you can forgive what is now the rather jarring absence of gender equality in the language.

Cardozo begins by saying this about the judge's task of decision making:[10]

> The work of deciding cases goes on every day in hundreds of courts throughout the land. Any judge, one might suppose, would find it easy to describe the process which he had followed a thousand times and more. Nothing could be farther from the truth. Let some intelligent layman ask him to explain: he will not go very far before taking refuge in the excuse that the language of craftsmen is unintelligible to those untutored in the craft. Such an excuse may cover with a semblance of respectability an otherwise ignominious retreat. It will hardly serve to still the pricks of curiosity and conscience. In moments of introspection, when there is no longer a necessity of putting off with a show of wisdom the uninitiated interlocutor, the troublesome problem will recur, and press for a solution. What is it that I do when I decide a case?

After posing a series of rhetorical questions, Cardozo asks:[11]

> At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals? Into that strange compound which is brewed daily in the caldron of the courts, all these ingredients enter in varying proportions.

Cardozo rejects the notion that judges neutrally and mechanically apply the law. Cardozo identifies four elements by which in the course of each case and over the course of time the law is applied and developed: rules of logic using analogy, or what he calls the method of philosophy; historical development, or what he calls the method of evolution; the line of custom, or what he calls the method of

[10] Cardozo (n 9) 9 - 10.
[11] Cardozo (n 9) 10.

tradition; and the line of justice, morals and social welfare, or what he calls the method of sociology.

Cardozo admits of what he calls the intolerable vagueness of it all. But he seeks to explain how the common law evolves to keep abreast of developing values of justice while maintaining fidelity to tradition and precedent. He explains:[12]

> The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered. It may not be modified at once, for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible; but if a rule continues to work injustice, it will eventually be reformulated. The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must ultimately be re-examined.

Cardozo gives examples. One is the development of the law in relation to tortious harm to another's economic interests or business. In a further example, Cardozo explains the competing forces of decision making. He writes:[13]

> … Let me take as an illustration of such conflict the famous case of Riggs v. Palmer, 115 N. Y. 506. That case decided that a legatee who had murdered his testator would not be permitted by a court of equity to enjoy the benefits of the will. Conflicting principles were there in competition for the mastery. One of them prevailed and vanquished all the others. There was the principle of the binding force of a will disposing of the estate of a testator in conformity with law. That principle, pushed to the limit of its logic, seemed to uphold the title of the murderer. There was the principle that civil courts may not add to the pains and penalties of crimes. That, pushed to the limit of its logic, seemed again to uphold his title. But over against these was another principle, of greater generality, its roots deeply fastened in universal sentiments of justice, the principle that no man should profit from his own inequity or take advantage of his own wrong. The logic of this principle prevailed over the logic of the others. I say its logic prevailed. The thing which really interests us, however, is why and how the choice was made between one logic and another. In this instance, the reason is not obscure. One path was followed, another closed, because of the conviction in the judicial mind that the one

[12] Cardozo (n 9) 23.
[13] Cardozo (n 9) 40 - 42.

> selected led to justice. Analogies and precedents and the principles behind them were brought together as rivals for precedence; in the end, the principle that was thought to be most fundamental, to represent the larger and deeper social interests, put its competitors to flight.

In that same context Cardozo introduces the great remedial device familiar to us all - the constructive trust:[14]

> Consistency was preserved, logic received its tribute, by holding that the legal title passed, but that it was subjected to a constructive trust. A constructive trust is nothing but "the formula through which the conscience of equity finds expression."

Cardozo was explaining in effect that the common law is well equipped to evolve and adapt. After giving other examples of the use of common law doctrines to address evolving mores, Cardozo explains with powerful eloquence that within even the rusting armoury of the common law, the judge will find the means to hew the path to justice but does so by relating the path to method, order, coherence and tradition. In a powerful statement Cardozo says:[15]

> It is, however, not so much in the making of new rules as in the application of old ones that the creative energy of custom most often manifests.

Cardozo then explains what he calls the directive forces of the common law: philosophy or logic, history and custom. He then turns to the force which he says in our generation is the fastest growing of them all - the power of social justice. What does he mean by that? He explains that social justice or social welfare is a broad term: 'its demands are those of religion or of ethics or of the social sense of justice, whether formulated in creed or system, or immanent in the common mind.'[16]

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[14] Cardozo (n 9) 42.
[15] Cardozo (n 9) 62.
[16] Cardozo (n 9) 72.

The final cause of the law, he says, is the welfare of society. That statement, by the way, is the motto of Cardozo Law School, which is the law school of the premier institution of academic modern Orthodox Judaism, Yeshivah University in New York.

Cardozo then turns to an ancient Jewish liturgical teaching which he calls 'an old legend'. On one occasion G-d prayed, and his prayer was: 'Be it my will that my justice be ruled by my mercy.' Cardozo says to the judge:[17]

> That is a prayer which we all need to utter at times when the demon of formalism tempts the intellect with the lure of scientific order. I do not mean, of course, that judges are commissioned to set aside existing rules at pleasure in favor of any other set of rules which they may hold to be expedient or wise. I mean that when they are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance.

In a sense Cardozo says judges do in effect legislate, but only between the gaps left by the formal law, and only by creatively using the tools of the common law itself.

In perhaps the most widely quoted passage of his essays, Cardozo warns against over-zealous creativity and the imposition of subjective morality:[18]

> The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life." Wide enough in all conscience is the field of discretion that remains.

[17] Cardozo (n 9) 66 - 67.
[18] Cardozo (n 9) 141.

Even within the dial of the compass of discretion permitted to the judge, there is room for caution and some scepticism. Cardozo writes in his finals essay that:[19]

> there is no method or procedure which entirely supplants subjective reason.
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> …
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> The spirit of the age, as it is revealed to each of us, is too often only the spirit of the group in which the accidents of birth or education or occupation or fellowship have given us a place. No effort or revolution of the mind will overthrow utterly and at all times the empire of these subconscious loyalties.

Ultimately, Cardozo is a great believer in and eloquent exponent of the great evolutionary capacity of the common law.

Cardozo's essays have been consistently referred to in Australia, particularly by the High Court across a wide spectrum of issues, including analogical reasoning in the context of patent law, the ability of a State act to declare the status of a criminal organisation, the law of unconscionability, the law of apprehended bias, the freedom of political communication, and the metes and bounds of precedent.[20] Interestingly, in the ***Work Choices Case*** reference was made to passages of Cardozo's essays as discussed by Barwick CJ at a 1969 lecture about the role of precedent that the Chief Justice gave in Jerusalem at the law faculty of the Hebrew University of Jerusalem.[21]

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[19] Cardozo (n 9) 173 - 175.

[20] ***Apotex Pty Ltd v Sanofi-Aventis Australia Pty Ltd*** (2013) 253 CLR 284; ***Korda v Australian Executor Trustees (SA) Ltd*** (2015) 255 CLR 62; ***Wainohu v New South Wales*** (2011) 243 CLR 181; ***Assistant Commissioner Michael James Condon v Pompano Pty Ltd*** (2013) 252 CLR 38; ***Productivity Partners Pty Ltd (t/as Captain Cook College) v Australian Competition and Consumer Commission*** (2024) 419 ALR 30; ***CNY17 v Minister for Immigration and Border Protection*** (2019) 268 CLR 76; ***Vella v Commissioner of Police (NSW)*** (2019) 269 CLR 219; ***Spence v Queensland*** (2019) 268 CLR 355; ***New South Wales v Commonwealth*** (2006) 229 CLR 1 ('***Work Choices Case***'); ***Cattanach v Melchior*** (2003) 215 CLR 1; ***Johnson v Johnson*** (2000) 201 CLR 488; ***Scott v Davis*** (2000) 204 CLR 333; ***Uebergang v Australian Wheat Board*** (1980) 145 CLR 266.

[21] ***Work Choices Case*** (n 20), 309 - 310 (Callinan J).

Cardozo's approach to the evolution of the common law reflecting societal values was echoed in the Australian context by Brennan J (in dissent) in ***Dietrich v the Queen***:[22]

> The common law has been created by the Courts and the genius of the common law system consists in the ability of the Courts to mould the law to correspond with the contemporary values of society.
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> …
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> The contemporary values which justify judicial development of the law are not the transient notions which emerge in reaction to a particular event, or which are inspired by a publicity campaign conducted by an interest group. They are the relatively permanent values of the Australian community.

Note the reference to what can be distilled as the relatively permanent values of the Australian community. Those sentiments should be understood in light of that which Brennan J had said in ***Mabo v The State of Queensland [No 2]***.[23] After describing what the common law itself took away from Australia's Indigenous inhabitants, Brennan J said:[24]

> Judged by any civilised standard, such a law is unjust and its claim to be part of the common law to be applied in contemporary Australia must be questioned.
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> …
>
> In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency.
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> …
>
> The peace and order of Australian society is built on the legal system. It can be modified to bring it into conformity with contemporary notions of justice and human rights, but it cannot be destroyed. … no case can command

[22] ***Dietrich v the Queen*** (1992) 117 CLR 292, 319 (Brennan J).
[23] ***Mabo v The State of Queensland [No 2]*** (1992) 175 CLR 1.
[24] ***Mabo v The State of Queensland [No 2]*** (n 23), 29 - 30 (Brennan J).

> unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system.

For an eloquent overview of Brennan J's approach, I would encourage reading Quinlan CJ's paper titled *The Law's Faithful Gardener*.[25]

For the balance of this talk, I wish to focus on a particular example of a class of case in which a debate about values was manifest, and then turn briefly to a point arising from my own experience. It is easier to appreciate the application of these ideas using a concrete example.

In the 1983 English decision of ***Udale v Bloomsbury Area Health Authority***,[26] a mother of four children did not wish to have any more. A sterilisation operation was negligently performed, and she subsequently became pregnant. She successfully sued for damages associated with the failed operation. However, the mother's claim for the cost of enlarging her home and the cost of rearing the child to age 16 failed on what the court described as public policy grounds. The public policy reasons included that 'it has been the assumption of our culture for time immemorial that a child coming into the world, even if, as some would say "the world is a vale of tears," is a blessing and an occasion for rejoicing'.[27]

In the New South Wales case of ***CES v Superclinics***,[28] it was alleged that in 1986 doctors at a medical clinic negligently failed to diagnose a woman's pregnancy very early in the pregnancy and at a time when the woman, had she known she was pregnant, would have terminated the pregnancy and been able to do so safely. By the time the pregnancy was discovered, she was almost 20 weeks pregnant. She was then advised that it was too late to perform a termination procedure

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[25] Quinlan CJ, 'The Law's Faithful Gardener: Remarks on the launch of Gerard Brennan's Articles and Speeches' (John XXIII College, 28 August 2025).
[26] ***Udale v Bloomsbury Area Health Authority*** [1983] 2 All ER 522.
[27] ***Udale v Bloomsbury Area Health Authority*** (n 26) 351 (Jupp J).
[28] ***CES v Superclinics*** (1995) 38 NSWLR 47.

safely. She thus claimed to have lost the opportunity to terminate the pregnancy by the negligence of the clinic and its staff. At full term, she gave birth to a healthy child.

The trial judge concluded that the termination would have been unlawful in any event and therefore an award of damages was not available. Much of the appeal was concerned with the lawfulness of the hypothetical termination. But a separate question arose under the heading of 'public policy'. The question was whether the notion of public policy forbids the provision of damages for the birth of a healthy child given the fundamental value placed by society on every human life. Kirby J, then as acting Chief Justice, reviewed authorities in England - including ***Udale v Bloomsbury Area Health Authority*** - and in the US, which tended to the view that a cause of action existed, but damages were limited to the immediate medical expenses and the pain and suffering of the pregnancy and birth itself, but public policy prevents damages for the cost of rearing the child.

Kirby ACJ allowed the claim, rejecting the notion that an award of damages would demean the sanctity of life regardless of the circumstances. His Honour also rejected the notion that a child is necessarily a blessing, observing:[29]

> The widespread use of contraceptive measures is itself an indication of a general social disagreement with the theory that every potential child must necessarily be considered an unalloyed blessing.

Kirby ACJ said such attitudes were 'out of harmony with the modern Australian society in which the Australian common law must operate'.[30] That is, the common law in Australia is shaped by the values of contemporary Australian society, including what his Honour called 'the modern realities of sexual conduct and birth

[29] ***CES v Superclinics*** (n 28) 74.
[30] ***CES v Superclinics*** (n 28) 74.

control, and the real possibilities of obtaining a termination of an unwanted pregnancy'.[31]

Kirby ACJ concluded there are no good public policy reasons for barring recovery. That is, public policy is to be taken into account, but here there was no *good* public policy reason.

In contrast, the colourful Meagher JA said:[32]

> It seems to me that our law has always proceeded on the premise that human life is sacred. That is so despite an occasional acknowledgment that existence is a "vale of tears". Hence, in criminal law, except within closely defined limits, to take another's life is murder; to threaten to do so is a criminal offence.

And:[33]

> Every parent looks on his child as David did on Absalon, or Oedipus on Antigone. In St John's Gospel (16.21) it is said: "A woman when she is in travail hath sorrow, because her hour has come: but as soon as she is delivered of the child, she remembereth no more the anguish, for joy that a man is born into the world." It would be unreal not to take account of such a factor.

CES v Superclinics was referred to in the English decision ***McFarlane v Tayside Health Board***.[34] In 1989, very similar circumstances to ***Udale v Bloomsbury Area Health Authority*** arose. A woman wished to limit her family to four children. Again, the sterilisation operation was negligently performed, and the mother became pregnant and gave birth to a healthy child. The mother sued for the costs associated directly with the pregnancy. Both parents sued for the cost of rearing the child. The claims were initially successful. Ultimately, the House of Lords permitted the mother's claim but denied the parents' claim for the cost of rearing the child.

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[31] ***CES v Superclinics*** (n 28) 74.
[32] ***CES v Superclinics*** (n 28) 86.
[33] ***CES v Superclinics*** (n 28) 87.
[34] ***McFarlane v Tayside Health Board*** [2000] 2 AC 59 (HL(Sc)).

A number of approaches were taken, but perhaps the most instructive is that of Lord Steyn. He examined the different approaches of corrective justice and distributive justice. Corrective justice means someone who has unjustifiably hurt another must compensate for the harm caused. On that approach there would be no reason to avoid liability for the parents' claim. Distributive justice on the other hand requires a focus on the just distribution of burdens and losses among members of society. On that basis, Lord Steyn framed the following question that he said is to be posed to commuters on the London Underground:[35]

> Should the parents of an unwanted but healthy child be able to sue the doctor or hospital for compensation equivalent to the cost of bringing up the child for the years of his or her minority, i.e. until about 18 years?

His Lordship was firmly of the view that an overwhelming majority would answer with an emphatic no. And the reason is based on what is morally acceptable and what is not. Lord Steyn says it may be objected that a court is a court of law, not morals. He explains:[36]

> The court must apply positive law. But judges' sense of the moral answer to a question, or the justice of the case, has been one of the great shaping forces of the common law. What may count in a situation of difficulty and uncertainty is not the subjective view of the judge but what he reasonably believes that the ordinary citizen would regard as right.

Perhaps curiously, Lord Steyn expressly disavows the proposition that he has decided the matter on grounds of public policy. He has avoided, his Lordship says, 'those quicksands'.[37] Lord Steyn then goes on to bolster his position by reference to coherence and rationality. That is said to be because the claim is repugnant to the sanctity and value of human life.

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[35] ***McFarlane v Tayside Health Board*** (n 34) 82.
[36] ***McFarlane v Tayside Health Board*** (n 34) 82.
[37] ***McFarlane v Tayside Health Board*** (n 34) 83.

What emerges is the disavowal of public policy but the adoption of the great shaping force of the common law by reference to what would be regarded by the average citizen as the moral distribution of burden and loss. His Lordship also agreed with the other law lords that the claim did not meet the higher threshold required in cases of pure economic loss of being fair, just and reasonable - which itself seems an evaluative exercise involving moral judgment.

Then in 2003 the High Court of Australia in ***Cattanach v Melchior***[38] considered a claim for the cost of raising and maintaining a child following the negligence of a doctor performing a sterilisation procedure on the mother. By a narrow majority of four to three, the High Court took a different view from the House of Lords and allowed the claim.

I am going to focus on the three judges in dissent, comprised of Gleeson CJ and Hayne and Heydon JJ. Gleeson CJ immediately addressed the sanctity of life argument. He wrote that the common law has always attached fundamental value to human life, a value originally based upon religious ideas which in our secular society no longer commands universal assent. Many people who now respect the very same value do so upon different grounds.

Gleeson CJ said that the parent-child relationship is significant, but not because it introduces an ethical dimension that forecloses debate. The problem to be addressed is legal. Gleeson CJ said the claim was for pure economic loss arising out of a relationship, and the question was whether the doctor owed them a duty of care that extended to a duty of care to protect them from that kind of loss or harm. The common law has exhibited reluctance to allow recovery of pure economic damage for negligence. That reluctance is appropriate here because of the potential indeterminacy of the financial consequences. Another reason for hesitancy is legal coherence. The law imposes obligations to support and protect

[38] ***Cattanach v Melchior*** (2003) 215 CLR 1.

a child, which are difficult to reconcile with a recognition of the relationship as damage. Noteworthy is Gleeson CJ's capacity to frame the child-parent relationship in legal terms.

In a lengthy and most interesting judgment, Hayne J met the values argument head-on under the heading 'public policy' stating that public policy has long played a key role in the development of the common law. Then under the heading 'what is the role of public policy in the development of the common law?' Hayne J quotes Cardozo's essays directly.[39]

His Honour acknowledged that all of the arguments against allowing damages explicitly or implicitly invoke values relating to the worth ascribed to the life of an individual and the worth of the relationship between parent and child.

His Honour said the admissibility of the head of damage is a question of law, but that public policy forecloses the inquiry about monetary value. Preventing the parent from embarking on that inquiry, Hayne J says:[40]

> resolves the conflict which otherwise would exist between the duty of the parent to preserve and protect the interests of the child by advancing the mutual worth of the bond between them, and the interest of the parent in seeking recompense for a wrongful invasion of the parent's interests.

Heydon J complains that many of the decisions on both sides of the argument are declamatory - stated as emphatic conclusions without substantive reasoning. He then explains at greater length a theme that appears in the reasons of both Gleeson CJ and Hayne J:[41]

> It is a fundamental assumption underlying many rules of the common law and many statutory provisions that, in general, that the interests of children are

[39] ***Cattanach v Melchior*** (n 38) 83.
[40] ***Cattanach v Melchior*** (n 38) 93.
[41] ***Cattanach v Melchior*** (n 38) 117 - 118.

> paramount and that parents have duties of a high order to advance the interests of their children.

Heydon J held that as the law assumes human life has unique value:[42]

> it is not possible to treat the costs of bringing up children as loss or damage to the parents because of the nature of the human child, the nature of the parent-child relationship and the duties which human birth causes to spring up.

He adds:[43]

> It is wrong to attempt to place a value on human life or a value on the expense of human life because human life is invaluable - incapable of effective or useful valuation.

To do otherwise, Heydon J says, would amount to the commodification of a child as an asset.

Kirby J, now in the High Court, continues with the theme he adopted in ***CES v Superclinics***. His Honour did not think there was any reasoned or public policy barrier to recovery of damages.

In his judgment, Kirby J appears to champion a form judicial restraint. Politicians, he says, can respond to echo chambers inhabited by journalists and public moralists. But judges must refine and apply the common law in ways that are reasoned and provide consistency with previous decisions.

In a pointed and sharp judgment, Kirby J accuses others of dressing up their personal opinions with thinly-veiled objectivity. He ridicules Lord Steyn's passenger on the Underground as a modern Delphic oracle amounting to nothing more than the subjective view of the judge about the beliefs of the ordinary citizen. That description apparently did not apply to Kirby J's own assessment in ***CES v Superclinics*** of the views of contemporary Australian society.

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[42] ***Cattanach v Melchior*** (n 38) 127.
[43] ***Cattanach v Melchior*** (n 38) 128.

Kirby J appears to be particularly troubled by what he perceives as the religious undertones of the arguments. In the development of the common law, he says judges have no authority to adopt arbitrary departures from basic doctrine and less still 'may they do so, in our secular society, on the footing of their personal religious beliefs or "moral" assessments concealed in an inarticulate premise dressed up, and described, as legal principle or legal policy'.[44]

In an even sharper passage, he attacks the notion that children are a 'blessing'. He states:[45]

> Neither the invocation of Scripture nor the invention of a fictitious oracle on the Underground (not even its Australian equivalent) authorises a court of law to depart from the ordinary principles governing the recovery of damages for the tort of negligence… If there is any area where the law has no business in intruding, it is in the enforcement of judicial interpretations of Scripture and in giving legal effect to various judicial assertions.

Kirby J then cherry-picks expressions from the reasons of Hayne and Heydon JJ which he considers are judicial assertions made without authority or reasoned principle. He then pointedly refers to Heydon J's criticism of prior judgments as declamatory, adding:[46]

> In this area of discourse most of the [declamatory judgments] have been on the side of those who most vehemently denounce their making.

It seems to me that referring to the scriptural origins of expressions or concepts that have historically become part of our society's cultural values or lexicon is a very long way from the enforcement of judicial interpretations of scripture. Parts of Kirby J's judgment appear so pointedly personal and polemical that it is hard to escape the conclusion that Kirby J is perhaps equally moved by his own

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[44] ***Cattanach v Melchior*** (n 38) 53.
[45] ***Cattanach v Melchior*** (n 38) 58 - 59.
[46] ***Cattanach v Melchior*** (n 38) 59.

subjective assessment of the views of the average citizen, or possibly even his own views.

What then emerges from all of this?

The ***Cattanach v Melchior*** decision appears to be a good example of everything that Cardozo explained. Judges do make law, but carefully and in the gaps. They take account of various competing forces of logic, history, tradition and social welfare. Perhaps it is also a good illustration of Cardozo's point that it is unrealistic to think that there is a method which entirely supplants subjective reason.

The conclusion seems to me to be inescapable that differing outcomes of judges are shaped by each judge's own background, values and views of morality and societal welfare.

And that brings me to my own small experience of the issue and back to the beginning of this talk.

A couple of years ago I was handed a complex single judge appeal that had been on foot for some time by a retiring judge with the motivating invitation, 'Solomon, I think you'll find this one interesting - I did not'.[47]

Mr Murray had been convicted of assault in the Magistrates Court in Karratha. He was a Walmajarri man. He had a lawyer and an interpreter at the trial. Mr Murray gave evidence in his own defence. As he began his evidence and the interpreter began to interpret, the magistrate ruled that Mr Murray was speaking English and the interpreter should not interpret. Both the interpreter and the lawyer explained to the magistrate that Mr Murray was not speaking English, he was speaking Kriol. The magistrate reiterated his ruling; no interpreting. The

[47] ***Murray v Feast*** [2023] WASC 273.

lawyer and the interpreter courageously ignored the magistrate and continued to interpret the whole of Mr Murray's evidence. The magistrate appeared to think better of the battle and just let it happen.

Mr Murray appealed on the basis that the magistrate had erred in ruling that Mr Murray was speaking English and did not require interpretation. The State accepted that was an error but argued strongly there had been no miscarriage of justice because Mr Murray had ultimately received a fair trial - his evidence had been interpreted in full.

I thought the State's argument was strong. But I was troubled but what seemed to me intuitively to be a gross unfairness about the way Mr Murray was treated. I spent far too long researching and thinking about it.

I should say that in a wonderful testament to retirement, in the period that I was researching and writing the judgment, I happen to see the now retired judge. I told him how interesting I was finding the matter. He replied, 'I'm very pleased for you. I look forward to not reading your judgment'.

Ultimately, I was struck by something in my own tradition. And here I imagine Kirby J would be particularly unimpressed. Chapter 16 verse 19 of the Book of Deuteronomy cautions the judge: thou shalt not pervert judgment and, in effect, though shalt not show favouritism in judgment.

The foremost of the medieval Jewish commentators is Rashi who lived in France in the 11th century. Rashi draws on the traditional rabbinic interpretation of the verse. It does not refer to favouritism in the result. That is obvious - scripture is not required for that. It is a reference to favourable treatment of the litigant in the course of proceedings, regardless of whether the correct outcome is reached. Moreover, the traditional rabbinic teaching is that the absence of procedural fairness creates substantive unfairness. That is because the litigant who is treated

unfairly may be so disturbed or spooked by the unfair treatment that they become unable to articulate their claim or evidence.

When I read the transcript and listened to the recording, I was reminded of that scriptural verse and its rabbinic tradition. I ruled in favour of Mr Murray. Let me make this plain. I did not quote Deuteronomy in the judgment. Nor did I base my decision on the verse or the rabbinic teaching. But it did seem to me that the sentiment expressed in that teaching was entirely consistent with the notion of a fair trial as understood by the common law. Nor do I suggest that another judge would have would not have reached the same decision by different means. But I do think my own cultural background equipped me with a sensitivity to the experience of Mr Murray and what this meant for him, and therefore to the attainment of justice.

As it turns out, and unbeknown to me at the time, the conduct of the trial did have a deep and debilitating impact on Mr Murray and the interpreter and indeed the interpreter's colleagues.

I should also point out that I do not limit my consideration to the Jewish tradition. As the Chief Justice of Western Australia is fond of pointing out, I am the only the judge who has quoted from Thomas à Kempis' *The Imitation of Christ*.[48]

I also hasten to add that there is nothing special about Mr Murray's case. Indeed, as Cardozo explains, the greatness of the common law is in its ordinary operation.

I should not let the occasion pass without noting that which has been said by many others; that the history and culture of the Jewish people equips them with a particular sensitivity to the plight of first Australians. It is no coincidence that the

[48] ***Lee-Kong v Brunnen*** [2022] WASC 150 [52].

lead counsel in the Mabo case was a Jew, Ron Castan AM QC and his junior Bryan Keon-Cohen AM QC was, as his name suggests, half Jewish.

And that takes me back to the beginning. Perhaps part of the greatness of the common law is that Sotomayor may well have been right, and a wise Latina woman *can* see a pathway to justice that others cannot.