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The Hon. Michael Kirby AC CMG with Professor Bernhard  
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**JUDICIAL VALUES: SHOULD JUDGES JUST APPLY THE  
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**TRANSCRIPT**

Damien Carrick: Hello, welcome. My name's Damien Carrick, I present the Law Report program on ABC Radio National.

This afternoon, we're going to be asking: judicial values — should judges just apply the law, or should they bring their own values to the task?

To discuss this question we have four fantastic minds. From Germany, we have Bernhard Schlink. He's best-known as an author. His most famous book is *The Reader*, but he's also a former judge of the Constitutional Court of the federal state of (correct my pronunciation) North Rhine-Westphalia.

Bernhard Schlink: That's it.

Damien Carrick: And he's also a Professor of Law at Humboldt University in Berlin and Cardozo University in New York.

We also have Michael Kirby, former Justice of the High Court of Australia. He holds the record for being the longest-serving judicial officer in Australia.

We also have Reg Graycar, barrister and professor law at the University of Sydney, and Justin Malbon, law professor at Monash University.

I'd like to have a conversation for about 45 minutes to an hour, and then if we have time, take some questions from the audience.

In 1992, the High Court attracted enormous criticism after the Mabo decision and later after the Wik decision, for appearing to change the law to suit the personal values of unelected judges. That was the criticism. And judges during the Nazi regime, and during the South African apartheid era, were criticised for being accomplices to grotesque regimes. So what should judges do? To what extent should they apply their personal values to their judicial tasks?

Michael Kirby, I'd like to start with you: in your time on the High Court, were there cases where your personal values drew you to a preferred outcome, but your duty to interpret the law as it is led to the opposite conclusion?

Michael Kirby: First of all I'd like to beg to differ with a little bit of your introduction, you know, lawyers tend to concentrate on words, and I'm not at all sure that there was such controversy by the time the Wik case came up. Now I came on to the High Court after Mabo and before Wik, so it may be that there were different issues, but so far as Wik was concerned, there was definitely advice as we now know from the Senate Committee Report in the federal government, the Attorney-General's Department, which indicated that there was a real concern and a real uncertainty as to whether the pastoral leases would bump out Native Title. Indeed the Commonwealth came along to the High Court and said 'Expedite this case because it's uncertain and we need to know.' So I think the controversy, at least in Wik, was a controversy about the politics of it; it wasn't a controversy as to whether there was or wasn't a legal issue. And the Wik case held that there was a legal issue and it resolved it in a very legal way, if I may say so.

Secondly, so far as my personal opinions and the law is concerned, well obviously my role as a judge was to give effect to my understanding of the law of the Constitution, and certainly there were cases during the course of my 13-year service on the High Court, and earlier in the Court of Appeal, where I had to give effect to opinions which I certainly wouldn't have reached if I had a free hand, if I'd been a legislator and deciding the matter in Parliament.

One of the cases that comes to mind is the case of the Minister for Immigration and B. Now that was the case where the challenge was to the

locking up of children in the middle of Australia simply because they'd arrived with their parents as refugee applicants in this country. And the argument was put to us, 'Well read down the requirement to put the children in detention camps, because they're children, and the Act doesn't specifically refer to them as children, and therefore say the Act applies to adults, but not to the children, it's a reading down process which is quite an orthodox sort of way in which you approach statutory interpretation.

There were two problems with that approach which I would have been willing to consider. Problem number one was that the provisions of the Act did contain a very specific provision about searching children in detention, and that rather indicated that Parliament had turned its attention to the issue of detaining children. Problem number two was that the Commonwealth laid before us the parliamentary debates and records which indicated that the Attorney-General's Department had specifically drawn to the notice of the parliament, that if it went ahead with detaining children, it would be in breach of the Convention on the Rights of the Child.

So once I had these two factors, I was sailing towards a decision where I would read down the Statute in a very orthodox, judicial way, that two icebergs loomed up, and one of them was the iceberg of the provision of the Act, the other the iceberg of the record. So I couldn't give effect to the reading down. I couldn't read it down, I just had to apply 'detain any person' to a child as well, and that was my decision and I gave that effect in my orders, and so that was an outcome which I wouldn't otherwise have liked to come to, but as a judge I had to, because we live in a Rule of Law society.

Give us a break, Damien, from the notion 'just apply the law', that begs the question, what is the law? And that's the question we're here to examine, how you get at that.

Damien Carrick: Well for a case to get all the way to the High Court, by definition the answer isn't clear-cut, so a judge's role is to interpret the words of the law, of the statutes or the precedents, and surely you can't help but interpret the law, the words, through the prism of your own values, in those not clear-cut cases.

Michael Kirby: Well you're stating this to me as if you're astonished that should be the case. But you see your disadvantage is you come from Melbourne! Whereas if you'd come from Sydney and specifically from this great Law School of Sydney University, and if you were taught by

Professor Julius Stone, you were taught that it's elementary that words are ambiguous, especially the English language, very ambiguous, and therefore you have to give construction and therefore you have to draw on your own values, and Professor Schlink, in one of his articles that I read, says 'It is not true that there was only one answer to a constitutional case.' Almost always there are at least two or maybe more answers, and the puzzle and the obligation and the privilege of the judge is to try to work out what is the answer, and then to give convincing reasons as to what the answer is.

Damien Carrick: Well Bernhard Schlink, let's come to you. You come from Germany, a country where under the Nazis — and I guess more recently in East Germany — judges operated in an environment of unjust laws. And I'm interested to hear from you what you would understand as a judge's responsibility, or perhaps their duty, on the one hand to stand firm to their own values, and on the other, interpret the law as it actually stands.

Bernhard Schlink: Well, as Justice Kirby, I have doubts whether there is a law that just stands, that we can take and apply. But back to 1933, when the National Socialists came to power, they actually didn't change the law in a big way. Only later they added some racial statutes, but they took the law as it stood, and encouraged, or pressured judges to interpret it or even distort it, now using National Socialist values. National Socialists in their legal theory, fought legal formalism, legal positivism, and demanded judges to become more political, to bring more National Socialist political values into the law. So it wasn't positivism requiring them to adhere to National Socialist law, and then maybe their own good values rebelled against it, it was rather the other way round: those judges who stuck with the traditional formalist and positivist interpretation, they're more immune against National Socialism than those who advocate freer use of values.

Damien Carrick: So when the Nazis came to power there was a spectrum of responses from judges on the bench: some ideologically rolled over, some stood firm. What happened to those who stood firm?

Bernhard Schlink: Well those who stood firm had also several options. They could leave the Bench, and some did, and became practising attorneys, as there were professors who turned away from their doctrinal field that they had taught so far, and turned to legal history — something less dangerous; and some judges became partisans of the system, so using the new language, they still tried to administer as much justice as possible.

Damien Carrick: Were they effective? Those who stayed in the system who tried to stay true to their own values, as the system around them changed, as the country around them changed?

Bernhard Schlink: Well some were, and some were not. It depended in what area of law they were working. So there were areas where it was more easy to avoid the National Socialist ideology and others where it was less easy. But it was nowhere really easy. So even if you are in the area of Family Law, and it's about parental care, the wellbeing of the child, where is a child best being taken care of? Of course in a National Socialist family rather than in one that isn't. So there was really no area that was completely immune against this ideological infusion.

Damien Carrick: Moving forward to contemporary Germany, do you have a debate on the extent to which judges should include their own values in their decision-making process? Is that the debate which I guess we're having, that's why we're all here today, here in this room in Australia, is that a debate that you also have in Germany?

Bernhard Schlink: We have a constant debate about our Federal Constitutional Court, who is a very powerful court, who decides cases of true political importance. And the debate is, since the '50s, is the court too political, is it going too far, should it use more restraint, and actually it uses less and less restraint, it just enjoys its power. But as far as judicial values go, I think we are at a point, after having discussed it for a long time, where we agree of course judges bring their values, personal values, political values; they also bring their moods and their tempers and their anger, whatever. And what matters is, whether all of this translates into good legal reasoning. And once it translates into good legal reasoning, it doesn't matter whether it was a good value, bad value, temper, mood, whatever — what really matters is does it translate into good legal reasoning.

Damien Carrick: I have a question. Is that debate about what translates into good legal reasoning, is that informed by Germany's experience of totalitarianism? Are there echoes coming down through the ages which might impact on the way that judges think in Germany, perhaps in a way that they might not be affected, or might not think in a country without that experience of totalitarianism. I'm wondering when you're talking about issues of say public order, or civil rights, do people have at the back of their mind the echoes of the 1930s and '40s?

Bernhard Schlink: Oh yes, again and again we have the Federal Constitutional Court and other courts mentioning this interpretation of the freedom of expression is to be understood before the background of the Third Reich, and this interpretation of parental autonomy vis-à-vis the state, is to be understood before the background of the totalitarian overtaking of children's education. Yes, we have references like this again and again. But the special topic of values, to what extent is a judge allowed to bring his values or her values into his decision-making, that's a different discussion.

Justin Malbon: Damien, just on this issue about when the Nazi regime came in, there were limited choices for a judge. Either you resigned, because you think, 'I'm not going to be a part of an appalling system', or alternatively you kind of hide in a little corner and do the non-controversial cases, or you become a participant, or you get shot. So I mean...

Bernard Schlink: You're a partisan. You use it and you try to do the right thing using the wrong language.

Justin Malbon: Yes, and I guess some of us hope that a court, or the judiciary, in times of great stress to the democracy, in some way is going to protect us, because I think what we as the people do — well I guess there's two ambitions we have. One is a kind of a longer-term ambition of a democratic, fair system, but at the same time we'll have an immediate desire that the legislature does what we want, and normally that's not a problem, but in certain instances, you know, particularly when fear is evoked, the fear that was evoked by Hitler, for example, or in Australia, communism, terrorism — all those allow the legislature to start amping up the sort of restrictions on basic rights and liberties, and it's usually at that crisis point that the courts are put into the fore.

And I guess at one level we're hoping that they will look after our longer-term ambitions of a fair and democratic system, but I do wonder in the light of, I guess, the most extreme, or one of the most extreme historical events, where you had a sophisticated, developed country such as Germany, finding that the judiciary just couldn't do anything to stop the onflow, and I guess what happens, do the icebergs melt? Or do somehow the judges take the hard, brave stand and face all the opprobrium that comes with it?

Damien Carrick: Well Michael Kirby, at what point would you bow out of the process? What would be your breaking point? What would be the point

where you would think, 'I don't want to be involved with this thing'. I mean you've probably never had to be in that situation.

Michael Kirby: We never got to that point in Australia and I don't think we ever have. We've had really wonderful and brave decisions in the High Court of Australia, and I'm thinking particularly of the Communist Party case in 1951, which disallowed the law which had been enacted with a full parliamentary mandate. It's often most important that the courts will speak logics and unpopular minorities, so we never got to that point in Australia, and therefore I didn't have to face it.

But it's not an unusual question. In Zimbabwe when UDI was declared, the court in Zimbabwe had to decide whether or not it would refuse to take the oath to the new constitution. Similar things are those recently in Fiji where the judges would take a commission for a coup-led government, and some judges said 'We will, because we think it's better that we're there to protect as many of the rights as we can.' This is Justin's point, that one judge alone Justice Fieldsend, said he would not take the commission, and he was packed off to England, and interestingly, it was Robert Mugabe who invited him back as the first white Chief Justice of the new Zimbabwe, and that was a long while ago, and he came back for a period as Chief Justice. It's a matter of course of judgment and assessment, but I think I would be on the Fieldsend side, a point would really reach where you would say 'I will not be a servant in this system, it's an offensive...'

Damien Carrick: Reg Graycar, the issue of values and judges, it's an important one for you. Why is that?

Reg Graycar: Well I guess. like Michael, I'm fighting the hypothetical if you like. I think this whole point of are there people who are value-free and then there are people with values, is completely a myth. And one of the reasons that I guess I've been so concerned about it is that I've developed a great interest in the ways in which, for want of a better word, outsider judges are challenged as being not value-neutral, not impartial, and there I'm thinking about the sorts of things that we see quite regularly in our courts. For example, on 17t October 1994, Justice Kiefel was sworn in as a judge of the Federal Court of Australia. Three days later, it was probably her first case, she had a litigant before her who asked her to recuse herself on the grounds that because she was a woman she couldn't possibly be impartial.

Now you can laugh about this, but there are a lot of challenges of that sort, and they're not made to white, male, heterosexual judges in the same

way. They may well resonate as people who are, to use the technical term, mad, but in fact if the content is very clear, you are not the sort of person we expect to see in this place, and perhaps I could share with you something that I read recently in The Nation, it's not my poem, it's by Calvin Trillin; for any of you who are Nation fans, he's the Deadline Poet in The Nation.

Sotomayor...

Damien Carrick: Perhaps you should just explain.

Reg Graycar: Oh, sorry. Sonia Sotomayor is a justice of the Supreme Court of the United States, but on 3 June when this was written, she was a nominee for the position, and as I'm sure many of you are aware, she's the first Latina woman justice on the United States Supreme Court. Now notice how I had to use all those adjectives to describe her, because of course if she were just a white male judge, we wouldn't have to attribute adjectives to her. So shall I start again? OK.

The nominee's Sotomayor, Whom all good Latinos adore  
But right-wingers tend to deplore.  
They'd like to show Sonia the door.  
Her record, they say, heretofore  
Reveals that beliefs at her core  
Would favor minorities more:  
She'd hand them decisions galore,  
Because of the racial rapport.  
Whereas white male judges are, as everyone knows,  
totally neutral.

And I read that...

Michael Kirby: I mean since that was written and before Justice Sotomayor was confirmed, she backed off to three things she was being attacked on. She said 'I would not allow my Latino, it's completely irrelevant'. And secondly she said, 'I would simply interpret the Constitution, I would not take values', and thirdly she said, contrary to her earlier statements, 'I would never take international law into account'. So she backed off all these things, because of the very peculiar, highly political system of confirmations in the United States of America. I hope that nobody thinks that's something we should introduce into our judicial appointments in this country because it leads to, frankly, just plain dishonesty. Judges are forced to say they wouldn't do things simply because otherwise they won't get confirmed into the sort of entertainment environment of the appointment of justices of the Supreme Court of the United States.

Damien Carrick: This issue of judicial values was faced quite squarely in a decision of the Supreme Court of Canada, I think it was RDS. Reg Graycar, tell me about that case.

Reg Graycar: Well it was your common-or-garden children's court case, not the sort of thing that usually attracts much scholarly attention. There was a young African-Canadian youth who was being charged with the kind of 'assault police resist arrest' etc. There was a white police officer who gave evidence, and nothing would have ever come of this had the judge simply said, which she found, that the matter was not proved beyond reasonable doubt. But she then added some comments along the lines of 'Well I'm not saying the police officer lied, but on the other hand he may well have, and you can understand that given the prevalent attitude of the day.' And so there was a very big furore, it was appealed to the Nova Scotia Supreme Court, the Court of Appeal, and then it went to the Supreme Court of Canada.

Damien Carrick: So she was commenting in the courtroom on her understanding of police and their attitudes towards minority kids.

Reg Graycar: Yes. And this is in a province where there had recently been a Royal Commission into the policing of minority peoples in Nova Scotia. It was a very well-known phenomenon that there was, shall we say, disproportionate policing of indigenous and African-Canadian kids in that province. But she was challenged by the prosecution for bias, and that was the issue that went all the way to the Supreme Court of Canada. And the court split, but was sort of a 6-3. We law professors like to draw fine distinctions between the 4 and the 2 who were in the 6, but whatever.

Basically, what the majority judges said was — and they drew on Benjamin Cardozo, a well-known American legal scholar and judge, they basically drew on his work on the nature of the judicial process to say judges are never neutral, they can never be neutral, but what they have to be is impartial. They have to be able to bring to their judging an open mind, basically. And so they really set out to kind of disabuse us of this myth that people go into court, tabula rasa, without their backgrounds, without who they are, without the baggage that they bring, and they made the point that in a multiracial, multicultural society, obviously judges are and should come from diverse backgrounds. What they have to do though to be impartial is to approach issues with an open mind what Martha Minow, who's now the Dean of Law at Harvard Law School, has called 'to retain the ability to be surprised'. And it was a really nice way of explaining

that concept of the absolute centrality of impartiality, but not confusing it with what I call the empty mind syndrome, that somehow or other an open mind means an empty mind, because no-one has...

Michael Kirby: Every day of mine on the High court was a surprise.

Damien Carrick: Did you come to your duties on the High Court with an open mind? Did you come to every case with an open mind?

Michael Kirby: I certainly hope so. I mean you're not sitting there just dispensing palm-tree justice, and you have to explain. That's the important thing. You don't choose the cases that come to the court, you do choose the cases that get in to the list, but you do that from the pool, which is decided independently of the court. You then have argument which is in public. It's the most open branch of government, everything except the final decision-making is done in public, and the reports are published, they are criticised by people like Professor Graycar who goes over the 4 and the 2, and I think it's quite a reasonably and legitimate thing to do, and then you are subject to the pages of history, and people will decide whether you were an honest and true judge, or you weren't. And I had differences from my colleagues in the High Court, but I never doubted that they were giving effect to genuine, conscientious, learned and scholarly opinions of their own — independent judges. We should be proud of that in this country.

Damien Carrick: Bernhard Schlink, did you always come to every case that you ever heard with an open mind?

Bernhard Schlink: I hope so. I think...

Damien Carrick: Did you ever, like Michael Kirby, come with values which might steer you in one direction and an outcome which the law required you to make in another direction?

Bernhard Schlink: Oh yes. Oh yes. I would have liked the case to be decided in one way for political grounds, and the law just didn't allow this, it had to be decided in the other direction.

I would like to add one point. I think we all agree that the law hardly ever can be just applied as it stands, it has to be interpreted. And interpretation means it doesn't have enough content as it stands, to solve the case. So we have to add content. We don't draw the meaning out of the words, we bring them to a certain

degree, into the words. And there of course our values, the openness of our minds, our biases — but even our moods and our tempers — play a role. And I wouldn't underestimate the disciplining role that the standards of legal reasoning, the standards of interpretation play.

And yes, in the end we often have two solutions for one case, but reducing all possible solutions to two is quite something, and this the merit of our standards of interpretation: we have to look at the texts, we have to look at the context, at the history, at the purpose of the statute. In Germany we even — looking at the context also includes looking at the international context, so there are standards and criteria that we use. And it's not just the law as it stands, or values, open mind, closed mind — no, standards of legal interpretation, standards of legal reasoning play an important and a disciplining role in all of that.

Michael Kirby: I hope you heard Professor Schlink say then 'looking at the international context' because in almost every country of the world, that is a complete non-issue that you look at your own domestic law in the international context, and there are two countries of the world, the United States of America, and Australia, where we still have this somewhat insular view that we are alone, sailing there all on our own in Australia and America. We've got to get over it.

Damien Carrick: And that's a view/value that separates you from your colleagues on the High Court, or your colleagues on the High Court at the time.

Michael Kirby: Well sometimes it led to a separation. But look, if I had been on the Supreme Court of Canada, or if I'd been in the House of Lords, or in other great courts in South African constitutional court, there would be no question but that you'd look at a problem, including a constitutional problem, in the context of the development of international law, and I attempted to do that in a number of cases, including the cases like *Kartinyeri* and the Commonwealth, where I referred to the Nazi period and I referred to the South African period. I referred to the fact that very soon after the Nazis came to power, they enacted a law to purify the professions and to get rid of the Jewish members of the profession.

Now a judge in that situation is really faced very squarely with 'do I give effect to that, or do I go?' And I once read a book, and Professor Schlink can confirm this or not — it was called *Hitler's Judges* and it said that the German judges of the 1930s only once presented a remonstrance to Adolf Hitler, and it concerned an interference with their pensions. And if that is

so, you know, that really shows that the values had been sapped out of them, in part by horrible legislation, in part by government policies, in part by the culture in which they were working, and it would be a very difficult thing to survive in that circumstance, but fortunately we've never had to face anything like that in Australia, and I hope never well. I hope we will always keep the Communist Party case before us, a great symbol of what our courts will do, fulfilling as far as they can Justin's hope that the courts will look beyond the next three years, and look down the pages of history.

Justin Malbon: A number of the — well our two former judges have talked about how the law will block their personal values, and this point was confirmed for me as a junior barrister when I went on a country circuit, and I represented this child who was doing all sorts of horrible things, and this was on circuit out in the country, which — the advantage of circuit is afterwards you can often go and have drinks with the judge, so that's very pleasant. It's a wonderful advantage. Usually it's brown-paper bags. Of money. No! And so I appeared before this judge and represented this child, and as I say this child was a horror, and so I put the case for minimisation of the sentence, suspension of the sentence and so on, and the judge dealt with it very carefully and in fact handed down a suspended sentence far beyond what I'd asked for and he gave much more than I expected. But anyway, drinks later on in the evening and the judge was talking to a group of people and he said, 'Oh, I had this horrible, horrible kid in front of me today,' and he said, 'You were representing him.' and he said, 'He was a terror, I felt like vomiting all over him.' And I thought Wow, That was what was going on in your head. So here he was, up there, thinking what a terror, I'm going to lock him up forever, that's what he wanted to do, yes,

Michael Kirby: But you said he was a terror. Why should you be surprised that the judges would think that?

Justin Malbon: No, no, I said he was an angel.

Michael Kirby: Well you might have said that, but I doubt if the judge had come down in the last shower...

Justin Malbon: Yes, but I just couldn't believe the disconnect between what the judge was thinking and what he actually did in his role as a judge. But it's interesting, we've also said, you know, we're all in heated agreement that it's not possible for a judge to do their task without infusing it with their values, but in fact there's an awful lot of judges that still retain the pretence that they are acting completely value-free, they're called

textualists, or legalists, and their claim is that they simply read the text, and in some kind of mechanical fashion, as if you could substitute them for a fairly elaborate computer, they come up with this lovely values-free judgment.

Bernhard Schlink: They still exist?

Justin Malbon: They still exist.

Bernhard Schlink: I have never met anyone.

Justin Malbon: They still exist, and you can still read about them.

Reg Graycar: But this Law School –

Bernhard Schlink: You can read them about, but do you meet them?

Reg Graycar: I think it's telling that 15 or 20 years ago there was someone at this Law School who tried to develop a program — I'm looking at Julie because she can probably remember his name, better than I can — where you could just predict the outcome by feeding everything into the computer, and nobody does that any more.

Damien Carrick: It was a Family Law...

Reg Graycar: No, that was another one...

Damien Carrick: Started with a Z...

Reg Graycar: But the point is, that nobody does it any more, I don't think, and I think that time has passed. I'd like their names and addresses, frankly.

Michael Kirby: I think there's a spectrum of opinion between those who are very open to understanding of their own motivations and feel it is very important for them to own up and be as candid as they possibly can and explain it, and those who say 'Well that way lies danger', because then you lend yourself open to attack, and I think that difference does exist. It's a spectrum of opinion within the judiciary and it's a legitimate matter on which styles of writing opinions and of explaining them differs amongst a college individuals.

Damien Carrick: Well Michael Kirby, you stand apart from almost all other judges in this country because you've always been comfortable speaking publicly on a whole range of issues. That meant that people knew your opinions on a range of topics, and therefore they could analyse your decisions in light of what they had heard you say. Did that make you a big target? Did that put you under a spotlight?

Michael Kirby: Well I think it might have put me under a bit of a spotlight, but I've been in the spotlight, but the fact is that I was taught in this Law School by Professor Julius Stone, that values affected outcomes, and it's just self evident. Professor Schlink is horrified to think there are still people in our country who did that. But in my sun, you think it's all on automatic pilot and George is directing to the conclusion and, as Justice Dixon, one of our greatest judges said, 'The law would have no meaning for me if it wasn't inevitable, if the outcome didn't come out of the precedents and the cases', and that was the received wisdom of the judiciary when I was at law school.

But we had this white-anting from Professor Julius Stone, who kept saying, Well Professor Pound taught us from the early parts of the 20th century that there are choices. Choices had to be made, and therefore you have to make them according to values and experience, as well as the precedents and the authority and so on, and I could never take it all that seriously after that.

As to going into the public... is it better that we don't have anybody in Australia who treats the people of Australia with the respect that they're entitled, that they are intelligent and they're entitled to know that having had the experience as a Latina, will inevitably affect the way, the diamond through which you see cases, that it is relevant in the present age to go beyond just read the text, just give effect to the text. And it is relevant in the present age, as Professor Schlink has said is done all the time in Germany, to look at the international law in the context in which our law operates. Now I think it's a good thing, and I have sufficient confidence in the people of Australia who believe that they're not fazed by this, and they know that that's the reality and it's a good thing that they were told.

Bernhard Schlink: I would really distinguish between a reference to wider context of law and a reference to me being a Latino. I think reference to a wider context of law is an integral element of legal reasoning. One can argue that, but in some traditions it is. But I would not, and I would accept a decision more easily if I understood oh, among many other arguments, this wider context speaks for this solution. But I wouldn't accept a decision

more easily because I was told I'm the Latino, and as a Latino I just feel it should be such-and-such. So I think there's a real difference, and I think of course personal values, personal experiences, go in to legal reasoning, that they go into it and through it, and have to be turned, translated, into legal arguments. And then if she as a Latina has a special sensitivity for aspects of this world that others don't have, then OK, that will bring the sensitivity, and let's see these aspects of the world that we haven't seen so far. But I'm not interested in reading about the personal values of the judges as such.

Michael Kirby: But it would be relevant, wouldn't it, that she might be more empathetic to, say, minorities, to vulnerable people in society, simply because she has had this background. It's just part of the way in which she looks at the problem, and to be honest about that, to deny it...who's going to believe that it's not going to affect her sensitivity to an argument. But I think in Germany you might have a difference from us in Australia because as I understand it, the Verfassungsgericht will — it writes opinions which are very similar to our traditional opinions. If you read them they're discursive, they're detailed, they're persuasive, they're trying to — they have dissents. Whereas in most courts in Germany, if you read them it is this French style 'Whereas, whereas, whereas, therefore ...' and it's much more dogmatic and it's not very convincing to us of the Anglo Saxon, I respectfully, as we all in an Anglo-Saxon society, we were going to say something really nasty.

Justin Malbon: And so with respect.

Michael Kirby: I find that Verfassungsgericht much more persuasive because it's very much more similar to our tradition, and goes in to more questions of values and legal values and legal policy.

Bernhard Schlink: Yes, into legal values and legal policy, that and I read your wonderful paper about you, maybe our concept of maybe our concept of legal reasoning is wider than yours here, and the purpose of the legislature and the purpose of the law and proportionality and reality come in, and so political perspectives and moral perspectives come in to the legal reasoning. But no, we don't have this 'Whereas, whereas, whereas', this is really something strange for us too. We have the court on which I was for 18 years, we had the same style as the Federal Constitutional Court, we just didn't have dissenting opinions and dissenting votes.

Damien Carrick: We might get on to Justin's article, which Bernhard was just speaking about. But Reg, you were itching to say something.

Reg Graycar: Well I just wanted — well two comments. I want to disagree with Michael, which I feel I can do now that he's no longer on the Bench.

Michael Kirby: Oh, but it's never stopped you before...

Reg Graycar: I think we don't perhaps pay enough attention in Australian courts to international law issues, but I do think that putting us in the same phrase as the United States is a bit unfortunate. We haven't ever really seen a Senate Committee try to pass a motion censuring a court, censuring a court for taking account of international law, which has happened in the United States.

Michael Kirby: Still time.

Reg Graycar: But the other thing I was going to come back to is I don't think you see people, I don't think the problem is, say, for example, a Latina judge saying, you know, 'As a Latina judge I feel like X', the problem is far more at the self-censuring level. It's actually trying not to show that you have any kind of background or values and again, my authority for that, as we lawyers like to say, is the number of these kinds of challenges, and they are legion. So for example, in the United States, you have a judge who was stopped for the offence of driving a flash car while black, and she of course being a judge, was unhappy about this and went on television and said, 'You know, racial profiling is a big problem in my community.' And of course the next time there was a discrimination case, they challenged her immediately. And a lot of these challenges don't succeed, but they serve this extraordinary disciplinary function of making people kind of hide away.

Michael Kirby: Reg, I don't think we have many challenges like that in Australia, I really don't...

Reg Graycar: Ooh, I've got a few up my sleeve...

Michael Kirby: Well we don't have very many of them in Australia, because most lawyers know it's not a good look...

Reg Graycar: It's a terrible look, they never succeed.

Michael Kirby: Unless you've got a strong case.

Damien Carrick: But it isn't only the media and it isn't only politicians and it isn't only litigants who are looking for a peg to hang their case on, who criticise judges and say that they're value-laden; you often have judges throwing the mud at each other. Justin Malbon, there have been a lot of cases of that.

Justin Malbon: Yes, the pin-up dude is Justice Scalia, of the United States Supreme Court. I have mixed feelings about Justice Scalia. First up, it's probably very difficult to agree with a lot of his values, he's extremely conservative and he brandishes that flag quite happily. And I like the way that he writes very succinctly and quite powerfully, but you do have to question at times whether he does use such intemperate language in his judgments, that you wonder whether he's just going a little bit too far.

And I'll just give you some examples. In one judgment, he accused his fellow judge, now this is just to show how polite and tame the High Court of Australia is, and I'm sure German courts are even tamer, but he once accused a fellow judge, Sandra Day O'Connor, who's an extremely smart judge, of holding 'irrational views in her judgments, that cannot be taken seriously'. So it's a good start. In another case, he said 'Seldom has the opinion of this court rested so obviously upon nothing but the personal views of its members', so that's another good swipe at the court. And another time he accused the court of being 'the most illiberal court' this is his own court by the way... 'this most illiberal court which has embarked on a course of inscribing one after another of the current preferences of the society and in some other cases the counter-majoritarian preferences of societies as a whole, into our basic law.'

Now just to indicate what he means by that, at a speech that he gave to a number of lawyers, and he knew that there were journalists in there, he decried the fact that the court was now making decisions that preserved liberties under the Constitution including the right to abortion and the right to homosexual sodomy (as he described it) and he says basically suggesting that those two laws were good, 'because they were rooted in the tradition of the American people by being criminalised for over 200 years.' So you know he's no blushing violet when it comes to his opinions.

And in another case he said, (which was the Guantanamo Bay case which he took a very strong attack at the majority on) but he said, 'What competence does this court have to second-guess the judgment of Congress and the President on this point?' (namely Guantanamo Bay) 'None whatsoever. But the court blunders in nevertheless.'

So as I say, it's good to have candour and certainly relative to other judges, Justice Kirby had more candour, I think, probably when it comes to candour you win the prize in the whole history of the High Court, but I guess with people like Scalia, you wonder whether there are limits.

Damien Carrick: Now Michael Kirby, he retired from the High Court earlier this year, you are, Justin Malbon, one of a number of academics who contributed to a book which analysed his decisions, and your chapter is titled 'Extra-Legal Reasoning'. In your research, did you discern any consistent thread of values in Justice Kirby's decisions?

Justin Malbon: Well the real advantage of writing a chapter in the book is that you can quietly go through the whole thing without being attacked. But I'm sure I don't have that privilege right at the moment. What I did was I thought that I'd just have a look at what Michael's underlying values were, and to do it properly would have been an impossible task, he writes so much, and there were so many judgments, so I thought that I'd just take ten cases of his, and do a textual analysis, so I was looking for the words that seemed to suggest the giving of a value, you know, 'the court ought to do this' or 'we should be referencing the greater international principles' and so on and so forth. So I was looking for those kind of catchphrases through those judgments, so I separated out those words from what I saw was strict legal analysis in the narrower sense, like 'in interpreting this section, ...' or 'following the precedent of ...' and once I'd collected all these phrases I thought, Well I'll look for themes, and put them in to boxes. And I guess it was at that point I was then wondering what the theme of Justice Kirby's values were.

The impression I got was of just those ten cases, I can't really speak much more broadly than that, I think one of the most important values I thought you were putting up was the integrity of the court system. Would that be true to say? That you say quite a number of times that the court must be very careful in containing itself, not entering into political decisions...

Michael Kirby: That's something on which I agree with what Professor Schlink has written, the anchor of most decision-making today is either the text of the Constitution, or the text of an Act of Parliament, and to the extent that a judge gets further distant from that, then the judge is in trouble, because you've really usually got to go back to what the written law says, and that's the anchor for the legitimacy of the decision that the judge has. Of course there will be differences about what the text means to one judge and another, but I certainly agree with Justin's analysis that

text is very important and I agree with Professor Schlink that that's where you draw your legitimacy, because that comes from the people. That's the basis of most decisions.

Damien Carrick: And Justin, did you discern any threads, consistent threads, or did you discern any inconsistencies?

Justin Malbon: Well I suspect that any of us if we're quizzed about our own values, we imagine our values as being far more consistent and homogeneous than if we're put in the conversation long enough, I think we'll start beginning to contradict ourselves, and I think Reg was telling me earlier that she was a little surprised by your decision in the Sex Slavery case for example. Would that be true? She's giving me a dark look. Shouldn't have said that.

Damien Carrick: We'll stick the article.

Michael Kirby: Don't expect me to go beyond the text here. Don't expect me to come over here and be on a dissecting table. This is the Law School, not the Medical School.

Reg Graycar: In the sex slavery case, the entire court adopted international jurisprudence just to go back to one of the themes. So that's quite significant.

Justin Malbon: And interestingly, in Al-Kateb now, would you say, I mean in that case you said that –

Damien Carrick: Just a reminder that Al-Kateb was whether from memory, an asylum seeker could be detained indefinitely in detention, and the majority of the High Court said, 'Yes, sure' and I think two or three judges, including Justice Kirby said 'No', and I think Justice Kirby's argument was that there was a Constitutional argument which supported that position.

Justin Malbon: Yes, now on the face of it there could be an inconsistency in the underlying values between Al-Kateb where you said that the court should be no less defensive of personal liberty in Australia than the courts of the United States, United Kingdom, the Privy Council of Hong Kong has been, all of which had withheld from executive power of unlimited detention. So you seemed to suggest there was an over-riding principle or value to which the legislature was subject, which is not to enable a situation of unlimited detention.

Michael Kirby: Justin this is one of the things I'm most proud of, that I've said consistently what Lord Cooke of Thorndon said in New Zealand and that the House of Lords and every other court and Professor Schlink tells us the German courts say, that when you look at a problem of your own Constitution today, 50, 60 years after the great birth of international law of Human Rights and so on, you test the propositions about your Constitution by reference to these great universal values, and had the German judges in the 1930s and '40s had such principles to guide them, as the German judges of today do, through the European Court of Human Rights and other sources, then perhaps there would have been stronger judges in those times. And I think if anything I ever did in the High Court will survive, it will be my insistence that in this day and age, the age of the Internet, the age of Jumbo Jets, and distinguished visitors who can be here and then go and they'll be back at home tomorrow, it will be that international law affects the way we see our law and the way we interpret it, and that is just an inevitable feature of the modern age.

Justin Malbon: But on the face of it, when you then face [Minister of Immigration] and B, which you said you faced these icebergs of...

Michael Kirby: It was impossible for me to give effect. I said, I acknowledged, If I could have interpreted the Migration Act 1958 of the Commonwealth of Australia to be excluding children, the Convention on the Rights of the Child, the most ratified treaty in the world, says 'Detention of a child shall be a last resort'. The interpretation that was urged for the Commonwealth and our Migration Act was it was a first resort to put these children in detention in the middle of South Australia out of connection with the rest of our civilisation. Now if I could have said well read the Act down, it doesn't specifically say detain children, leave it only to apply to adults and let the children be dealt with separately, Parliament hasn't dealt with it. But then these two icebergs appeared. The Act did contain provision for the searching of children in detention, which showed Parliament had thought of it, and secondly, the record of the Parliamentary debates show that it had been brought to the attention of Parliament, but it went on regardless, so it just wasn't possible to read it down.

Damien Carrick: Is what Justin's saying, that you saw icebergs in the child detention case, but you didn't see perhaps icebergs which were floating around in the Al-Kateb decision. I'm paraphrasing.

Michael Kirby: I didn't think there was an iceberg in Al-Kateb, because Mr Al-Kateb was a stateless person. This was the problem, our Act of

Parliament had not dealt specifically with a very well-known case of international, or a stateless person. He was a Palestinian. The Act had been framed on the hypothesis that a person could finish their detention by going back to their country of nationality, but he had no country of nationality. Israel wouldn't let him pass into Palestine, Kuwait wouldn't take him from whence he'd come, and therefore the view could be taken of reading our statute, Parliament just didn't deal with the special case of a stateless person. And that was encouraged by a knowledge of what international law says on stateless people, and the way international law treats them as protected people. So I didn't see icebergs there at all, and neither, I should say in the result did Chief Justice Gleeson or Justice Gummow. It was a 4-3 decision.

Damien Carrick: Justin Malbon, did you see any other points that you'd like to make about your research, no?

Bernhard Schlink: Well let me... because I read it with such interest. I mean I couldn't read your decisions in the brief time that I had here, so I read your article about your decisions, and I found two things really interesting: that your distinction between strict legal reasoning and other, extra legal reasoning, felt so alien to me. Most of what you put under the rubric Extra Legal Reasoning in my tradition would be regarded legal reasoning. So looking at not just international law but looking at the reality, looking at means and ends, looking at the results, and the consequences in our traditions, is all part of legal reasoning. And then I found interesting the quest for a consistent or an inconsistent use of values. I would be interested: is the legal reasoning a consistent body of legal reasoning, but whether Justice Kirby held these values here or there, they may different or they made consistent or inconsistent, who cares? The value of legal reasoning should be consistent, and make consistent sense. But where he gets his inspiration from, I still think...

Damien Carrick: Should we just try for consistent legal reasoning, or should we strive for something else?

Bernhard Schlink: We should strive I think for consistent legal reasoning.

Damien Carrick: But Nazi German judges could — I mean you can have consistent legal reasoning which leads you down a number of different paths. Should there be something which informs the path that you want to embark on?

Bernhard Schlink: I'm talking about legal reasoning that is the legal reasoning that comes with a democratic state under the rule of law. Of course it's not consistency per se, and we are talking about the interpretation of a constitution in a democratic state under the rule of law. There I think consistency is more interesting, consistency of legal reasoning, in a way, is more interesting than consistent...

Michael Kirby: You're more likely to get consistent reasoning if you tame your values and use the developing international law of human rights. I mean it's available to us, it is written about, extensively. There are wonderful books by Lord Leicester, on the European Court of Human Rights, and by Sarah Joseph of Monash University on the International Covenant on Civil and Political Rights. There's oodles of law on these things, and a lot of Australian lawyers are hostile to it, and we've got to overcome this; we've got to overcome this insular hostility and realise that far from being something which you avoid, it helps consistency and it often has a lot of very good ideas that give you a test for the way in which you are inclined to approach a constitutional legal problem. And this is commonplace in Europe, but in this country, until now, it's been a source of a lot of controversy in some circles.

Reg Graycar: But once we start using more international law, guess what, we're still going to disagree on the texts and the words and the meaning that instruments carry and so on, and that is a function of the looseness of language, and so on. I mean for every European Court of Human Rights decision, there are contested decisions in the Courts below, that's why they're there on appeal. So I mean yes, it's very important that we look more broadly at our legal sources, but they're not going to suddenly give us a map that we're missing that will lead us to the only true correct decision. They may just you know, put some of those nice lights on the path that are only lit by the sun and therefore they're really quite sort of murky, but at least they're there.

Damien Carrick: I'd like to talk about what is perhaps the most important case in Australian history, the Mabo decision of the High Court back in 1992. Some people see Mabo and the following case and Wik, which came a few years later, as examples of unelected judges running riot, and others see them as a momentous but ultimately sensible and long overdue correction to the Common Law, one which addressed a profound historical injustice. Now Justin Malbon, the judges in the majority in Mabo, they used quite, I guess what we can say, unjudicial language. What sorts of things did they say which could be described that way?

Justin Malbon: Well what I think is interesting about Mabo is you do have the court being quite explicit to some extent, about the context and the values that they're bringing to the judgment. And it must have scared the court, I think for some time after that, being so frank about what they believed was the historical context in which the case was situated, because I mean one set of reactions was that the case would lead to stealing our backyards, you know, that Aboriginal people could steal our backyards. There was a complete hysteria. But what was even more frightening was that you had senior members of government, including the Deputy Prime Minister at the time, making — if it wasn't a personal attack on members of the High Court, it got awfully close to it. So I think that was not a great period in terms of the way the politicians behaved in relation to having sufficient respect to our judicial institutions.

Damien Carrick: But the language itself of the decision. In terms of making that decision that Native Title could be incorporated in our Common Law, it reflected on the history and the experience of Australia and why that had not been done to date and what the consequences of that was.

Justin Malbon: Yes well they did give an historical context which became very much challenged by the government afterwards, but for example, Justice Deane and Gaudron spoke of the oppression and conflict, which over a century spread out across the continent to dispossess, degrade and devastate the Aboriginal peoples, and we leave a national legacy of unutterable shame. The white expropriation of land continued, spreading not only through the fertile regions of the continent, but to parts of the desert interior and Justice Brennan said 'The Common Law itself took from Indigenous inhabitants any right to occupy their traditional land, exposed them to deprivation of religious, cultural and economic sustenance which the land provides, vested the land effectively in the control of the imperial authorities without the right to compensation and made the Indigenous inhabitants intruders in their own homes and mendicants for a place to live.'

Damien Carrick: That kind of language, it's going away from the 'whereas, whereas, whereas ...' language that can be in legal judgments, and is taking us into a much deeper realm, one which in some ways is including notions of guilt and shame. It's a much more — Michael Kirby: Can I put — I don't feel involved in the Mabo decision in the sense that I was not a member of the court, therefore I didn't write it. But I want to defend it. I feel it was a great decision of our court, and it must be very curious to Professor Schlink to sit here and hear us ruminating about whether it was really time for the High Court of Australia in 1992 to come to the view that

a Common Law principle, inherited from the Privy Council and early Australian decisions, which had not been corrected in 150 years of democratic parliaments in this country, could survive. I mean it was based fundamentally on denying people, Aboriginal and Indigenous people, a right to land on the basis of their race. And all of the High Court of Australia said was 'Judges made that rule in the 19th century. We say we think it was based on a false factual premise. But however that may be, judges make the Common Law, judges can un-make it. And in this circumstance that cannot be the Common Law of Australia in 1992.'

And I think if you asked Australian citizens today what are the two decisions of the High Court you are most proud of? They will say the Communist Party case, which defended the right, even bizarrely, to be a communist in 1951, which the people of this country proudly upheld in the Referendum that followed; and the Mabo case, which said, in our country, in terms of rights to land, the Indigenous people are equal to the white European settlers. And to think that we're still ruminating about was that a right decision or a wrong decision in this day and age, is frankly, I think a little bit out of touch with reality. It was a great decision and it was thoroughly and carefully reasoned, and it's not a matter of picking over one or two phrases, it would have been a shameful decision to hold in 1992 that that was the Common Law of Australia, that because you were an Aboriginal or a Torres Strait Islander, you had no right to land, an outrageous review, and the High Court simply corrected it. I was proud to sit on a court that corrected it.

Damien Carrick: What do you think of the language that was used? You're saying that this is a non-issue.

Michael Kirby: I'm not going to sit here and parse and analyse words used by a judge. I mean the judges were concerned, very deeply concerned that this was a source of the disadvantage and deprivation of rights of the Indigenous people of this continent, and we had a very important cathartic moment earlier in the year when there was a national apology which was given with the Opposition and the Government united in expressing sorrow. I think we've still got a long way to go in repairing of our country, our relations with Indigenous people, we should be thinking carefully of the South African experience. It's one thing for us to offer an apology, it's another thing for us to ask the Aboriginal people 'What do you really want in terms of the reparation for and the correction for what you have suffered?' And I think that's the next thing. But Mabo started the ball rolling, a very good thing it did. Parliament could have overridden it, and in some respects it did, but it was a step in the Common Law — judges

make the Common Law and judges have the responsibility when a case comes before them to re-express it. And the High Court did, well before time.

Damien Carrick: Well, Bernhard Schlink, judges in Germany and Europe more generally, do they deal with these issues and use the language of contrition, historical responsibility, guilt, which in some ways the majority of Mabo were entertaining?.

Bernhard Schlink: Well the little I know about Mabo, I think the language that is being used in your court or also in an American court, where the judge as a person, speaks and writes, is of course different than the language in our tradition that is the result of talking about each sentence and agreeing on each sentence, and finally the result sounds more objectified, or neutral or unpersonal. So it's a different tradition. This emotional, compassionate language would probably not be to be found in our decisions. But the issue of the past and responsibility for the past, that of course comes up again and again.

Justin Malbon: I wonder if a system which allows for disagreement and these emotional responses, offers a greater protection in times of stress, you know, threats of terrorism or communists or whatever — do you think that offers us somehow more protection than, say, a system in which there is a taking out of the emotion, there is no real room for dissent? Do you think that's perhaps why the Nazi courts were, in a sense, fell over, weren't a roadblock to what happened?

Bernhard Schlink: Well I think once you have a totalitarian regime with everything it has: power, influence, then it's too late for the courts to stop the course of events. Courts can play an important role, helping to avoid that we get there, but once we have a totalitarian regime I think courts are too weak to change it, and lead it back to a democratic system under the rule of law. And I just can't judge whether these different traditions and styles of judging make a difference in that respect.

Damien Carrick: Justin Malbon, I'd like to finish up with you. We've been discussing the question should judges justify the law, or should they bring their own values to the task. But is this really the right question we should be asking in the first place?

Justin Malbon: Well I guess it's — from this panel, I think everyone's saying that it's a bit of a nonsense to imagine that dichotomy, that should you have a judge that doesn't bring values as opposed to a judge that

does... I think some judges, as I've mentioned before, do pretend that they're acting terribly objectively and not infusing it with their values; others may even on occasion use somewhat emotive language. But I think from Professor Schlink's last comment, it seems to me that what is required of courts is to be vigilant at the outset, and I think Michael Kirby said that in an earlier judgment or a speech at one earlier occasion in which he said we should react sooner rather than later when we see real threats to our system, because otherwise, as you say, if you allow that to happen and this to happen, and you turn a blind eye to this breach of a fundamental right, and you keep allowing that situation to develop, then it will be too late.

Damien Carrick: A last word from Michael Kirby or Reg Graycar.

Michael Kirby: Well if I said that, I'd think it was a very good thing said that I'd said. I think we've been very privileged tonight to have Professor Schlink here, to get this insight, not only is he a wonderful writer and he's given so much pleasure to so many millions of people, but he's a wonderful lawyer and a great constitutionalist and we don't know enough about the German and the European systems, and we should be less insular. You can be live very comfortably in the Anglo-Saxon and the anglophone world, and I think it's been a fantastic thing that we've had this great scholar and writer in our midst tonight. As a citizen of Australia, I'd like to thank you for joining us.

Damien Carrick: And would you please help me thank all our guests.

[Applause...]

Damien Carrick: Bernhard Schlink, Michael Kirby, Reg Graycar and Justin Malbon, thank you very much.

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