UNENLIGHTENED SELF-INTEREST

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I MICHAEL KIRBY

Given that this is the Michael Kirby Oration, allow me a couple of minutes to talk about Michael Kirby. I do this, in part, because I heard Michael give the Alan Missen Oration at Federation Square.[1] He said that an oration named after a person should say something about the person in whose name the oration is given. Chastened by that, I decided I should follow his example because it had many elements of a command.

I first met Michael Kirby many years ago. We both had an interest in computers and their potential impact on the law. When I addressed the matter, people thought me a harmless eccentric. When he spoke of it (as Chair of the Law Reform Commission) people took him seriously.[2] Given that our thoughts on the subject ran in parallel, I was encouraged by this. We had appeared on the same platform at Swinburne University in (I think) 1983, at a seminar to do with computers and their likely impact on law and legal practice.[3] I thought I knew a thing or two about the subject. His knowledge and insight made a great impression. Shortly after that appearance, Kirby telephoned me at home at about eight on a Sunday morning. I was awake, but my day had not started. His opening words surprised me: 'I rang you in chambers, but you were not there'. His tone of gentle reproach suggested that I needed to improve my work habits.

At the time, I was an ambitious young junior barrister, but the idea of being in chambers early on a Sunday morning had not occurred to me. At the time I thought his purpose in calling me on a Sunday morning early, was to impress me with his industry. It worked. If I had been tempted to think that he was showing off, the balance of his history would prove me wrong: Kirby's industry is legendary; his output has been phenomenal.

There are too many aspects of his productive life to compress into these brief remarks, but one of the enduring themes is founded in a profound ethical choice. Kirby's thinking has always been guided by an unshakeable conviction that human dignity and human rights are the gravitational centre of any civilized society; and that a legal system that escapes the insistent pull of human rights will produce law without justice. Kirby writes for a future that honours that role of law in society.

It seems curious that this might be a matter of ethical choice, since it seems to me so obviously right. But Kirby's view of the proper role of law is not shared by everyone: for some whose human rights are not in doubt, law serves better if it gets on with other tasks.

In much of his writing, on and off the bench, he has stood above the crowd and has seen further. If he has looked to the future, it is because he sees clearly how the future can be. While contemporary commentators have not been uniform in their appreciation of Kirby's views, I think posterity will be more generous.

His appeal to future ages will come, in large measure, from the central idea that human dignity and human rights are fundamental. His place in history will depend in part on whether or not we acknowledge the centrality of human rights in our system of law. That idea provokes hostility in some quarters and indifference in others. It is by no means certain that we will end up with a legal system based on the notion that law should produce a just result consistent with the principles of human rights.

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1 Michael Kirby, 'Michael Kirby on Human Rights in North Korea' (Speech delivered at the Melbourne Writers Festival Alan Missen Oration, Melbourne, 22 August 2014).

2 See Michael Kirby, 'Computer Suppliers and the Law' (Paper presented at the Australian Computer Equipment Suppliers' Association Annual Conference, Canberra, 24 November 1981) <http://www.michaelkirby.com.au/images/stories/speeches/1980s/vol8/1981/294-Aus_Computer_Equipment_Suppliers%27_Association_-_Computer_Suppliers_and_the_Law.pdf>.

3 See Michael Kirby, *Melbourne Seminar on Privacy: A Report* (January 1981) Law Institute of Victoria. <http://www.michaelkirby.com.au/images/stories/speeches/1980s/vol7/1981/216-Law_Institute_of_Vic_-_Melbourne_Seminar_on_Privacy_-_A_Report.pdf>.

Kirby writes for the future. I would make it plain that it is a future I would wish to share. It may be difficult to attain. But he has shown us the way, and he has shown that it is worth striving for. His decision to live as a gay man without the respectable cover of a heterosexual marriage was an ethical choice; his decision to 'come out' was another.

II ETHICAL CHOICES

With one possible exception, I have not had to make such profound existential choices. And I come to the subject of ethics as a layperson, an amateur. Apart from the narrow field of professional ethics, lawyers are not instructed in ethics. Professional ethics, for lawyers, deals with such prosaic ideas as not stealing a client's money, and not being rude to judges. It does not take a postgraduate degree in philosophy to discover the rules of professional ethics.

The exception was the choice to take on the Howard Government in 2001 over the Tampa episode, and then over the issue of the treatment of asylum seekers generally. For a person who had never been politically engaged, it was a strange choice, but an easy one. It was made easier by the fact that my naïveté prevented me from foreseeing the personal cost of doing what I did. But even if I had been smart enough to predict the death threats, the hate mail and the vilification by government acolytes in the maggot end of the press, I would have made the same choice.

If I had thought it through, it was a collision of principle (which said it is essential to do something) and pragmatism (which said 'this is a bad career move'). But I made the choice by instinct, not by ethics.

It is a pity that lawyers do not receive any real training in ethics, because one way or another, lawyers, like doctors, are involved in ethical problems which are part of the fabric of any society and which emerge unexpectedly in a society in which technology is evolving rapidly.

Medicine continues to throw up ethical choices of the most fundamental kind. What constitutes a living human being? When is a person dead? When is a person entitled to die? What are the relevant limiting criteria shaping end-of-life decisions: sentience, physical capability, independence, resource allocation? Does the right of a patient to have an abortion impose a corresponding obligation on a doctor to perform one?

Lawyers have a limited role in making ethical decisions of that sort: we are generally consulted by one or another side of the contest. But they do not ask 'What is the right answer?' They tell you their version of the right answer, and ask you to persuade a court (or perhaps a parliament) to embrace that answer.

For barristers at least, this position is in part a result of the cab-rank principle. Every barrister has had the experience of being asked, at a dinner party, 'How can you defend someone who you know is guilty?' The answer is simple: 'The cab-rank principle.'

The cab-rank principle says that if you are offered a brief in a field of your ordinary practice, marked with a fee appropriate to your experience, and for a time when you are available, then you must accept the brief.[4] It matters not that you despise the client, or the client's cause or the client's conduct. Those matters are subordinated to the idea that everyone is entitled to competent representation. It is an important principle, because without it, some people would have real difficulty finding anyone willing to represent them. The fact that people still ask the question highlights the problem: some lay people, perhaps many of them, think that a guilty person should not be able to have legal representation. Apart from anything else, this view conveniently forgets that everyone is presumed innocent until proven guilty, and that the lawyer's role is to represent the client, not to judge his guilt or innocence.

I should hasten to add that this principle does not apply to *pro bono* work. Self-evidently, *pro bono* work is unpaid[5], so *pro bono* work does not meet the criterion that the brief is marked with an appropriate fee. In performing *pro bono* work, barristers not only discharge the useful function of supplementing the inadequacy of Legal Aid, but in addition they express by implication, their own ethical choices.

The presumption of innocence, and the requirement that all people who go to court are entitled to competent representation, illustrates the way various ethical choices have played out in our society.

4 See Róisín Annesley, *Good Conduct Guide: Professional Standards for Victorian Barristers* (Victorian Bar, 2nd ed, 2008) 43, 45.

5 '*Pro bono*' is a short-hand version of *pro bono publico* ('for the public good'). But as a matter of practice, *pro bono* work is unpaid.

The choice that all people are entitled to justice, not only the powerful. The choice that an accused person should be presumed innocent (the same presumption does not operate in Japan.[6]) The choice that in the contest between State and citizen, the parties should meet on equal terms, with each competently represented.

The most fundamental of these choices is the first: that our conception of justice includes the idea that all people are entitled to it. This is neither universal nor self-evident. In his history of the Peloponnesian wars, Thucydides retells the Melian Dialogue. In its war against Sparta, Athens decided to invade the island of Melos. Although Melos had not harmed Athens, and was neutral in the war, it was strategically located. Athens wanted Melos for its strategic importance. An Athenian delegation went to the Commissioners of Melos and came straight to the point. They agreed that it would seem unjust for them to invade Melos, but noted that 'Justice is only relevant between equals in power. Where power is not equal, the strong do what they will, and the weak suffer what they must.'[7]

Feudal societies and dictatorships tend to share the Athenian view. Neither the Taliban, nor those who hold Taliban without trial in Guantanamo Bay think that justice is for all.

An equally deep ethical choice is involved in deciding what constitutes justice. The answer to this question helps shape innumerable aspects of the legal system. Try this: A mother, stressed already by school holiday torment, is in the kitchen when she hears a crash in the living room. She rushes to see what has happened and finds her favourite, most precious vase shattered on the hearth. She knows with a certainty that transcends analysis, that her youngest was responsible. She finds him and sends him to bed without dinner. As it happens, he was in fact responsible for breaking the vase.

The alternative version: When the mother finds the vase, she realizes that no-one should be punished without good cause and due process. This is the minimum requirement of justice. She seeks out each child in turn and asks questions calculated to discover the truth of the matter. Suspicion eventually falls on her youngest. She gives him a chance to explain. Not convinced by his explanation she sends him to bed without dinner. As it happens, he was not responsible for breaking the vase.

The question is: Which of these two results is more just? The first is pragmatic; the second accords with principle. But most people cannot choose which is right without hesitation. Due process is inherent in our conception of justice. But bad process can yield right results, just as good process can produce wrong results. The legal system, with all its concerns about process and procedure, is designed to produce justice. The idea of a mob lynching of a suspected criminal is abhorrent, even if it happens that the mob is right in their choice of victim.

This simple example illustrates how hard it is to choose what constitutes justice. The difficulty is compounded by the fact that our ethical criteria are not static. What appears just in one age may be repugnant in another. A crude illustration of this process is found in social attitudes to capital punishment.

Ronald Ryan was the last person put to death by the Australian Government. The fight to save him from the gallows in 1967 was hotly contested. Led by Barry Jones, those campaigning against capital punishment were vilified by the government of the day and by the tabloid press. In the years following Ryan's execution, every jurisdiction in Australia has abolished capital punishment. Now, 47 years on, no government in Australia today argues for reintroduction of capital punishment, and members of the community who support capital punishment are either a small minority or surprisingly quiet (and incidentally, Barry Jones is now one of the most respected figures in Australian public life).

Nevertheless, there was a strong body of opinion in Australia that supported the idea of executing the Bali Bombers, and even more local opposition to the execution of the Bali Nine. One integer of the ethical choice, it seems, is the nationality of the prisoner being sentenced.

One hundred years ago there was near universal support for the death penalty as an appropriate feature of the justice system. Two hundred years ago, capital punishment was a commonplace, as was public flogging. What was 'just' then looks barbaric now.

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6 See generally Arne F. Soldwedel, 'Testing Japan's Convictions: The Lay Judge System and the Rights of Criminal Defendants' (2008) 41 *Vanderbilt Journal of Transnational Law* 1417, 1446-7.

7 See Thucydides, *History of The Peloponnesian War* (Rex Warner trans, Penguin 1972) 5.69.

III THE STOLEN GENERATION

Another example can be found in the recent history of South Australia. Until the early 1960s, the South Australian Government had a practice of removing Aboriginal children from their parents. There have been three attempts by members of the Stolen Generations to recover damages. Actions in the Northern Territory and New South Wales failed.[8] In August 2007 an action brought in South Australia succeeded.[9]

In the South Australian case, the Plaintiff was Bruce Trevorrow. Bruce was the illegitimate son of Joe Trevorrow and Thora Lampard. They lived at One Mile Camp, Meningie, on the Coorong. They had two other sons: Tom and George Trevorrow. One Mile Camp, Meningie was a small collection of humpies made from flattened oil drums and old sackcloth, one mile outside Meningie. They lived at One Mile Camp because in those times it was not lawful for an Aborigine to live closer than one mile to a place of white settlement.

When Bruce was 13 months old, he got gastroenteritis. Joe did not have a car capable of taking Bruce to the hospital, so some neighbours from Meningie took him to the Adelaide Children's Hospital where he was admitted on Christmas Day 1957. Hospital records show that he was diagnosed with gastroenteritis; he was treated appropriately and the gastro resolved within six or seven days. Seven days after that he was given away to a white family.

The family lived in suburban Adelaide. They had a daughter who was aged about 16 at the time. She gave evidence at the trial as an elderly woman. She remembered the day clearly. Her mother had always wanted a second daughter. They had seen an advertisement in the local newspaper offering Aboriginal babies for fostering. They went to the hospital and looked at a number of eligible babies and saw a cute little girl with curly hair and chose her. They took her home and, when they changed her nappy, they discovered she was a boy. That is how Bruce Trevorrow was given away.

A short time later, Bruce's mother managed to lay her hands on a pen, and paper, and an envelope, and an address. She wrote to the Department asking how Bruce was doing and when he was coming home. The Department replied that Bruce was doing quite well but that the doctors said he was not yet well enough to come home. Bruce had been given away weeks earlier. For the next eight years, they prevented Bruce's mother from finding out where he was.

When Bruce was three years old he was taken to hospital again: he was pulling his own hair out. When he was eight or nine years old, he was seen a number of times by the Child Guidance Clinic and was diagnosed as profoundly anxious and depressed, and as having no sense of his own identity.

Every time he has been assessed by a psychiatrist, from the age of 9 to the age of 49, the diagnosis has been the same: anxiety, profound depression, no sense of identity and no sense of belonging anywhere.

Bruce's brothers came to give evidence in Bruce's case. A striking feature of the trial was the astonishing difference between Bruce and his brothers, Tom and George, who had not been removed. They told of growing up with Joe Trevorrow, who taught them how to track and hunt, how to use plants for medicine, how to fish. He impressed on them the need for proper schooling. They spoke of growing up in physically wretched circumstances, but loved and valued and supported. They presented as strong, resilient, resourceful people. By contrast, Bruce was profoundly damaged, depressed and broken.

In its defence, the Government of South Australia argued that removing a child from his or her parents did no harm. This contest led to one of the most significant findings in the case. Justice Gray said in his judgment:

> I find that it was reasonably foreseeable that the separation of a 13-month-old Aboriginal child from his natural mother and family and the placement of that child in a non-indigenous family for long-term fostering created real risks to the child's health. The State through its emanations, departments and departmental officers either foresaw these risks or ought to have foreseen these risks.[10]

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8 See *McLennan v Northern Territory Aboriginal Corporation* [2012] FWA 3167 (12 April 2012); *Williams v Minister, Aboriginal Land Rights Act 1983* [1999] NSWSC 843 (26 August 1999); *Harvey v New South Wales* [2006] NSWSC 1436 (21 December 2006).

9 See *Trevorrow v South Australia* [2007] SASC 285 (1 August 2007). The subsequent appeal of this decision was dismissed; see *South Australia v Lampard-Trevorrow* [2010] SASC 56 (22 March 2010).

10 *Trevorrow v South Australia* [2007] SASC 285 (1 August 2007) 90 [885].

That finding was based on extensive evidence concerning the work of John Bowlby in the early 1950s, and it also accords with commonsense: we all have an instinct that taking children from their parents will cause great pain.

It is fair to assume that most of the people involved in this conduct considered that they were acting justly, for was it not self-evident that an Aboriginal child would be better off growing up in white, middle-class suburbia than in the shabbiness of an Aboriginal settlement, even if the shabbiness was itself the result of Aboriginals being alienated from white society?

Now we see it differently. In its first sitting, the Rudd government said 'sorry' to the Stolen Generations. It seemed almost too good to be true: it was the apology so many had waited so long to hear. And when we heard it, we rejoiced at the sound of some of the noblest and most dignified sentiments ever uttered in that place on the hill. It is worth recalling some of Kevin Rudd's words:

> Today we honour the indigenous peoples of this land, the oldest continuing cultures in human history.
>
> We reflect on their past mistreatment.
>
> We reflect in particular on the mistreatment of those who were Stolen Generations – this blemished chapter in our nation's history.
>
> The time has now come for the nation to turn a new page in Australia's history by righting the wrongs of the past and so moving forward with confidence to the future.
>
> We apologize for the laws and policies of successive Parliaments and Governments that have inflicted profound grief, suffering and loss on these our fellow Australians…
>
> For the pain, suffering and hurt of these Stolen Generations, their descendants and for their families left behind, we say sorry…[11]

The day Kevin Rudd said sorry to the Stolen Generations was 13 February 2008. It will be remembered as a day when the spirit of the nation stirred. The apology raised a couple of new ethical problems. The first is this. The Prime Minister acknowledged that the removal of children from their parents caused great harm, both to the parents and to the children. He acknowledged that it was a great wrong. The judgment in Bruce Trevorrow's case shows that the harm was predictable, and was foreseen – or at least foreseeable – by governments at the time.[12] Is there not an ethical obligation to go further than saying sorry? Where a moral wrong has caused foreseeable harm, surely saying sorry is not enough – it is ethically necessary to help remedy the harm done.

The second is this. Many Australians – about 80 per cent it seems – approved strongly of the apology. Many people obviously felt that something profoundly important had happened. Many, I am sure, felt better in themselves for the fact that we had, as a nation, apologized to the Stolen Generations.

But is it ethically right for us to feel cleansed and relieved by the apology, and do nothing to persuade the Government that an apology is not enough, and that compensation is needed? It is clear enough that saying sorry is useful and to a degree palliative. But it is clear also that the harm that the Prime Minister acknowledged will not be remedied by an apology alone. Even compensation will not mend the wounds entirely, but compensation will go further toward that end than an apology alone.

The next ethical choice we need to make, as a society, is for a national compensation scheme, run by the States, Territories and Commonwealth in co-operation with each other. The scheme I advocate would allow people to register their claim to be members of the Stolen Generations. If that claim were on its face, correct, then they would be entitled to receive copies of all relevant Government records. A panel would then assess which of the following categories best describes the claimant:

a. removed for demonstrably good welfare reasons;
b. removed with the informed consent of the parents;
c. removed without welfare justification but survived and flourished; or
d. removed without welfare justification but did not flourish.

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[11] Commonwealth, *Parliamentary Debates,* House of Representatives, 13 February 2008, 167 (Kevin Rudd, Prime Minister).
[12] See *Trevorrow v State of South Australia* [No 7] [2008] SASC 5 (1 February 2008).

The first and second categories might receive nominal compensation. The third category should receive modest compensation, say AUD 5 000 to AUD 25 000, depending on circumstances. The fourth category should receive substantial compensation, between say AUD 25 000 to AUD 100 000, depending on circumstances.

The process should be simple, cooperative, lawyer-free and run in a way consistent with its benevolent objectives. If only the governments of Australia could see their way clear to implement a scheme like this, the original owners of this land would receive real justice in compensation for one of the most wretched chapters in our history. Unfortunately, as a community we seem to have made an ethical choice which says that saying sorry is enough.

It is interesting to contrast the current attitude to removal of aboriginal children with attitudes at the time it happened. Then it was (at least to many) an ethical practice. Now it is not. If, in 2014, officers of a government department regularly decided to remove white children from parents, who lived in poor, industrial suburbs and placing them with white parents in leafy, wealthy suburbs, in order to give them a better chance in life, the community would be rightly horrified. Few people would say that it makes any difference if the children being removed are white, black, Asian, Christian, Jewish or Muslim; although I have to acknowledge that it might cloud the vision of some.

IV End-of-Life Decisions

This raises troubling questions about later assessment of current orthodoxies. In 2003 I was briefed by the Office of the Public Advocate in Victoria to act in an end-of-life case.[13] The patient, known as Mrs BWV, was a middle-aged woman who had been in a persistent vegetative state for many years. She was kept alive by being fed via percutaneous endoscopic gastrostomy [PEG] (a tube which goes through the abdominal wall and directly into the stomach). The *Medical Treatment Act* [14] provided that a person's guardian may, on behalf of the patient, refuse medical treatment. However, the Act went onto say that it did not apply to palliative care.[15] Palliative care was defined as including the reasonable provision of food and water.[16]

The Public Advocate was acting as BWV's guardian. He sought a court declaration that feeding by PEG was 'medical treatment' for the purposes of the Act.[17] He made it clear that, if feeding by PEG was properly regarded as medical treatment in the circumstances, he intended to withdraw consent. The inevitable result of that would be that Mrs BWV would die over the course of a week or so.

Mrs BWV's family supported this course, saying that their mother had often expressed horror at the idea of being kept alive artificially if she were in a permanent coma.

It struck me then, and now, as ethically right that a person should be allowed to choose to die, and to dictate their choice in advance in case later circumstances left them unable to express a choice at the relevant time. (Incidentally, it struck me then as it strikes me now that if a decision to die is legitimate, then requiring slow death by starvation is barbaric, when death by injection would be nearly instantaneous).

That said, it is not difficult to see that in 20 or 50 or 100 years from now, social mores may have changed; such that allowing a person to die in these circumstances would be regarded as unethical, immoral or criminal. Sir Francis Galton's theory of eugenics had many adherents for decades, until the Nazis gave it a bad name. There is already a strong and vocal movement that opposes the idea of allowing a person to die in the position of Mrs BWV. There is no certainty at all that the ethical choices we make now will be viewed benevolently by later generations.

13 See *Re BWV* [2003] VSC 173 (29 May 2003).
14 Medical Treatment Act 1988 (Vic).
15 Ibid s 4.
16 Ibid s 3.
17 Ibid s 4.

V REFUGEES [18]

In reading this section of the paper, it may be useful to bear in mind the following political chronology:

3 Dec 2007	ALP wins Federal election and Rudd becomes Prime Minister
1 Dec 2009	Abbott deposes Malcolm Turnbull and becomes Leader of the Opposition
24 Jun 2010	Gillard replaces Rudd as Prime Minister
21 Aug 2010	ALP wins Federal election and Gillard remains Prime Minister
27 Jun 2013	Rudd replaces Gillard as Prime Minister
18 Sep 2013	LNP wins Federal election and Abbott becomes Prime Minister
15 Sep 2015	Malcolm Turnbull deposes Abbott and becomes Prime Minister

Perhaps not surprisingly, I see Australia's treatment of refugees as one of ethical choice. It goes to the heart of whether we are a just society, and for any lawyer, justice is – or should be – a central concern. It is pre-eminently an area where principle, pragmatism and politics collide. In recent times, the debate about boat people has reignited.

Recent comments by Tony Abbott[19] suggest that, if elected, he would take a much harder line on what he calls 'border protection'. He would reintroduce the Temporary Protection Visa; he would reintroduce the Pacific Solution; he would reintroduce the extraordinary idea that asylum seekers, held indefinitely despite having committed no offence, should be liable to the government for the daily cost of their incarceration. These things were bad under Howard and Ruddock. What is alarming is that Abbott immediately gained ground in the polls.

Clearly, he had taken his cue from polling in the marginal electorates and saw that pushing back Muslim refugees would be popular. He lied by suggesting that we were being flooded by boat people; whereas, in fact, the arrival rate is still tiny by any measure. He condemned all people smugglers to moral depths, as if all were in the same moral basket.

The people of this country, by and large, approved of his idea of mistreating the innocent to deter others from seeking our help.

Kevin Rudd's principles[20] should have rejected Abbott's approach, but he quickly followed suit, and started talking tough about boat people: he had figured out that decent treatment of refugees would work against him in the electorate. Of course, his harshest comments were directed against people smugglers, because a frontal attack on refugees might have looked a bit too harsh.

But surely the parable of the Good Samaritan demands a humane response to people who, without committing any offence, come here and politely ask us to protect them. And let us not forget that Dietrich Bonhoeffer was a people smuggler. And so was Oskar Schindler, and so was Captain Schroeder, the master of the MS St Louis who tried valiantly to find a safe country for 900 Jewish refugees in 1939, but was eventually forced to return them to Europe where more than half of them perished in concentration camps.

Bonhoeffer, Schindler and Schroeder were people smugglers who made dangerous choices for principle against politics and pragmatism. We honour their memory. For political leaders in this country, especially self-proclaimed Christians, to prefer politics over principle is as disappointing as it is familiar.

Conversely, Julia Gillard had turned her attention to boat people. It would have been an easy thing for her to take the initiative and respond in a principled way. She could have demonstrated just how flagrantly

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[18] After Abbott became Leader of the Opposition, both Rudd and then Gillard adopted increasingly harsh attitudes in relation to boat people until, in his second term as Prime Minister, Rudd brought the mistreatment of boat people to a degree of harshness not previously seen.

[19] This speech was given while Tony Abbott was Prime Minister, but before he was deposed by Malcolm Turnbull on 15 September 2015.

[20] In 2013 Kevin Rudd made offshore detention of refugees even harsher than it had been under the leadership of Julia Gillard PM.

Abbott[21] had tried to mislead the public on the issue. She could have pointed out that, even at the current rate of arrival, it would take 20 years to fill the Melbourne Cricket Ground with boat people. She could have pointed out that about 90 per cent of boat people are ultimately assessed as genuine refugees who are legally entitled to our protection. She could have pointed out that the Taliban insurgency in Afghanistan is so great that our troops are scarcely gaining ground, and that many boat people in recent times have been Afghans fleeing the Taliban. She could have pointed out that, if we are concerned about a sustainable population, for every boat person who comes to Australia each year, we accept 20 new permanent economic migrants who come here as a matter of free choice.

Faced with these facts, the public might think that the case for human decency is overwhelming. But I fear that pragmatism of the crudest sort will govern the outcome.

Genuine protection of human rights is a necessary feature of a just society. Any worthwhile human rights framework will guarantee as inalienable rights those conditions that are generally regarded as necessary for a decent human existence. A survey of the guaranteed rights in other Western democracies shows that they all guarantee the following rights and freedoms:

1. Right to life and liberty;
2. Freedom of religion, speech, press and assembly;
3. Freedom from arbitrary search and seizure;
4. Due process and equal protection under law;
5. No cruel and unusual punishment;
6. No slavery;
7. Privileges and immunities, due process; and
8. Right to vote.[22]

The Israeli philosopher Avishai Margalit has explored the question whether a just society will also necessarily be a decent society. He tests the question by asking whether a society that is just may also choose to tolerate 'humiliating institutions'.[23]

What does Margalit's proposition mean? He asks us to imagine a village in which food aid is to be distributed. Each villager needs one kilogram of rice. A just distribution may be achieved by visiting each house in the village and handing out the appropriate number of rice parcels. An alternative means is to drive through the village and tip the rice parcels off the back of the truck, with police on hand to ensure that no-one tries to take more than one package. Both methods result in an equal distribution, and thus satisfy John Rawls' famous test for a just society. But the second method is humiliating. As Margalit says:

> The distribution may be both efficient and just, yet still humiliating… The claim that there can be bad manners in a Just Society may seem petty – confusing the major issue of ethics with the minor one of etiquette. But it is not petty. It reflects an old fear that justice may lack compassion and might even be an expression of vindictiveness. There is a suspicion that the Just Society might become mired in rigid calculations of what is just, which may replace gentleness and humane consideration in simple human relations. The requirement that a Just Society should also be a decent one means that it is not enough for goods to be distributed justly and efficiently – the style of their distribution must also be taken into account.[24]

Margalit develops this, arguing that of all the goods that must be equally distributed, the most fundamental is self-respect. Self-respect precedes other basic goods – freedom of thought, speech and movement; food and shelter; education and employment – because self-respect is necessary if a person's existence is to have any meaning at all. Without the possibility of self-respect, a person's life can have no purpose, and pursuit of life's other goals is a meaningless exercise. By this path, we see the undeniable centrality of human dignity in any coherent social framework, just as Kirby has consistently argued.

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21 In his capacity as Leader of the Opposition.

22 See *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

23 See Avishai Margalit, *The Decent Society* (Naomi Goldblum trans, Harvard University Press, 1998) 21.

24 Ibid 280-1.

For some time, without knowing it, Australia has been wrestling with this great ethical choice: do we want to be a decent society? Do we actually believe in human rights, or do we simply pay lip service to the idea? There are worrying signs that we have resolved the question the wrong way.

Broadly speaking, Australians have a fairly respectful attitude to human rights. If most Australians were asked what they thought of human rights, they would say that human rights matter. The question then arises: How is it that those same people watched with unconcern as David Hicks languished for years in Guantanamo Bay without charge and without trial? How is it that they watched with unconcern for years as innocent men, women and children were locked up indefinitely in desert jails merely because they were fleeing the Taliban or Saddam Hussein? How is it that we have managed such enduring complacency to the plight of the Aborigines whose land was taken and whose children were stolen? How is it that we are indifferent to the draconian effects of the anti-terror laws as they are applied to Muslims in the Australian community, when we would not tolerate similar intrusions on our own rights?

We have seen recently an unhappy reflection of this ambivalence about human rights. After an exhaustive consultation process, the Brennan Committee recommended that Australia enact a 'Human Rights Act', of the sort we have in Victoria and the Australian Capital Territory.[25] The Brennan Committee received more submissions than any government enquiry in Australia's history. The submissions were overwhelmingly in favour of a Human Rights Act. But in April, the Rudd Government announced that the Government would not put forward a Bill for a Human Rights Act. It was a triumph of practical politics over principle. Not only is Australia the only Western democracy not to have a Human Rights Act, we are probably the only country in the world to have actively chosen not to have one. How is it that, as a fairly benign democracy, we have ended up in this position?

The answer I think is this: Australians subconsciously divide human beings into two categories: 'us' and 'other'. We think, perhaps subconsciously: 'my rights matter, and so do those of my family and friends and neighbours, but the human rights of others do not matter in quite the same way because (without quite saying it) the others are not human in quite the same way we are'. It is dangerous thinking and profoundly wrong.

We have human rights not because we are nice or because we are white or because we are Christian, but because we are human. This is something that the Australian public does not generally understand. So they are easily spooked by the utterly misguided and misleading comments of people like Cardinal Pell and Bob Carr; their anxiety was reflected in polling in marginal electorates, and politics trump principle.

VI Politics and Pragmatism

Of all the things that might be said about Australia in the 21st century, the most depressing is this: political leaders of both major parties are driven almost completely by pragmatism, and not by principle. Malcolm Turnbull tried to cling to principle in relation to global warming and he was dumped by his party. Neither Rudd nor Abbott allowed their Christian values to get in the way of focus group results. Julia Gillard was ultimately no better on refugees, although she made a real effort to combat global warming with the short-lived carbon tax.

VII Enlightened Self-interest

One of the few, practically universal, philosophical precepts is captured in the Christian teaching '[d]o unto others as you would have them do unto you'.[26] In its original Biblical expression it says '[t]herefore all things whatsoever ye would that men should do to you, do ye even so to them: for this is the law and the prophets'.[27]

Described in the West as the Golden Rule, it is found in many religious and secular philosophies. It is found in Brahmanism: '[t]his is the sum of Dharma [duty]: Do nothing to others which would cause you pain if done to you'.[28] In Buddhism: '...a state that is not pleasing or delightful to me, how could I inflict that upon

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[25] Human Rights Consultation Committee, Parliament of Australia, National Human Rights Consultation: Report (2009, recommendation 23); *See Human Rights Act 2004* (ACT), *Charter of Human Rights and Responsibilities Act 2006* (Vic).
[26] *New Testament* [Luke 6:31].
[27] *New Testament* [Matthew 7:12].
[28] Mahabharata [5:1517].

another?' In Confucianism: '[d]o not do to others what you do not want them to do to you'.[29] In Islam: '[n]one of you [truly] believes until he wishes for his brother what he wishes for himself.'[30] And in Taoism: '[r]egard your neighbour's gain as your own gain, and your neighbour's loss as your own loss'.[31] The same principle has been advocated by secular philosophers, including Epictetus, Plato, Socrates, Seneca and Immanuel Kant.

The foundation of the idea is reciprocity and, in this setting, reciprocity is an expression of enlightened self-interest. Little wonder then that the idea is widespread. At its least, it tempers our basest impulses. At its highest, it produces acts of extraordinary altruism.

The principle of reciprocity, and the Golden Rule that springs from it, emerges from selfishness, which is a near-universal human characteristic. Human infants are near perfect parasites: their every instinct is directed at self-preservation. It is a necessary characteristic in creatures that remain dependent on others for a very long time, unlike the infants of other species.

So, self-interest has been naturally selected because it helps us survive to adulthood. But as we grow up we learn that the way we behave now may have consequences later. As children grow up, they begin to notice that sacrificing an immediate gain in the interest of others can result in greater gains later. We learn that it can be strategically wise to postpone or subordinate our immediate interests in favour of others.

The tension between these forces is everywhere to be seen and especially at times of stress. In all the issues I have tried to cover in this talk, the only satisfactory explanation is self-interest, but *un*enlightened self-interest. Australia's response has been so poor as to redefine our national character or, at least, to degrade our national image.

The moral rebranding of a nation goes to the heart of inter-generational justice, just as surely as our environmental legacy does. But this is easily overlooked. It involves more than issues of deceptive packaging. We are handing over to the next generation a world beset by problems that are unique in human history and which do, without exaggeration, involve challenges for civilization, as we understand it, and perhaps for the continued survival of the human species. We should avoid saddling the next generation with a tarnished national reputation to add to these burdens. But more than that, we should try to hand over a country that has had the decency to be true to its declared values.

The ethical choice implicit in these matters reflects badly on the country. I began by lamenting that lawyers do not study ethics at university. Perhaps the real problem is that Australians are not taught ethics at school: they learn ethics by observation, by watching what sports people do, by watching what politicians do. Heaven help us all.

[29] Samyutta Nikaya [v 353].
[30] Imam [13].
[31] Analects [15:23].