Legal Studies Research Paper Series Paper No. 1805

Judicial Biography of Australian Justice Sir Gerard Brennan (Book Review)

William H. Clune

This paper can be downloaded without charge from the
Social Science Research Network Electronic Paper Collection at:

https://ssrn.com/abstract=4826673

Judicial biography of Australian Justice, Sir Gerard Brennan
Book Review[1]
Bill Clune[2] interviews author Jeffrey Fitzgerald[3]

Abstract. *This is a book review in interview format with me interviewing the book's author, Jeffrey Fitzgerald. The book is a judicial biography of the famous and influential Australian jurist. Sir Gerard Brennan. Largely in chronological sequence, the book also identifies cross-cutting themes such as the evolution of his jurisprudence over time.*

My questions are designed to highlight issues that have parallels in American law, thus introducing the book to American readers. A second focus is the interaction of law and society. Law and society issues pervade the book because it is a longitudinal account of the judge's encounters with important legal issues that arose in a changing Australian society, his influence on that society, and the corresponding evolution of his jurisprudence. It is law as both a dependent and independent variable, a classic law and society formulation. The judge's decisions and jurisprudence operate as "constitutive law," reflecting both the influence of society on law and its influence on society while remaining relatively autonomous from both. Former U.S. Supreme Court Justice Steven Breyer's recent exposition of judicial "pragmatism" is congruent with the jurisprudence of Justice Brennan.

The paper has eight parts with questions and answers as sub-parts: (1) the book and Brennan's career; (2) constitutional law, federalism, separation of powers, judicial review; (3) civil rights, aboriginal people's rights, racial discrimination, and other rights; (4) impact on other areas of law (e.g., torts, contracts, criminal law); (5) Brennan's principles of jurisprudence (6) the High Court, its divisions, and politics (7) personal, family, and professional life; (8) conclusion: mutual influence of law and society.

Jeffrey Fitzgerald, Sire Gerard Brennan: The Laws Good Servant (2024) can be purchased here: https://federationpress.com.au/product/sir-gerard-brennan/

This is a book review in interview format with me interviewing the book's author, Jeffrey Fitzgerald.[4] The book is a judicial biography of a famous and influential Australian jurist. Sir Gerard Brennan. The biography is a life history narrative which traces his career, education, bar membership, judicial appointments, and influential activities and decisions in roughly chronological order, staying close to his life as it was lived and experienced. To a degree it is like a second person memoir, especially as it is based on extensive interviews with the judge and his family, but also includes other people's perceptions. While in chronological sequence, the book identifies cross-cutting themes that appear and reappear, such as evolution of the judge's jurisprudential perspectives over time.

[1] Fitzgerald, Jeffrey, **Sir Gerard Brennan: The Law's Good Servant** (The Federation Press, 2024)

[2] Bill Clune is Voss-Bascom Professor of Law Emeritus at the University of Wisconsin Law School

[3] For questions and comments contact Fitzgerald at "FITZGERALD,JEFF&LORRAINE" <jeffitz@outlook.com.au>

[4] Jeffrey Fitzgerald and I went to graduate school in Sociology at Northwestern together, coauthoring a joint Ph.D. qualifying exam with Robert Kidder that synthesized law and society research. Fitzgerald's dissertation was as a participant observer of the Contract Buyers League in Chicago, an organization that fought predatory land contracts.

My questions are designed to highlight issues that have parallels in American law, thus introducing the book to American readers. A second focus is the interaction of law and society in the judge's life as reflected through the Fitzgerald's lens. Law and society issues pervade the book because it is a longitudinal account of a judge's encounters with important legal issues that arose in a changing Australian society, his influence on that society, and the corresponding evolution of his jurisprudence. It is law as both a dependent and independent variable, a classic law and society formulation. The judge's decisions and jurisprudence operate as "constitutive law," reflecting both the influence of society on law and its influence on society while remaining relatively autonomous from both.[5]

The exploration of Brennan's jurisprudence by Fitzgerald is one of the book's deepest and most important contributions, as reflected in several of the questions and answers below, with a degree of complexity suitable for a complex topic. Former U.S. Supreme Court Justice Steven Breyer's recent exposition of judicial "pragmatism" is congruent with the jurisprudence of Justice Brennan. A quote from his essay in the New York Review of books:

> There has long been what I call a "traditional" approach, embodied in the work of judges like Oliver Wendell Holmes Jr., Benjamin Cardozo, and Louis Brandeis, and professors such as Henry Hart and Albert Sacks. It sees legal interpretation as pragmatic, undogmatic, and adaptive. It sees law as an untidy body of understandings among groups and institutions, inherited from the past and open to change mostly at the edges.
> ***
> Seen in this way, the law requires judges interpreting indefinite or uncertain texts (and virtually all Supreme Court cases involve uncertainty as to a text's meaning or application) both to examine the words themselves and to recognize the limits of language to convey meaning. When faced with such limits, a practical judge will often ask, What purposes do these words serve? What ends do they seek to further? What mischief do they seek to avoid? As Justice Holmes wrote, a law's "general purpose is a more important aid to…meaning than any rule which grammar or formal logic may lay down."
> Of course, an examination of purpose will not always (or exclusively) provide a key to a phrase's meaning. In such cases, a judge might look deeper. What is the context in which the phrase appears? What does history tell us of the social conflicts that the phrase or the statute seeks to settle? What are the consequences—for example, for legal (or nonlegal) institutions—of one interpretation as opposed to another? What values does the phrase or the law seek to promote?[6]

So far as I can tell the jurisprudence of our Justice Breyer and Australian Justice Brennan are close enough to begin an interesting discussion. This paper is divided into eight parts with

---

[5] A constitutive theory of law seeks to avoid the view that law is either autonomous from or completely determined by society in favor of an interactive relationship between law and society in which each has influence on but is not reducible to the other. Michael Osborne, "Explorations in Law and Society: Toward a Constitutive Theory of Law" (1995) 4 Dal J Leg Stud 293.]

[6] Breyer, Stephen A., *Choosing Pragmatism over Textualism*, **New York Review of Books** (May 23,2024). Referring to his book Breyer, Stephen A. **Reading the Constitution: Why I Chose Pragmatism, Not Textualism** (Simon & Schuster, 2024).

questions and answers as the sub-parts: (a) the book and Brennan's career; (b) constitutional law, federalism, separation of powers, and judicial review; (c) civil rights, aboriginal people's rights, racial discrimination, and other rights; (d) impact on other areas of law (e.g., torts, contracts, criminal law); (e) Brennan's principles of jurisprudence (f) the high court, its divisions, and politics (g) personal, family, and professional life; (h) conclusion: mutual influence of law and society. There are four Appendices (Brennan's life chronology from the book, and three book-launch speeches including Fitzgerald's).

A. The book and Brenan's career

You've just published a well-received, carefully researched biography of the great Australian judge and Justice, Sir Gerard Brennan. I'd like to ask you some questions about the book, his career, and his influence on the law. The focus will be on parallels with American law.

1. *How long did you work on this book, and what were your sources of information?*

I started work on the book in 2008 and the text was finally settled in late 2023. I spent hundreds of hours talking to the judge and discussing various issues with him, interviewed 60+ people who had known or worked with him, accessed and analysed a great deal of material contained in newspapers, law reports and journals, and Brennan's personal papers.

2. *Can you give us a brief chronology of Brennan's time at the Bar and his major appointments, judicial and non-judicial?*

Brennan began practice as a barrister in 1951, and "took silk" in 1965 (promoted to senior barrister). In 1976 he was appointed to head a unique and innovative Tribunal with a mission to review the merits of decisions and actions of the Australian federal government agencies and appointed a federal judge. In 1981 he was appointed as a Justice of the Australian High Court and in 1995 he became Chief Justice of that Court until his retirement in 1998. After that he served, *inter alia* as a part time member of the Hong Kong Final Court of Appeal, and as Chancellor of the University of Technology, Sydney. He died in mid-2022 at the age of 94.

3. *How would you describe his approach to judging over his whole career, qualities that made him the law's good servant, in the words of the subtitle of the book?*

In essence Brennan's approach to judicial decision-making and judgment writing combined three distinctive but complementary analytical processes. The first entailed a very disciplined legal analysis which inevitably entailed comprehending the meaning and scope of legal rules and standards (constitutional, common law and statutory) within the framework of what he saw to be a set of fundamental legal principles. The second was an equally disciplined determination to understand the way those rules and standards actually "worked" in contemporary society. He (and his fellow judges) largely did so by considering their application to the various factual situations presented in a series of cases dealt with by the Court over time and through "feedback" from the legal profession, including legal academic writings. The third was to assess the efficacy and justice of the rule or standard so informed and, where necessary, to further develop or re-shape those rules and standards where it was legitimately open for the judiciary to do so within

the constitutionally entrenched separation of powers between the Legislative and Judicial branches of government.

In those cases in which Brennan was considering whether to adopt a particular revamped or expanded statement of a legal rule or standard he would get his associate (Clerk) to identify up to twenty relevant varied factual situations. He and the associate would then discuss how a potentially revised or new statement of the rule or standard law would actually apply in each of them, in terms both of consistency with relevant existing authoritative legal precedents and with the fundamental principles of law and justice. In employing this approach, Brennan saw himself as striving to ensure that the Law was "kept in good shape" by reference to both the substantive consistency of its content and the judicial oath to administer justice according to law. Like Justice Benjaman Cardozo, Brennan recognised that the nature and magnitude of the challenges entailed in that responsibility could only be met through the sustained jurisprudential analysis by, and dialectics and dialogue over time between, all the members of the Court. In that regard he understood that those dialectics and dialogue must be of a respectful (if at times robust) nature in which no judge should feel under any pressure to compromise on a position which they considered to be valid as distinct from modifying or changing their position as a result of a genuine realization of what was deficient or erroneous in their original position. It is of fundamental importance to appreciate that the dynamics involved in such dialectics and dialogue differ profoundly from bargaining to achieve a compromise in which at least some participants agree to an outcome which they consider to be incorrect in some respects in the cause of presenting a united front. The broader implications of this approach for an understanding of the sociology of law are considered below. (Section H)

B. Constitutional law, federalism, separation of powers, and judicial review

Now I'd like to ask about his impact on various areas of the law, which were quite sweeping in their variety and depth, reflecting major changes in Australian society, perhaps giving us an example or two in your comments in each area.

1. *Federalism and national powers. Brennan was involved with cases involving conflicts between national power, the states and territories, and what role the courts should play in these conflicts. How were some of these conflicts resolved, and what role did Brennan play in those resolutions?*

The Australian Constitution lists the various "Heads of Powers" of the federal Parliament (such as defense and external relations) with state parliaments having responsibility for all other matters. The Constitution also contains a provision that any state law which is inconsistent with a valid federal law is invalidated to the extent of such inconsistency. Brennan sat on a number of the major cases which revolved around that issue. The judges of the Court understood and applied the "inconsistency" provision in varying ways which varied somewhat, largely in respect of the extent to which they were prepared to allow the meaning and scope of a particular "Head of Power" to evolve over time in line with social and geo-political changes. This was especially evident in the *Tasmanian Dams* case in which the Court interpreted the external affairs power of the federal Parliament to enable it to implement a treaty relating to protecting the environment even though "protection of the environment" was quite clearly outside the scope of

the express wording of all the federal "Heads of Power". In the case in question the Court upheld the validity of the federal legislation which sought to override state legislation which authorized major infrastructure projects which would have had deleterious impacts on the environment. The "inconsistency" provision was also crucial in the *Mabo* litigation in which the federal Racial Discrimination Act was held to invalidate state legislation which sought to compulsorily appropriate land without compensation over which native title rights may have existed, thereby operating in a discriminatory way compared to the appropriation of land held under other forms of title.

In general Brennan understood and accepted the need for flexibility in the interpretation of such constitutional terms where he was convinced that it was necessary to give effect in a changed world to the substantive intent of the Constitution's drafters. In contrast, some other judges on the Court treated the meaning of each head of power as immutably fixed in time while some others viewed the Constitution as a "living document" whose meaning over time could and should be expanded by the Judiciary beyond that envisaged by its drafters. In many cases Brennan's view (which coincided with several other members of the High Court) "carried the day" after a vigorous judicial dialectic and dialogue within the context of a number of cases over time.

2. *Judicial review of legislation. Brennan was involved with various cases challenging the impact of laws of Parliament. How would you describe the Australian dynamic between courts and legislatures?*

At the time of Australia's Federation in 1901, it was simply taken for granted that the Constitution implementing that Federation invested the High Court with the power and responsibility of ensuring that federal legislation was within one or other of the "Heads Power" invested in the federal legislature. This was in sharp contrast to the authority of the state Supreme Courts (and the Courts in the United Kingdom) which were seen as only having the power to interpret legislation. The acceptance of such an expanded nature of the High Court's authority was due to the fact that the framers of the Australian Constitution had modelled its structure on the Constitution of the U.S.A. as that Constitution had been interpreted in *Marbury v. Madison.* In general, while Brennan was on the High Court the Parliaments and Executive Governments at the federal level accepted the foregoing understanding of the constitutional structure without demur. However, in more recent times some conservative Members of Parliament and Ministers have been far less accepting of it, especially in areas such as the immigration and deportation of aliens. (See Section F3 below)

3. *Judicial review of administrative law. I was surprised how many of Brennan's decisions were involved with standards for review of administrative decisions, perhaps partly due to the rapid development of administrative law during his tenure. How would you describe the principles he developed for this type of review?*

While Brennan had had some experience as a practicing lawyer in dealing with administrative bodies and their procedures, he did not claim to have special expertise in Administrative law and justice. Instead, he developed a profound understanding of what is involved in various types of

administrative review during the three years he was the inaugural President the Australian Administrative Appeals Tribunal. That Tribunal had been established as a result of a protracted period of policy review and debate amongst a group of lawyers and others (not including Brennan himself) about the deficiencies of the existing state of Administrative law as administered by the courts. The new Tribunal had a mandate to provide what was seen to be review on the merits of administrative decisions and actions as distinct from judicial review which was essentially concerned with their legality and procedural fairness. In the course of developing a sound and robust jurisprudence of "merits review" Brennan necessarily also developed a profound understanding of the existing rules and standards of judicial review. The depth and sophistication of that understanding was immediately evident in Brennan's early High Court administrative law cases. However, his most significant contribution to Australian Administrative law was to identify the Constitution as the source of the Court's jurisdiction in that area. In so doing he was inspired by Chief Justice Marshall's exposition in *Marbury v. Madison* that it is, "emphatically, the province and duty of the judicial department to say what the law is." It took some years for the other members of the High Court to understand and accept that seminal insight as investing the Court with a constitutionally based authority which the legislature could not modify or remove. Previously, the orthodox view amongst judges and lawyers had been that Administrative law was a branch of the Common Law which was subject to legislative restriction and limit, and which employed a number of what can fairly be described as mystical distinctions such as between jurisdictional and non-jurisdictional facts, and whether an error of law did or did nor "appear on the face of the record". While the new understanding of Administrative law's constitutional base meant that while the nature and scope of judicial review became somewhat more confined than many judges, legal practitioners and academics had previously understood, the judges administering that area of law no longer felt compelled to employ the "mystical distinctions" referred to above.

C. Civil rights, aboriginal rights, racial discrimination, and other rights

1. *Aboriginal people's rights, the Mabo cases, and aftermath. I got the impression that Aboriginal people's rights were one of Brennan's signature accomplishments. Would you agree?*

Prior to 1970, Brennan's understanding of the situation of Aboriginal Australians was comparatively limited, being largely based upon one of his daughter's efforts to assist a seriously disabled young Aboriginal girl and from information he gained through he and his wife's participation in a church discussion group. In 1972 he acted as the prosecutor in a long-running murder case arising from the protests of the members of tribe which had been dispossessed of their traditional lands in Papua-New Guinea by German settlers. That experience greatly enhanced his understanding of the significance of land for indigenous peoples, and in particular of the impact on them of disposition by those settlers. However, the major increment in his understanding of, and sympathetic response to, the situation of Aboriginal people whose ancestors had been dispossessed of their lands occurred in 1973-4 when he represented a large group of Aboriginal people during the proceedings of a Royal Commission which had been charged with developing recommendations regarding the most appropriate ways to deal with claims that such dispossessions were invalid and for specifying the current entitlements over them. That Commission comprehensively adopted his proposal for an imaginative and workable

legislative system which guaranteed the restoration and continuation for many years Aboriginal people of the right of traditional access to, and occupation of, large tracts of land which had not subsequently been legally transferred to private ownership.

In 1992 in the *Mabo (No 2)* case in the High Court, Brennan's judgement was crucial to the outcome (which upheld the traditional rights of indigenous people in respect of the occupation and use of lands) for two reasons. The first was his demonstration to the complete satisfaction of several of his fellow judges of the fallacy of the long-held belief amongst many Australian lawyers and judges that the Common Law had operated to extinguish any such rights as a consequence of the occupation of the continent of Australia by the British Crown. It appears almost certain that in the absence of that demonstration a majority of the judges would have dismissed the action. The second was his adaptation of the analogy between the nature and scope of those continuing native title rights and those of the owners of an equitable interest in land within the existing legal system. The fact that the Government subsequently introduced legislation to provide a more manageable system of determining the existence of native title rights over parcels of land did not constitute a retrenchment of any such rights. Rather it was aimed at making the determination of such claims less complex and expensive than conventional litigation.

In the 1996 *Wik* case Brennan was in the minority which reasoned that the grant of a statutory lease over what would otherwise be land subject to native title rights had extinguished any such rights. His reasoning for that conclusion was totally consistent with his reasoning in the *Mabo (No 2)* case.

2. *Immigration and exclusion. Immigration and racial exclusion are and always have been hot topics in the U.S. (at least since the arrival of the first voluntary nonwhite immigrants), and these issues featured prominently in Australia as well. Would you agree?*

Australia's Federation occurred in 1900, and during the ensuing half century the administration of immigration had been openly based upon the "White Australia" policy which was enforced by the use of a "dictation test" in any language chosen by an immigration official to provide the basis for deporting non-Caucasians who failed that test. That crude and blatantly discriminatory process was abandoned during the period Brennan was a practicing lawyer, but a view prevailed amongst many lawyers and judges that migration decisions remained "entirely within the unconfined discretion" of the Minister for Immigration. In 1985, Brennan was in the majority of the High Court which decisively rejected that extreme view and engaged in several important related legal developments. One of those was the general and long-overdue expansion and refinement of Administrative Law, and judicial review of administrative actions and decisions in particular. (See B 3 above) The other was to discern and explicate the way in which that Law should apply in immigration/deportation situations. I think it is fair to say that Brenna's role (like that of most of his fellow judges) in that process essentially consisted in a careful consideration of the many competing considerations including the constitutional separation of powers and the responsibility of the legislature in setting and administering immigration etc. As such the Court mandated a vastly improved level of procedural fairness for those being threatened with

deportation. In 2022 the High Court ruled that the scope of the "Immigration Head of Power" did not permit the indefinite incarceration of illegal immigrants who refused to take the steps necessary for their removal from Australia. The largely hostile public and political furore which followed that decision amply illustrated the difficulty faced by the courts in devising legal standards and rules based upon what they see as fundamental principles (legal or otherwise) where substantial segments of the public disagree.

3. *Freedom of speech and communication. As in the U.S., freedom to oppose government action is an important right. Brennan was involved in some important cases. Could you comment?*

The framers of the Australian Constitution deliberately excluded a Bill of Rights from it and for many decades Australian judges and lawyers generally believed that the only possible legal source of protection of human rights was the Common Law. During Brennan's period on the High Court in the course of deciding string of cases commencing in 1992 and ending in 1997. Brennan's judgments were instrumental in leading his fellow judges to conclude that a provision in the Constitution which stated that members of the legislature were to be "chosen by the people" inherently provides an implied protection for the freedom of speech and communication concerning political matters. Initially some of Brennan's fellow judges contended that a much broader range of protections could and should be implied: with one of them contending that the Constitution was a "living document" which the High Court could and should revamp over time by implying rights such as freedom of speech generally and freedom of movement. In contrast, some other members of the Court maintained that the meaning of the Constitution was fixed and must be ascertained strictly in accordance with the rules of statutory interpretation. The respective judgments of all the members of the Court in the cases in question provide a fascinating insight into the judicial dialectics which led to the unanimous support for the eventual position espoused in Brennan's 1997 judgment.

4. *Freedom of religion and church and state. Brennan was raised and educated as a traditional Catholic, like the Catholicism of our 1950's, and he remained a devout Catholic his entire life. During his lifetime Catholicism was evolving, and Brennan developed his own approach to the judicial role in a diverse society. Did the moral values he acquired in his Catholic upbringing influence Brennan's decisions and in what ways? Were these values universalistic rather than sectarian, and was he also influenced by the spiritual traditions of other cultures? Could you comment on his views and where he ended up?*

While at high school and university Brennan had come to see that his duty as a fully committed Catholic entailed not only a loyal and fulsome participation in the Mass and other Sacraments and living a moral life, but an equally compelling obligation to serve God in the world through his work and other activities. That understanding persisted throughout his career as a lawyer and a judge. While he maintained a very strong commitment to a traditional Catholic moral code and made it clear to his children that he expected them to do likewise, he also recognised and respected the fact that Australia was a multi-cultural society in which various other groups of people of good will and integrity subscribed to moral codes which were not the same as his. As a consequence he saw the relationship between law and morality in quite sophisticated terms and

was adamant that his faith did not require him to base his judicial reasoning upon Catholic doctrine and rules. This was because Brennan took it to be axiomatic that laws which were inconsistent with the key widely shared values of a community were bound to fail and indeed could operate unjustly in respect of some segments of the community. As a result he reasoned that his obligations as a judge required him to undertake two related forms of analysis, the first of which was to identify and articulate what he described the fundamental human values and the fundamental legal values (such as the inherent dignity of each human being) as distinct from the cannons of Catholic morality). The second was to ensure that legal rules and standards to be applied in determining litigation were firmly based those widely shared fundamental values and principles. However, it is also important to point out, as he did himself, that what he took to be those fundamental human and values largely corresponded to the fundamental elements of Christian morality and the moral codes of many non-Christian religions. In situations in which there was no such congruence, Brennan posited that it was essentially the role of the legislature in a democratic society, and not the courts, to determine the rules and standards to be applied.

5. *Rights of privacy and compulsory sterilization. Brennan was involved with one well publicized case involving compulsory sterilization, but I don't remember anything like the prominence of rights of privacy in U.S. constitutional law (contraception, abortion, etc.). Could you comment on the case, and is this generalization correct? How are privacy issues dealt with in Australian legislation?*

The Australian constitution does not contain any provisions protecting privacy either explicitly or by implication. In *Marion's case* (the case you are referring to) Brennan was the sole member of a seven member panel of the High Court to rule that neither the parents, nor the Federal Court had the legal authority to authorize the sterilization of a seriously mentally disabled adolescent female to ensure that she did not become pregnant (as distinct from when sterilization is a necessary component of the treatment of a serious medical condition.) While his decision was consistent with Catholic doctrine Brennan insisted that that doctrine had played no part in his formulating his decision. The reasoning he employed in his dissenting judgement fully supports that view. Moreover, he was reassured in that belief by the fact that a fellow judge whose commitment to the Catholic faith was comparable to his own reached the opposite decision on the matter.

Brennan's judgment reasoned that there was no binding law (statutory or in Common Law) covering the situation, and in such a situation in cases in which a decision had to be made one way or the other, the courts should base their decision the fundamental legal principles most relevant to that situation. In Marion's case he identified the germane principle to be that the basic dignity of each and every human deserves to be fully respected. He reasoned that any involuntary deprivation of a person's capacity to fulfil a natural function such as childbirth violated that right. In reaching that position his understanding and appreciation of what is truly entailed in the dignity of disabled people was undoubtedly informed and heightened through his understanding of the earlier insights and experiences (referred to above) of his wife and daughter in relating to disabled and deprived children. In particular it enabled and motivated him to identify claims that the proposed sterilization would be "in the Child's best interests" as "weasel words" because in "in the absence of legal rules" to guide their meaning "the value system" of a decision maker

would determine how a decision would be made. He observed that in effect that would entail bestowing "an unexaminable discretion" upon that decision maker.

D. Impact on other areas of law

1. *Reform of tort law. Brennan addressed one major issue of tort law in his cases – the "proximity" of the alleged tortious act to the resulting damages. This is a common issue in Anglo-American tort law. Brennan's approach seemed to be one of resolving vagueness and inconsistency in the standards. Is this correct?*

That is correct. The basis for Brennan's insistence upon the necessity for legal rules and standards to be stated with clarity and without ambiguity rested in his understanding of what is truly required if Justice is to be administered according to Law. In essence he considered those qualities to be as important in that regard as issues such as the provision of substantive fairness of outcomes for various classes of plaintiffs and defendants. The issue came to the fore in a series of cases in the 1990s during which Brennan became the only member of the Court to not agree that the existing Common Law of negligence should be re-formulated so as to make it less complex more comprehensible. However, the vigorous judicial dialectics over the issue which were evident in many of the judgments in the cases in question (and those of Brennan in particular) soon resulted in a succession of "changes of heart" on the part of those other judges which, in combination with some changes in the membership of the Court, led to Brennan's position on the issues in question being adopted unanimously.
The existing law of negligence adopted Lord Atkin's "valuable practical guide" to that area of law which he explicated in the 1932 landmark case in *in Donoghue v Stephenson*[i] to be:

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably have them in contemplation as being so affected when I am directing my mind to acts or omissions which are called in question.

Over the ensuing decades, the very generality of that "practical guide" had resulted in the courts augmenting it with a complex mishmash of more specific rules and standards, clusters of which were applicable in various types of situations which were seen as a set of particular categories of negligence such as negligent misstatements, economic loss, and "nervous shock." In 1978 the House of Lords in the UK sought to simplify the foregoing explication of the law of negligence by replacing the "categories of negligence" approach in favor of one which relied on two general rules which were said to cover negligence as a whole. In 1994 one of Brennan's fellow High Court judges "went one better" than the House of Lords and contended that the myriad of rules and standards in the "categories of negligence" could validly be subsumed into a single criterion "based upon logical or causal proximity between the act of carelessness and the resulting injury".

Brennan formed and maintained the view that the "proximity" criterion was too general to be consistently applied by courts and relied on by lawyers in advising clients, and as such could not validly be employed legitimately in the "administration of Justice through Law." However, the

course of deciding several appeals in subsequent negligence cases, all the other members of the High Court came to adopt the "proximity" criterion. Brennan expressed his views quite robustly in the judgments he issued in support of his dissenting decision in those appeals and in one of them he likened the concept of "proximity" to a "juristic black hole into which particular criteria would collapse and from which no illumination of principle would emerge". The failure of his reasoning to persuade his colleagues unsettled his confidence in its validity to the extent that he told a lawyer with whom he regularly discussed legal jurisprudential issues that "he was close to thinking that maybe he should give it all up" because all of his colleagues including those whose legal analytical skills he very much admired had reached the opposite conclusion to his.

However, over the course of several ensuing years, various of Brennan's fellow High Court judges began to acknowledge in their judgments that they had come to identify serious, and possible fatal, difficulties using " proximity" as the sole criterion to the full range of situations presented in negligence litigation. Several years after Brennan's retirement from the High Court the Court as a whole agreed that while the "proximity" concept "expresses the nature of what is in issue … but as an explanation of a process of reasoning leading to a conclusion its utility is limited." That turn-around caused Brennan considerable judicial satisfaction and professional pride which he tempered with the recognition and regret that the Court (including himself) had not been able to identify and articulate an improved and "truly workable" formulation of the existing law of negligence.

2. *Reform of contract law and equitable considerations such as estoppel. Recognition of equitable considerations and unfairness beyond the literal words of contracts is a feature of contracts law in the U.S. What was Brennan's position in such cases, and did it recognize unfair effects*?

Between 1983 and 1990 the High Court dealt with a number of cases in the areas of contract and estoppel and related areas. Brennan, in common with all his fellow judges, clearly understood the "Judicial Oath" they had sworn on their appointment to the Court, which committed them to administer "justice according to law", entailed an obligation to have proper regard for both fairness and consistency in the application of legal rules and standards. As already discussed, Brennan himself was manifestly cognizant of the complexity of the relationship between fairness and consistency and he sought to manage much of that complexity by interpreting the meaning and scope of legal rules and standards within the framework of what he saw to be a set of fundamental legal principles. He considered that those legal principles were essentially congruent with the basic set of human values which provided the basis for determining fairness in the way people should be treated and treat each other. As a result, his approach to contract and similar branches of law regularly involved the consideration and application of what he saw to be substantial legality as distinct from pedantic and overly technical legalism. Equally, he fully respected that within a constitutional structure embodying the separation of powers and the supremacy of parliament it was beyond the legitimate authority of the Court to simply disregard well established and long understood legal rules and standards.

In dealing with the cases in question, Brennan's fellow members of the High Court all understood and accepted that their mandate obliged them to act with regard to both justice and

law. However, they dealt with the complexities involved in doing in cases concerning contract and equity in somewhat varying ways. Nevertheless, there was a much closer "meeting of the minds" in respect to these areas of law than there had been in respect to "proximity" (See D 2 above). As a result the members of the Court did not consider it necessary to engage in the type of robust dialectics manifest in the "proximity" cases. Instead, most of the judgments in the contract, equity and related areas evidence a congruence concerning the urgent and compelling need for some existing legal rules and standards to be updated and made more transparent. However they also evidence the difficulties in doing so in a way which they could all agree provided the authoritative, precise, and inclusive statement of the updated law. This prompted me to categorize the cases in question as resulting in "A modern law of estoppel, but what exactly is it?".

3. *Modernization of criminal law and the insanity defense. Brennan's early career at the bar involved criminal cases where he learned to appreciate the plight of people affected. Later he was involved with cases involving the insanity defense and other areas of criminal law. Could you comment on this aspect of his career?*

In essence Brennan's approach to criminal law involved a strong commitment to what one of the judges who succeed him on the High Court has characterised a judicial responsibility to "keeping the Criminal Law in 'serviceable condition'." I came to understand that his prior experiences as a barrister in acting in criminal cases had stimulated his desire to deepen his understanding of the implications which modern developments in psychiatry, psychology and neurology might have had for meeting the challenge of keeping the law relating to the mental elements of crime in a "serviceable condition", for example in dealing with the improved understanding of the nature and consequences of conditions such as temporary atomistic behaviors. In responding to that need over the years Brennan had learned much from the readings and work experiences of his wife, and from his work on the Australian Law Reform Commission, and his participation in a committee charged with framing a criminal code for the Australian Capital Territory. However it is difficult to specify the impact of Brennan's own role on the High Court in fulfilling that responsibility because most, if not all, his fellow judges had a similar view of their responsibilities and in a very real way responded to it along generally similar lines.

4. *Labor law and unionization. Brennan's father Frank had been actively involved in support of unions. One of Brennan's last acts as Chief Justice appears to have resulted in a High Court ruling which effectively undermined a very determined effort by a conservative government to help the waterfront employer companies obliterate the union for wharf workers. What connection do you see in those two observations?*

The very last case Brennan sat on in the High Court arose from a bitter and protracted industrial dispute between the stevedoring company operating the major Australian ports, and the distinctly militant Union representing Australian waterside workers. The markedly conservative federal government of the day had pointedly supported the company through legislative and other means. Weeks before the mandatory date for Brennan's retirement from the High Court the matter came before that Court for the resolution of some legal issues of significance for the dispute, as distinct from the resolution of the dispute itself (which quite clearly would have been beyond the jurisdiction and competence of that Court.) Although Brennan was not expected to sit

on new cases during those last few weeks (so he could settle his outstanding judgments) he scheduled hearings of the litigation relating to the waterfront dispute, presided over those hearings, and organized all the members of the Court (including himself) to make their decisions and deliver judgments prior to his retirement. The Court's decision and the judgments accompanying it had the effect of removing a number of apparently invincible advantages which the employer company previously appeared to have (as a result of government support and otherwise). In so doing the Court's decision effectively rebalanced the respective bargaining positions of the parties in a way that opened the way for genuine negotiation and real bargaining to occur. Those processes were initiated and resulted in a viable and enduring settlement of the dispute which was widely seen as satisfactory and fair.

Prima facie it could appear that Brennan responded as he had because of the sympathetic view of workers and worker unions which he had inherited from his father. However, that would be quite erroneous for several reasons. The first was that during the 1940s, while still valuing Labor Unions highly, his father had also come to criticize many of their deficiencies, especially those which put the welfare of their members above the safety, and security, and well-being of the nation as a whole. Moreover, Brennan himself had never embraced, or indeed had any reason to embrace, the type of loyalty to Unions which was of such a magnitude and intensity as to take precedence over his predominant commitment to administering Justice through Law. It is fair to say that he took pride in the fact that by resolving the issues entailed in the litigation, the High Court had cleared the way for the actual substantial dispute between the parties to be resolved through the regular processes of industrial mediation and conciliation: a development which Brennan himself saw to be entirely consistent with the mandate of the High Court.

E. Brennan's principles of jurisprudence

1. *Personal and religious values and judicial decisions. In one way, Brennan's decisions were infused with his moral convictions, yet he also deeply respected the law as a source of values and alternative convictions. Is this correct, and how did he reconcile the two perspectives?*

In essence, Brennan focused on the fundamental principles which he saw as underpinning the law and those which he discerned as underpinning Christianity (and indeed some other major religions and espoused in the philosophy of humanism). He also concluded that each of those sets of underpinning values and principles were largely in accord. In the comparatively rare situations in which he perceived that there was no general community acceptance of a Christian or humanistic value or principle, he accepted it would be well-nigh impossible for a legal rule embodying it to gain general acceptance. To his way of thinking such situations can only properly be dealt with politically through the legislative process.

2. *Development of Australian law. Did Brennan see a need for a distinctive Australian approach to the law?*

Brennan did not have a chauvinistic urge to make the law distinctively Australian. Rather, as discussed above, he was committed to understanding the meaning and scope of legal rules and standards in the context of the particular underpinning fundamental legal, Christian, and

human/social values and principles. It is fair to say that until the middle of the 20th Century most Australian lawyers and judges who consciously considered such values assumed that they were the same in Australia as they were in the United Kingdom. Thereafter that assumption began to wane, as did the nature of the political ties between Australia and the United Kingdom. In parallel with that, appeals from the decisions of Australian Courts to the Privy Council in the UK were increasingly restricted and in 1986 they were abolished completely. As a result, the High Court became the Court of Final Appeal in Australia, freeing its members from the prospect of being overruled, thereby allowing them to respond appropriately in situations where they discerned a relevant distinctive "Australian" value or principle. While that did not open the way for across-the board legal reformulations, it did result in the development of some areas of law with a uniquely Australian content or orientation. (For example Administrative law. See B3 above.)

3. *Morality and legitimacy of law and the Man for All Seasons. Is it true that Brennan came to believe that the legitimacy of and respect for law depended on a foundation of moral convictions? I was struck by this because of the late great criminologist Herman Goldstein's belief that moral persuasion can be an important factor in the reduction of crime. What did Brennan see in the movie and play: A Man for All Seasons?*

Brennan believed that the legitimacy of, and respect for, the law depended upon its being perceived to be reflective of the underlying values of the community in which it applied- many of which are of a moral nature. As discussed below he also strongly believed that such acceptance was also dependent upon what Max Weber identified as the perceived legitimacy and integrity of the processes involved in making and applying the law. Brennan's interest in, respect for, and inspiration from Thomas More, the 16th Century lawyer, philosopher and Chancellor of England preceded the play and movie about More's life but was reinforced by them. During Brennan's childhood and early career Brennan came to appreciate Thomas More as a highly revered Catholic saint who had been martyred for refusing to endorse the legitimacy of King Henry's divorce. In the early stages of Brennan's career at the Bar he came to appreciate More as the patron saint to the legal profession who was honored at the Legal Mass marking the beginning of each legal year in each state's Catholic Cathedral. Subsequently Brennan undertook considerable academic research into the philosophical and legal writings of More and published several articles which outlined the major aspects of More's significance as a lawyer, a loyal subject of the King, and a fully committed Catholic.

Brennan identified two aspects of More's life to be of particular continuing importance. The first was encapsulated in the Declaration which More is reputed to have made immediately before he was beheaded: "I die the Kings good servant, But God's first." Brennan confided in me that he desperately hoped he would have done and spoken as had More if he had been in the same situation but that he wondered whether he would have had the courage to do so. The other concerned the crucial importance of the scrupulously objective administration of justice through law. That aspect of More's jurisprudential position is brilliantly highlighted in one scene in *The Man for All Seasons* in which More pointedly refused to use his position as Chancellor to prosecute a person who is quite clearly trying to destroy More's career and reputation but who had not committed any criminal offence in his attempts to do so. More is quoted as using a great forest as a metaphor for the Law and explaining that the use of the law to stop that person from

those attempts would be the equivalent of cutting down all the trees in that forest. He reasoned that the repercussions of such a use of the law would be that the law would no longer provide the protection it properly should for all people just as the destruction of the forest would destroy the protection from the elements which its trees provided to those living in it-- even where that destruction had been for what was perceived as a "good cause". He elaborated that:

> I'd give the Devil the benefit of law, for my own safety's sake … And whoever hunts for me… God or Devil, will find me hiding in the thickets of the law. And I'll hide my daughter with me!

4. Awareness of the practical consequences of law (including on poor people) is both jurisprudential value and a key feature of law in action. Was this a characteristic perspective in of Brennan's decisions?

Brennan did not think in terms which differentiated between the impact of laws and rules on various defined classes of people. Rather he had a thoroughly egalitarian perspective which led him to seek to understand how each law and rule he was considering would impact upon both the litigants in each case he was considering and the community more generally. In doing that he fully recognised that there were very many differences between various members of that community and that the content and administration of the law should recognise the implications of those differences where the dictates of justice truly required it. Brennan had a sophisticated sense of the complex challenges and difficulties in following that perspective faithfully-- unlike some judges and lawyers appear to rely entirely on their personal values and views to provide "justice" for "ordinary people" or to advance various "worthy causes".

F. The High Court, its divisions, and politics

1. Brennan and politics in his environment. How was Brennan's career affected by politics and political change in Australia, for example, shifts in the Prime Minister and parliament from liberal to conservative?

Brennan was appointed to head the Administrative Appeals Tribunal, the Federal Court, and the High Court by conservative Governments, and as Chief Justice by a Labor Government. That can be attributed to the fact that while Brennan had very strong values and perspectives which were largely liberal (there were some exceptions concerning some moral matters) he saw as axiomatic that everyone should be treated with respect. Moreover as a practicing barrister who was ethically obliged to represent his clients even when he differed substantially with them on political and related issues, he considered that would be inappropriate for him to involve himself in markedly political activities. Accordingly, in stark contrast to his father in earlier times, he rarely sought to involve himself publicly and actively in such matters—one exception being his call for both the government and protesters to act properly and respectfully in supporting or opposing the visit of a "whites-only" visiting South African Rugby team.

He did, however, experience several significant problems as Chief Justice with several situations which arose because of the actions of individual Government ministers. The first arose when Tim Fischer, the Deputy Prime Minister, publicly criticized the Court for not handling one of the key

land-rights cases (referred to above in Section C3) more expeditiously. Brennan wrote a letter to Fischer pointing out the longstanding and clear protocol which required each branch of government to respect the processes of the other branches. While Brennan gave no publicity to that letter himself, he had drafted it carefully in the expectation that Fischer was likely to leak it to the media-- which he did! In the event, after some time Fischer actually backed down and apologized for his earlier outburst. The second major public friction between the Brennan as Chief Justice and a Government Minister centered around the refusal of Daryl Williams, the Attorney General, to speak on behalf of the Court when there was a need to counter unfounded criticisms of the Court. Williams' refusal constituted an abrogation of a previously widely accepted convention that the Attorney's Ministerial responsibilities included putting Court's position on the record in situations in which the Court was under criticism for its decisions and process. The basis of that convention was that it enabled the Court to "keep out of politics" and to confine its own activities to the judicial functions of hearing and deciding cases. Williams' refusal led Brennan to see the necessity for him, as Chief Justice, to make several public statements supporting the foregoing convention and explaining its rationale. However Williams, with the apparent support of the government as a whole, refused to change his position and the Court was left with the challenge of devising ways to counter criticisms without becoming embroiled in public controversies. Several years later Brennan used the events and publicity surrounding his retirement deliberately and very deftly to draw public attention to the foregoing matters.

2. *Tensions on the High Court over tradition vs liberalized rights. Did Brennan have a perspective different from other members of the Court, such as liberal or progressive? Did this vary over time periods in his long career (e.g., new appointments)?*

Neither Brennan nor his colleagues considered that members of the Court could or should fairly be categorized as liberal/progressive or conservative. It is also germane to observe that the categorization of Australian judges in such terms is much less informative that appears to have been the case on the judges in the United States. However, it is fair to say that the ways in which several members of the Court (not including Brennan) understood and approached their judicial responsibilities sometimes led some of them to reach and justify conclusions in terms which fitted one or other of such classifications.

A major reason for the comparative absence of polarization of Australian judges along the foregoing lines has been the general acceptance by the great majority of the High Court judges that no judge can have the knowledge and skills to always get things right. Rather, to varying degrees in varying areas of law, they have all largely manifested a commitment to engage in what Brennan described as judicial dialectics aimed at getting the statement and application of legal rules and standards as accurate and as comprehensible as they could. (See Section H below for a discussion of what Brennan saw to be entailed in such dialectics.) In that sense, changes in the composition of the Court have led to consequential shifts in the nature and direction of the dialectics relevant to specific legal areas and issues, which in turn has appeared to have had an impact upon the resolution of some controversial matters, such as the extent, if any, to which protection of personal rights could validly be implied from the Australian Constitution. (see Section C 3 above). It is worth adding that some of the judicial tensions which observers have recorded during Brennan's Chief Justiceship appear to have risen because one or more of the

judges acted in ways which in some respects appeared to be antithetical to the type of judicial dialectics and dialogue referred to above. An example of one such an action which is reputed to have occurred involved one judge expressing disagreement with statements in another judge's draft judgment in terms which were seen to be of a personally disparaging nature.

3. *Legislative push back and polarization. Dic Brennan's decisions sometimes result in strong push back from the Parliament?*

In much of Australia's history prior to Brennan's appointment to the High Court there had been little evident push-back from either the federal Parliament or the Government of the day against that Court's decisions. Indeed, in the 1940s, the High Court's ruling that the widely supported Communist party dissolution legislation was unconstitutional was accepted by the very conservative government of the times without rancor. That level of inter-institutional acceptance eroded somewhat over the ensuing decades and at some stage during Brennan's time on the High Court its absence had become quite manifest, especially in areas such as immigration and deportation. In many other areas, however, while various politicians and their supporters did express strong negative views about particular Court decisions, there was comparatively little actual institutional "push back". As noted above (Section C1) in the area of the native title, the federal government of the day actually introduced legislation which accepted the essential thrust of the Court's decisions and developed procedures to handle the multitude of claims which arose because of those decisions in ways which were designed to entail less expense and time compared with litigation through the courts. Subsequently, while some conservative politicians very publicly advocated a strong legislative pushback, the then conservative federal government eventually adopted a far more measured approach.

Some state governments were less accepting, with the conservative Queensland government attempting to circumvent the possibility of native title entitlements to certain lands by special legislation which authorized the compulsory acquisition of those lands without compensation to those otherwise entitled to occupy it. The High Court promptly declared that the legislation in question was invalid by virtue of its inconsistency with the Federal Anti-Discrimination legislation. In the case of the Tasmanian Dams litigation, the High Court's position was strongly supported by the federal government of the time, and it prevailed over the intense opposition and push-back of the Tasmanian state government.

4. *Scandal on the High Court. The High Court had at least one major scandal in the case of Lionel Murphy that led to a parliamentary inquiry and charges of partisan bias. Is a parliamentary inquiry roughly like impeachment in U.S. constitutional law? What became of the inquiry?*

Yes, the parliamentary inquiry into Murphy's alleged misbehavior was roughly the equivalent of impeachment in the USA. It was wound up, and its tentative findings were given "secret" status very soon after Murphy had been diagnosed with terminal cancer and had very short life expectancy. He died within a short period.

5. *The courts, public criticism, and confidence in the courts. Is it accurate to say that Brennan believed that public criticism should be addressed through measured reasonableness rather than antagonism and partisanship?*

Brennan held a very strong conviction that public confidence in a court was essential to the acceptance of that court's decisions and rulings. He also had an equally strong conviction that the proper performance of the judicial function required that the only legitimate explanation a judge can properly give for their decisions and rulings must be provided within the written judgments (opinions) which that judges issue in conjunction with the judge's own decisions and rulings. As a consequence he did not see it as appropriate for a judge or a court to address public criticism of decisions and judgments as distinct from providing explanation and exposition of the judge or court's position on issues in controversy in future judgments. He was content to rely upon the convention that it was part of an Attorney General's portfolio responsibilities to explain the Court's position in the arena of public debate, and his disquiet when the Attorney General of the day refused to accept that convention was manifest. (See section F.1 above)

6. *Conviviality and common bonds of the bar and bench and his role as Chief Justice. Brennan seemed like a "natural" in fostering common bonds with members of the bar and bench, and he enjoyed socializing with other lawyers and judges outside of court proceedings. As Chief he strove to build bridges rather than stoke divisions. Do you think that forging common bonds characterized his approach to relationships across his whole career?*

From his very early days in practice as a barrister Brennan participated enthusiastically in the community of the Queensland Bar which was small in number and whose members worked in "chambers" which were largely located in close proximity. There was a strong tradition of fellowship between almost all at the Bar, and many of the older more experienced members went out of their way to inculcate newer members with that tradition. One High Court judge interviewed for the book explained that the significance of such a fellowship for barristers was especially important because "the Bar is the only profession where you go off to work each day knowing that an intelligent person is going to do his level best to prove to another intelligent person that you are a congenital idiot!" He elaborated that it is the shared mindset amongst barristers that while "striving as adversaries in Court" they must also be "eating and drinking as friends" that is generally effective in preventing their being "at each other's throats" to such an extent that many of them "just wouldn't be able to carry the nervous strain". The current Chief Justice of Australia also explained in an interview that it is the "Bar gossip" and humorous and apocryphal "stories about barristers and life at the Bar … over a drink at the end of the day, sometimes over a cup of tea, but more generally over a beer or a scotch" that are essential to sustaining the camaraderie. He elaborated that such interactions act as "a way of de-briefing" and as a "way of relieving stress by talking about stressful events that have occurred in the course of the last 24 or 48 hours with people who have been through similar experiences themselves. You can't have the same conversation with someone who hasn't been through courtroom dramas".

Brennan's own personality made it particularly easy for him to engage in such relations and interactions and led him to both enjoy and value them highly. When Brennan became a judge, he readily adopted a friendly and convivial style of colleagueship with his fellow judges which

included regular lunchtime walks through Canberra with a group of them and holding regular after-sitting drinks in his Chambers for all the judges in which, as one of them put it "We did not usually discuss the cases … we might discuss Counsel … but it was basically social 'chit chat'." A number of Brennan's fellow judges assured me that such initiatives on Brennan's part went a long way in explaining why the Court operated as cohesively as it did during most of Brennan's membership of It.

G. Personal, family, and professional life

Brennan's personal and family life as affected by his professional life is discussed throughout your book. His wife Patricia was a medical doctor who decided to stay home and care for their seven children, in a familiar pattern of marriages of that generation. Both experienced the stress of his time away from the family due to his intense and time-consuming professional responsibilities and periodic long distances from home while residing in other cities. Such family patterns have since become less common along with a rise in women's consciousness about their own careers. It seems to me that in writing the book you considered these matters important to note, and that your portrait of the Brennan couple is that they lived lovingly and faithfully according to their convictions and that this commitment sustained the family in difficult times, no doubt with some ill effects. Is that an accurate picture?

Brennan was adamant that family was one of the four key elements in his life, the others being his faith, the law, and his country. Although he was quite clearly absorbed in his legal work as a lawyer and then as a judge to the extent that he would spend a high proportion of his waking hours absorbed in it, he saw himself as having a happy and productive family life which he appreciated was being made possible by the extraordinary lengths to which his wife went in nurturing and supporting each of their seven children in a way that was meant to be experienced as coming from both parents. For example, on one occasion when Brennan and his instructing solicitor had been commissioned to visit a string of sugar plantations along a large section of the Queensland coastline for briefings prior to representing them at in major administrative proceedings, she arranged for her and the children to accompany them. In the process the children not only enjoyed beaches and other attractions but visited many of the plantations and were warmly greeted and entertained by some of the Italian and Spanish cane cutters working on them. One of those children told me that he wasn't conscious that his father was actually working during that trip. However, it must also be said that sometimes Brennan himself questioned whether he was actually involved enough with the children to be properly seen as a "good father" and confided to at least one friend that he seriously doubted whether it was actually possibly to be both a good father and a good lawyer. It is also fair to say that while some of his children saw and continued to see him as an ideal father, some others appear to have been less positive—a scenario which, as you rightly say, is far from uncommon in large families.

H. Conclusion: mutual influence of law and society

You've mentioned to me that Brennan's career and your book are illustrative of the mutual of influence of society on law and of law on society, law as both a dependent and independent

variable, a foundation of law and society studies that the two of us have shared since our graduate studies in Sociology. In a sense your book is a longitudinal study of these relationships which evolved and morphed over time along with changes in Australian society and judicial roles. Within such a framework, the art of good judicial decision making can be thought of as reaching results that are faithful to law and beneficial for society. I sense that your view of Brennan as a very good judge and "faithful servant of the law" can be thought of somewhat along these lines. Could you comment?

During the long course of researching and writing preliminary drafts of segments of what was to become the final draft of Brennan's biography, I became increasingly drawn to an article which Brennan had shown me and about which he expressed great enthusiasm. That article had been written by Stephen Gageler, who was then Solicitor General for the federal Government, and who was appointed to the Court more than a decade after Brennan's retirement and is now the Chief Justice. In that article Gageler characterised Common Law as a reality which is regarded as existing at any given time "within the collective imaginations of those who practise and administer it"-- judges and lawyers. Within that commonly shared vision, those judges and lawyers understand themselves as being under an obligation to act as "the custodians for the present" of the evolving concepts, principles and rules which "they must interpret each for themselves in terms that are meaningful to them and for their own time" while also understanding that the "issues with which they deal must be put in a long-term perspective". He also observed that while each judge strives to achieve a fully accurate understanding of a particular legal rule or principle, they "cannot all be expected to see things exactly the same way" at any point in time. As a consequence, the proper maintenance and appropriate development of a legal principle or rule depend on the type of judicial dialectics which has been referred to above.

Those dialectics operate over time and entail processes in which the varying and diverse views of each individual judge meld into an improved legal formulation of each of the various principles or rules relevant to the cases being determined in ways which more closely accord with both the prior precedents and the social realities of the time. Gageler also observed that probability theory posits that the adoption of such a collective framework in which each individual judge exercises their own best efforts to reach the correct decision and satisfy themselves of the validity of its legal basis is more likely to result in a superior articulation of the relevant law than the efforts of any individual judge, no matter how legally able they may be.

What eventually struck me most forcefully was how well what Gageler described could be conceptualized as the on-going social construction and development of legal reality—in this case the content of the Common Law. On that view, while the law and each of its rules and standards are viewed as real, that reality does not entail the assumption that there is an objectively correct law which judges divine solely through legal analysis and reasoning. Equally, it is antithetical to the claim that in reality the rulings of judges simply reflect their own personal values and views (political, religious, social, etc., albeit embossed (or disguised) in legal language and the other trappings of legality. As I applied that perspective in attempting to understand and assess the myriad of the judgements which Brennan and is fellow judges wrote, I found it very helpful to use the analogy of the way the collective work of scientists over time contributes over time to the

development scientific paradigms and the occasional occurrence of scientific revolutions as expounded in the writings of Thomas Kuhn.

It is certainly the case that one of the major reasons I had for describing Brennan as a very good judge and a “faithful servant of the law” was his consistent and highly disciplined participation in the collective endeavors of the members of the High Court to maintain and improve the law through their fulsome participation in the dialectics and dialogue over time within epistemological/jurisprudential framework identified by Gageler.

Appendices

(1) **Fitzgerald Book Chronology of Brennan's Career**

Chronology of Events
1863 Mrs Ann Brennan (Sir Gerard Brennan's) great grandmother and five children (including Martin, Catherine and Patrick)
migrate from Ireland.
1922 Brennan's mother (Gertrude) and father (Frank) married.
1928 Francis Gerard Brennan born (22 May) in Rockhampton
1946 Brennan enrols University of Queensland, BA/LLB.
1949 National President of NUAUS. Brennan's father dies.
1950 Assistant Registrar at ANU (Jan-May) and associate to Townley J (Manus Island war crimes trials).
1951 Completes LLB. Admitted to Queensland Bar at end of December.
1953 Marries Patricia O'Hara.
1954-62 Seven Brennan children born.
1959 Harris v Wagner (Brennan's first High Court appearance).
1960 Brennan's mother Gertrude dies.
1965 Brennan takes silk.
1969 Fiji Sugar Inquiry
1972 Emanuel trial (PNG)
1973 Law Conference in Perth and Monday Conference.
1973-74 Land Rights Royal Commission. Cudgen Rutile (No 2) (Brennan's sole privy Council appearance).
1974-76 President of Queensland Bar Association.
1975 Barton Investigation. Brennan appointed to the Australian Law Reform Commission. President of Australian Bar
Association. Commonwealth v Queensland (Brennan's last appear- ance before High Court). 486
1976 President of Administrative Appeals Tribunal. Chair of Administrative Review Council. Judge of the Industrial Court and territory Supreme Courts.
1977 Appointed to Federal Court.
1979 Resigned from Administrative Appeals Tribunal and Administrative Review Council.
1981 Appointed to High Court on Gibbs' appointment as Chief Justice.
1982 Deane and Dawson replace Stephen and Aitkin as members of the Court.
1984-85 The Murphy Saga.
1985 Brennan's son Frank ordained a priest.
1987 Mason replaces Gibbs as Chief Justice.
1995 Brennan replaces Mason as Chief Justice. Gummow appointed to Court.
1996 Deane retires from Court. Kirby appointed to Court.
1997 Fischer's letter etc. Hayne replaces Dawson.

1998 Callinan replaces Toohey. Brennan retires from High Court. Brennan appointed Chancellor, University of Technology
Sydney, and also appointed Foundation Scientia Professor of Law University of New South Wales.
1999 Appointed to Supreme Court of Fiji.
2000 Resigns from Supreme Court of Fiji.
2000 Appointed to Hong Kong Final Court of Appeal. 2012 Retires from Hong Kong Final Court of Appeal. 2019 Patricia Brennan dies.
2022 Brennan dies.

(2) **Book launch Speech by Jeffrey Fitzgerald**

Chief Justice Mortimer, Your Honours, my learned and other friends, and family
I can scarcely believe that after 16 years my book is not only finished but has actually been launched by Chief Justice Mortimer. I thank her not only for her kind words tonight but also for her generosity all those years ago in sharing her own insights into Sir Gerard's approach to his judicial responsibilities and to his family when I interviewed her for the book. I also express my profound gratitude to Father Frank Brennan whose support and assistance has played a truly crucial part in enabling this book to become a reality. A year or so before he died Sir Gerard requested that I work closely with Frank to ensure that I was able to understand and respond appropriately to any issues which he felt Sir Gerard would wish to discuss with me if he was well enough to do so. I can truly say that Sir Gerard could not have chosen a more helpful and constructive delegate.

I first heard of Gerard Brennan during the second half of the 1970s. I was teaching a course on Law and Government in the Legal Studies Department at La Trobe University which aimed to provide the students with a critical understanding of the existing (confused and confusing) state of administrative law and a comparative perspective on other possible approaches to keeping government bodies and public servants in line. The fledgling Administrative Appeals Tribunal featured large in that perspective. As a fan of Harry Whitmore I was very impatient at Brennan's cautious and seemingly circumspect approach to the AAT—a sentiment which stayed with me until I actually began work on the section of the book dealing with that period of Brennan's life. It did not take me long to realise how simplistic and superficial my earlier views of Brennan's approach to the AAT had been!

I first met Sir Gerard in the mid-1990s when, as Registrar of the University of Technology Sydney, I briefed him about the ceremony at which he was to receive an honorary doctorate. He told me in no uncertain terms that there was to be none of that pompous music at the conclusion of the occasion. Instead the procession must leave the Great Hall to the accompaniment of Australian Bush Ballads!!!!

Soon after that, Sir Gerard became Chancellor of our University, where he proved to be an enthusiastic supporter of all aspects of the University, from the most advanced scientific research to a range of rich and broadening student experiences such as debating, cultural activities, sports etc. Early in Brennan's term as Chancellor, a group of radical students and others attempted to blockade a meeting of the University Council. To our utter amazement Brennan thrust himself

into the fray, telling us that he had had great experience as a student politician some 50 years earlier, and was sure he could engage the demonstrators in a constructive dialogue and help them "see sense". I won't go into details of what ensued, but will simply say that Sir Gerard very soon came to realize when his open and rational approach was met with scorn and belligerence that the "rules of the game" had changed drastically during those 50 years.

A year or so later, while I was driving Sir Gerard home from a University Council Retreat, he telephoned his wife Patricia and greeted her in quite dulcet tones: "Hello Darling, I have missed you and am looking forward so much to being home with you in about ½ an hour." I just about drove off the road at the response it elicited which was to the effect "How come you are talking to me in that soppy voice. Is Jeff in the car with you!!!"

Eight or so years later I found myself at the loosest of ends as a very recent retiree, wondering how one could remain sane and happy with nothing demanding and significant to do all day every day!!! Then I had a brilliant idea… I would write the biography of Sir Gerard. I contacted him in great excitement to tell him that good news, and was stunned by his polite but firmly negative response which was based on the maxim that judges must let their judgments speak for themselves. For good measure he assured me that he did not consider the non-judicial aspects of his life warranted a biography. He softened the blow to my ego with a counterproposal that we work jointly on a book exploring "distinctively Australian values", a subject in which he had a very strong interest, which stemmed back to his own father's philosophy and to the thinking Brennan himself had done at Downlands Secondary College and subsequently in Philosophy at the University of Queensland. The least said about that project the better, and it suffices to say that after six months or so Sir Gerard conceded that :"This is never going to work. Go on write the biography!"

My friend Alex Byrne, then the librarian at UTS, advised me that before I did anything else I should settle upon the "type of biography" I planned to write. He literally lined up across a table about 30 biographies which adopted a very wide range of approaches to help me choose the type I would write. These ranged from purely factual, to adulatory, highly critical, psychological, legalistic, "life and times" etc, etc. I must admit that I thoroughly enjoyed a biography of William O Douglas of the US Supreme Court entitled "Wild Bill". However, it was obvious that there was no "Wild Gerard" to fit into its mould. I next tried a biography of H.L.A Hart, the great English theorist of Law, but abandoned its usefulness as a model when I learned it had taken 14 years for that very scholarly biography to be written!!! Little did I know what was in store for me!!!!!!

It was then that I determined that my "opus" would evolve and take shape in response to what I learned from Brennan and others about him and his life. In retrospect, I can see that that seemingly unstructured and intuitive approach was actually the product of my studies in sociology many decades earlier. In particular it emulated the ethnographic approach and discipline which I had learned from Howard Becker which essentially requires the researcher to identify, describe and explain the activities and organisation of those who are the subject of the study through the subjects own perceptions of the reality of their lives.

While sounding simplistic and subjective, that approach actually requires sophisticated and disciplined investigation and analysis. In the case of my project, that it led me to focus upon the nexus between Brennan the man, and Brennan the judge. I recognised that such an endeavour would entail many special challenges because of the entrenched, and entirely legitimate, norm that judges must be objective and impartial in their administration of justice according to law. That norm had long been seen by many to require judges to divest themselves of any personal views and qualities in deciding cases and writing judgments and, in effect, act in a way that Law Bots now do. Of course that view of the norm in question has been challenged by many others who see it as a very serious oversimplification which ignores important lines of jurisprudential thought and philosophy-- including those elaborated by Benjamin Cardozo, and Learned Hand, two philosophers of law who were greatly admired by Brennan himself.

In the course of working through an enormous amount of legal and non-legal materials, my focus for the book jelled into an attempt to discern and describe the complex relationships between Sir Gerard's jurisprudence and some other key aspects of his life. In particular it has sought to identify how some of his relationships, non-judicial experiences, religious and other values, and other personal and social attributes have acted to shape and, dare I say it, enrich aspects of his legal analysis and reasoning. The book also seeks to illustrate how the efficacy and legitimacy of such shaping and enrichment depends upon two crucial conditions being satisfied. The first is that each judge in a Court of Final Appeal adopt and maintain a highly disciplined and demanding jurisprudential approach akin to that evidenced in Brennan's own judicial work and output. The second is that all the judges in that Court see themselves to be engaged in a dialogue and dialectic over time (partly explicit, and often implicit) in which each of them participate openly, thoughtfully, and even robustly.

In conclusion, I would like to acknowledge the enormous support and assistance which I have received from many people over the period of the book's gestation, and without which I am quite sure the book would never have reached even the "still born" stage. Time does not allow me to repeat the thanks and gratitude to each and every one of those involved which I have expressed in the Note at the start of the book. But I would be remiss if I failed to acknowledge on this occasion the staff and owners of Federation Press who have been particularly helpful and supportive. Jason and Trisha have been ever understanding, constructive and encouraging. The disconcertingly frank initial response of Justice Leeming to an early and unrefined draft of the book has been instrumental in much guaranteeing of its subsequent refinement. Catherine FitzGerald (no relative) went to extraordinary lengths to ensure that flaws of all types were expunged from the text and citations were both accurate and properly formatted. Kathy Fitzhenry performed miracles with the photos, proofs etc. Many other people have worked through early and subsequent drafts of sections, chapters and even the whole text and have provided a veritable treasure of suggestions, improvements, embellishments, and modifications which have added greatly to whatever qualities and virtues there are in the final product. Finally I would also be very remiss if I did not acknowledge the support and encouragement provided by my wife Lorraine, which is particularly praiseworthy in the light of the many potential trips and holidays she has had to forego because of THE BOOK.

Finally, thank you all for being here tonight to celebrate this attempt of mine to do justice to the life and work of Sir Gerard Brennan--a judge of the highest stature, a very great Australian, and in every sense of the phrase "A Man for All Seasons".

(3) Book launch statement by Frank Brennan, S.J.

Being the eldest child of Francis Gerard Brennan, I am delighted and honoured to say a few words at the launch of Jeff Fitzgerald's detailed biography of a person who was one of the Australian law's finest servants. As Jeff notes at the outset, 'In 2008, when I asked him if he would cooperate with me if I were to write his biography his response was negative, and largely based upon his own humility.' Here we are 16 years later wondering what Dad would have made of it all. With that characteristic humility, he'd have thought that it was best that he was not in attendance.

I know Dad would be very chuffed that one of his very own associates, Debbie Mortimer, now Chief Justice of the court of which Dad was a proud founding member, is present to launch the book. He would be delighted that we are gathered in this splendid courtroom where he spoke from this very lectern on the 40th anniversary of the Federal Court.

What can I usefully add, especially when speaking to such an esteemed audience of judges and barristers? I note that the many silks in the room include one who is his daughter, and another who is his granddaughter. Being the only priest amongst his descendants, I thought it useful to toast Jeff's book through the prism of Jeff's self imposed task of doing justice to his subject 'as a man, a committed Catholic, a husband and father, and as a barrister and judge. Equally, very high priority has been given to exploring how the contributions he has made to the development of Australian law have been informed and enlightened by his humanity and his experiences in each of those capacities.'

These are bold undertakings and beyond the bounds of a routine judicial biography. Jeff displays some fascination with how Dad held together the highest legal method, absolute judicial integrity and commitment to his Catholic faith. I always thought the answer was neatly summarised by Dad in the four points he made in 1992 when speaking at the ecumenical service for the opening of the legal year at the Lutheran church in Canberra. While judgment was reserved in Mabo, he told his fellow believers and fellow lawyers: (1) 'Declarations of solidarity with or sympathy for a neighbour who suffers an injustice are no substitute for, or solvent of, the duty to do whatever lies within our power to see that justice is done according to law.' (2) 'We have no divine mandate to administer justice in disregard of human law. To the contrary, the professional duty of the Christian lawyer is to administer the law created by the competent organs of society's government.' (3) 'If the law itself is an obstacle to justice, the duty of a Christian lawyer extends to seeking its reform.' (4) 'To aspire to perform our duties, we need wisdom and knowledge, humility and compassion, courage and strength. These are gifts for which we pray and which we commit ourselves to employ.'

This is not the place for me to say much about Dad's role as husband and father. But might I wholeheartedly endorse the observations offered by Chief Justice Mortimer and one other 'close colleague'. Jeff writes: 'Throughout the period of the "Mason Court", the relationship between

Gerard and Patricia continued to be one which was remarkable for what Debra Mortimer, Brennan's associate in 1988, has identified as the mutuality of understanding between them and the absence of "any sense of subordination of one to the other". Mortimer also reported that, while she has observed other legal colleagues "strive to adopt a similar relationship", very few have entailed "the same levels of respect, affection, and priority that [she] saw in theirs". Another close colleague during the period marvelled at how Brennan had been "greatly helped by a very remarkable wife who won't allow a word against [him] to be said by anyone outside the family or a few very close friends, but who isn't a member of his Number One Fan Club, and who brings him down to earth very, very well".'

Though it's very irreverent not only to deceased judges but also to the living, I think it worth recalling Mum's great line: 'The thing I like least about the Australian legal profession is that the more your husband is promoted, the more stupid they think you must be.' I once got into trouble with a woman silk for disclosing in an interview that my mother was 'probably smarter than my father.' Any child with difficult maths homework knew that to be the case. My parents' medico-legal alliance bore great fruit, including a ferment of ideas born of independent thought and respectful engagement.

I was very fortunate as a son to be living at home studying law and politics in Bjelke-Petersen's Queensland between 1971 and 1974. I then lived in Sydney in 1975 and 1976 while Dad was doing a lot of work here, prior to his appointment to the bench, wondering what was to become of him, because a return to Queensland seemed impossible. So I had a front row seat to many of the activities detailed in Jeff's Chapter 5: 'Broader Legal Horizons'.

There had been the 1969 Sugar Inquiry before Lord Denning in Fiji. This arbitration opened Dad up to the reality of Indigenous land rights.

There was the publication of his 1971 letter to the editor objecting to the tactics being adopted in Queensland with the declaration of a state of emergency to permit the trouble free playing of a rugby game by the all white Springboks team. That night he came home and told Mum and me that he had been confronted at lunch by Peter Connolly, one of the doyens of the Queensland Bar, who told him: 'That's it, Brennan. Now you'll never be a judge.' He matter of factly said to us: 'Well so be it.' But that wasn't it at all. Within a decade he was a Justice of the High Court of Australia.

There was the 1972 politically explosive trial in Rabaul of 13 Tolai charged with the murder of an Australian district patrol officer. The Commonwealth asked Dad to prosecute because there was a need for a first rate lawyer to handle the sensitivities of the land dispute which occasioned the killing.

There was the 1973 Woodward Royal Commission into land rights. Woodward specifically requested Dad to be senior counsel for the Northern Land Council. I'm pleased that Jeff has reported that Woodward was persuaded to make such far-reaching recommendations in response to Brennan's submission that "this is a report which will for all time mark the high-water mark of possible Aboriginal aspirations. Whatever Your Honour does not recommend in favour of Aborigines at this stage, will never be granted.' Also Jeff felicitously quotes Woodward's chief

anthropologist Nicolas Peterson who explained that the Northern Territory Land Rights Act's 'genius lay in the fact that it benefited "the most tradition-oriented and poorest Aboriginal people, the great majority of whom were actually living on or near the land with which they had traditional connections. It was legislation concerned with the future rather than the past, and it was based substantially on the drafting instructions written by Brennan.'

Unbeknown to any of us at the time there was Barwick's letter to Prime Minister Whitlam in September 1973 enclosing a short list of nine possible appointments to the High Court. Dad and Ron Wilson were on that list.

There was Dad's appointment to the Law Reform Commission in 1975 under the dynamic youthful leadership of Michael Kirby where Dad often locked horns robustly and happily with Gareth Evans.

These horizons kept opening, taking him beyond the Queensland Bar and beyond the strict parameters of the law.

From 1969 onwards, my father was always conscious of the law's shortcomings when it came to the rights and aspirations of the First Australians. In January 1976 – after Woodward, after the dismissal of the Whitlam government and prior to his appointment to the bench - he joined Patrick Dodson at Yeppoon in Queensland and delivered two stirring speeches to the Aboriginal and Islander Catholic Council.

Dad proposed a motion to the conference which was carried overwhelmingly. These were the opening preambular words of his draft:

'As the Aboriginal peoples in Queensland have no title to their land; as land is essential to the life and dignity of Aboriginal people; as Aboriginal people have frequently been removed from their land and homes, without their consent; and all Aboriginal people who wish to do so should be entitled to live in a traditional style:'

These were stirring words almost 50 years ago.

In the book Jeff deals at length with the Mabo proceedings and Kenneth Hayne contributes a fine foreword noting: 'This book seeks to describe and explain the impact Gerard Brennan had on Australian law and Australian society. His judgment in Mabo (No 2) is the most prominent example of that impact. The Court's decision in that case, and what Brennan wrote in his reasons, was a fundamental re-evaluation of the common law of Australia.'

I have long thought that the culmination of Dad's passion for justice, quest for legal principle, unfailing courtesy, honest intellectual inquiry and judicious contribution to what he often described as 'a free and confident nation' was the exchange between him and Geoff Davies, Solicitor General of Queensland, on the third day of argument in the Mabo proceedings:

‘Brennan J: If your argument be right, Mr Solicitor, it seems that the common law as applied in England, and perhaps the law as applied in Canada and the United States, was no more than a device to ensure that the indigenous people had nothing.

‘Mr Davies: Your Honour, historically unpalatable as that may appear to be today to us looking back at that in retrospect, historically it seems to have been correct, but it was no rights against the government.

‘Brennan J: No rights against those who exercise the power of control?

‘Mr Davies: Yes, that seems to be the case.

‘Brennan J: It is scarcely an enabling doctrine for a common law.’

Congratulations Jeff, on placing in broad context the splendid achievements of Gerard Brennan who was the law’s good servant. We salute Ged’s ‘wisdom and knowledge, humility and compassion, courage and strength’. Thank you.

(4) Book launch statement by Chief Justice Mortimer

We are on Gadigal country, and at the launch of a book about a man who drove the correction of the law about who this country traditionally belonged to and who belonged to this country, it is especially appropriate to pay our respects to the Gadigal people of the Eora Nation, to their elders and to their ancestors. And to acknowledge that despite colonisation, Gadigal law and traditions, culture and connection to these lands and waters endures, and all Australians are the richer for it.

Stacy Schiff, an American author, who has written a number of biographies said this about the task:

> When finally I mustered the courage to tell a novelist friend that I was talking to editors about a biography, her reply was, ‘Oh, that’s okay. That’s not a real book.’

That statement does not apply to Jeff Fitzgerald’s biography of Sir Gerard Brennan. It is a REAL book. With extraordinary dedication and determination, Jeff has investigated, interviewed, sifted and sorted a huge amount of material and has produced an account of the professional life of Sir Gerard which aptly reflects the subtitle of the biography, “The Law’s Good Servant”.

It is important also to give thanks to Robert Hannaford; the extraordinary artist whose portrait of Sir Gerard fills the dust cover of the book. This portrait so tenderly and appropriately reflects Sir Gerard Brennan the Judge, and Ged Brennan the human being, that it is simply remarkable - his gaze seems astonishingly real. Thank you Jeff for choosing to use it.

Biography is a genre that is unlikely ever to satisfy any reader completely – and I imagine, especially not the author. One sets out to capture the life of another person, usually a person with a great many achievements, known by a large number of people, but known in such a variety of ways. Ged is a good example of this. I expect almost everyone who is here, is here because they

knew Ged in some way. We all encountered him through particular periods of his life, and of our own lives; we may share some experiences of him but we may view even those experiences quite differently from one another, and there will be other parts of his life, both personal and professional, about which we know very little, or nothing. There may be strong yet complicated emotional ties held by family, as family ties inevitably are. They may be ties born of collegiality and friendship outside the law or within it, ties developed through working with Ged in one or more of the Courts and Tribunals to which he devoted so much of himself and his life. We will bring those different perspectives to our reading of this biography. It makes the task Jeff has taken on all the more challenging.

I knew Ged from the time I was in my late twenties. So there are parts of Jeff's biography that are quite familiar to me, but many parts of it which were new.

I was fascinated to read about 3 matters wholly new to me:
(a) The paternal care Ged's father Frank showed towards him as a child, and the diary that Frank kept about Ged's childhood, some of which can be seen in one of the photos in the book. For a professional man in the late 1920's and early 1930, this was a tender and, I venture to suggest, unusual activity for a father.
(b) The Chapter on the early years of the Administrative Appeals Tribunal under Ged's leadership was full of interesting material. I very much enjoyed the quote from an oppositional bureaucrat that the establishment and entrenchment of the AAT as an administrative merits review body meant that
"Never before have officials had to be conscious of legal details in terms of what is decided and how it is decided."
A revolutionary proposition indeed. We have Ged's leadership, and the inspiration of the federal government in the early 1970's to thank for the fact that it is a regular expectation in the exercise of administrative power in this country that officials "understand the legal details".
(c) Finally, I was fascinated to read at many points in this biography about the Ged I did not know as well – the determined and somewhat outspoken lawyer who was committed to law reform and to addressing the way the justice system failed to serve those who needed it most. Of course this was something I knew about Ged in a general sense, but I read with interest those parts of Jeff's biography about Ged's time on the Australian law reform Commission, and his roles in the Queensland and Australian Bar Associations. In particular I enjoyed reading about Ged's cameo on the then ABC TV program Monday Conference in 1973 . Let's reflect that was forty years ago. I was just entering high school. The pressing issues Ged and other participants were asked about included costs of legal representation, costs of litigation, long delays in court proceedings, the role of the legal profession in driving change in these matters. Is it reassuring or disturbing that these sound so familiar forty years later? These stories were a reminder to me of the real changes and constraints brought to Ged's life once he took an appointment as a Judge, and for the most part he then faithfully abstained from participating in public debate. That is, until his retirement, including the documentary he participated in at his retirement. In retirement, his letters to the editor always hit the mark and I remember his satisfaction in being able to express himself again in public debate.

Other parts of Jeff's biography involved a new rendition of familiar events

In 1988, the decision in Cole v Whitfield – that being the year I was Ged's Associate. It's always fascinating to see different perspectives on an event like that which one lived through, - but as I now know only too well, what an Associate might see and might believe they understand could only be the tip of the judicial iceberg.

Jeff's recording of Ged's personal reflections about the 1992 decision in Marion's case , and the deep importance of the issues in that case to Ged as a person, especially why he considered the correct approach was to prioritise the inherent dignity of every individual over the concept of the best interests of the child . In our chats over the years, Ged often returned to Marion's case.

The anecdote about the avalanche of Brennan grandchildren towards their grandfather and the official photographers at Ged's farewell ceremony in May 1998. One of Ged's granddaughters is quoted as describing the ensuing photos showing "a grandfather laughing with joy in the middle, his wife at his side, mobbed in all directions by more than a dozen young grandchildren" . Family – and lots of them – was the fabric of Ged's life, and of Pat's life. While family is not the focus of this biography we cannot describe Sir Gerard the Judge without talking about his family. Jeff Fitzgerald's work amply recognises this.

Jeff has understandably devoted a large part of the book to Ged's reflections and commitment to the interests of Fist Nations Peoples. He has traced some of the ways Ged's thinking developed over time and what influenced him. Jeff has paid due attention to the decisions after Mabo No 2 , such as Wik , and Kruger , and I found the "Aftermath" section in the Mabo cases chapter insightful.

Ged's contributions through the Mabo decisions resonate through time and place. In November 2022 I was in Waiben, or Thursday Island in the Torres Strait, to make orders recognising more than 40,000 square km of sea country of six groups, extending through the Torres Strait and around Cape York.

I often spoke to him about the Court's native title work and he loved to hear about it. But this day, six months after Ged's death, sitting right in front of me was a traditional drummer with a t-shirt dating from the Mabo decision in 1992. It had obviously been washed and washed, and worn and worn. This Torres Strait Islander wore that Mabo t-shirt with such pride and remembrance, while he was front and centre in a ceremony in 2022 that would never have occurred but for Ged's judicial courage and brilliance in 1992. My point is: the judgment in Mabo is not a decision consigned to history in the Torres Strait, nor indeed around this country in First Nations communities. It has become a living and vital part of people's stories and identity.

Jeff, we thank you for ensuring we are all reminded of the Ged we knew, and the Ged we did not know. And for setting down in writing a narrative of the so very many different ways in which he served.